

# What are the Differences between a Final Environment Impact Statement (EIS) and a Draft EIS?



U.S. Department of Commerce  
National Oceanic & Atmospheric Administration  
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## ABSTRACT

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This guidance document is focused on the required and potential differences between the contents of draft and final EISs. The bases for such differences are primarily associated with agency timing of the identification of the preferred alternative, intra-agency reviews of draft EISs along with inter-agency and public stakeholder reviews of draft EISs and associated agency responses. New information from post-draft EIS analyses and studies also could prompt differences. This guidance provides information which demonstrates that CEQ's NEPA regulations, along with National Oceanic and Atmospheric Administration (NOAA) NEPA regulations, provide sound principles and processes for developing EISs on the various actions of the NOAA Fisheries Service. Specifications for the contents of draft and final EISs are adequately articulated in the regulations and they should be used in the planning and preparation of EISs. Further, the regulations also provide procedural information related to both internal and external reviews of EISs. In addition, the process for systematically reviewing and classifying received agency and stakeholder comments and for developing appropriate responses needs to be carefully planned and implemented. Finally, while generic differences in the topical contents of draft and final EISs can be identified; study-specific differences largely will be dependent upon the completeness of the draft EIS, and dependent upon the scientific and policy issues identified during the comment-response process, new studies and analyses completed during the post-draft EIS time period and relevant case law.



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## Purpose of this Guidance

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Because of unique definitions related to documents prepared under the auspices of the National Environmental Policy Act (NEPA), of the need to match the NEPA regulations of the Council on Environmental Quality (CEQ) and the various marine resource programs of the NOAA Fisheries Service, and to incorporate agency and public reviews of such documents, multiple questions may arise for NOAA Fisheries Service' professional staffs regarding various requirements and details. One fundamental question can be framed as – what are the required and potential differences between a final EIS and a draft EIS prepared for a typical NOAA Fisheries Service action (e.g., an amendment to a multi-species fishery management plan)? Because of the practical importance of this question, this document has been prepared. The anticipated audiences for this guidance are the professional staffs of the New England Fishery Management Council and the Mid-Atlantic Fishery Management Council and the NEPA and program professional staff of the Northeast Regional Office (NERO) of the NOAA Fisheries Service.

## What is an EIS?

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The conceptual basis for draft and final EISs was inferred in NEPA, although these two types of documents were not specifically identified. To illustrate, NEPA itself, which was signed into law on January 1, 1970, has as a central feature, which is the requirement that Federal agencies describe how the significant environmental consequences (impacts) of proposed actions (primarily regulations) are taken into consideration in decision-making along with economic evaluations, technical requirements and feasibility. Such impact considerations are to be documented in what NEPA refers to as a “detailed statement” (U.S. Congress, 1970, as amended). This statement soon became known as an “environmental impact statement” (EIS). Although NEPA itself did not specifically delineate draft and final EISs, this concept was inferred in Section 102 as follows (U.S. Congress, 1970, as amended):

*Prior to making any detailed statement (infers a final EIS), the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved (infers a review process for a draft EIS).*

## What are the regulatory requirements for EISs?

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The principles and processes associated with planning and completing draft and final EISs are contained in CEQ's NEPA regulations and the NOAA NEPA regulations (Council on Environmental Quality, 1999; and National Oceanic and Atmospheric Administration, 1999). The NOAA Fisheries Service' regulations are in NOAA Administrative Order (NAO) 216-6. Of importance is that CEQ's regulations note that an EIS is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

CEQ's NEPA regulations also list several principles and concepts related to the preparation of EISs. Four pertinent examples related to both draft and final EISs are (Council on Environmental Quality, 1999):

- NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (Section 1500.1(b)).
- Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues (Section 1502.2(b)).

- EISs shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size (Section 1502.2(c)).
- The range of alternatives discussed in EISs shall encompass those to be considered by the ultimate agency decision maker (Section 1502.2(e)).

### General Contents of Draft and Final EISs



The standard contents of both a draft and final EIS should include:

- A cover sheet;
- Summary;
- Table of contents;
- Description of need for and purpose of the action;
- A discussion of the comparative features and impacts of the alternatives (including the proposed action);
- A description of the affected environment;
- A focused synopsis of the anticipated environmental consequences (impacts or effects) of the reasonable alternatives and the proposed action (including mitigation measures as appropriate);
- List of preparers;
- References;
- EIS distribution list;
- Index; and
- Supporting appendices related to environmental information and analyses.

Table 1 (under Draft EIS) includes a brief summary of the focus and contents of each of the sections (Council on Environmental Quality, 1999). Other formats and orders of presentation listed in the NOAA NEPA Handbook may provide a more effective means of communicating the impact study findings (NEPA Coordinator Staff, 2005, p. 64).

Additional information to be included within a final EIS includes a list of preparers (Section 1502.17); a list of agencies, organizations, and persons to whom copies of the draft EIS were sent; and an index of pertinent policy and technical terms. Further, comments received from the review process on a draft

EIS are to be summarized and responses thereto are to be incorporated in the final EIS (Section 1502.9 (b)). Also, copies of the comment letters must be included in an appendix as per NERO General Counsel. Responses to comments will be addressed in a subsequent subsection in the document.

In addition to the requirements of the CEQ regulations, other legal issues that may need to be addressed in EISs include the stipulations of both statutory and Executive Order (EO) requirements. Guidance for addressing these laws, regulations and EOs is provided in the March 14, 2005, memorandum to SFD staff from George Darcy. Examples of other statutes with specific requirements include: Administrative Procedure Act, Information Quality Act, Coastal Zone Management Act, Clean Water Act, Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, Magnuson-Stevens Fishery Conservation and Management Act, National Historic Preservation Act, Abandoned Shipwreck Act, and National Marine Sanctuaries Act (NOAA, 1999, p. 14; and NEPA Coordinator Staff, 2005, pp. 79-80). Examples of EOs include the stipulations of: EO 12114 (Environmental Effect Abroad of Major Federal Actions), EO 12866 (Regulatory Planning and Review), EO 12898 (Environmental Justice), EO 13089 (Coral Reef Protection), EO 13112 (Invasive Species), and EO 13158 (Marine Protected Areas) (NOAA, 1999, pp. 47-51; and NEPA Coordinator Staff, 2005, pp. 78-79). As appropriate, the related issues arising from these statutes and EOs should be addressed in both draft and final EISs.





**Table 1: Substantive Topical Contents of a Draft EIS and Comparison with Final EIS**


EIS Section (CEQ Reference)	DRAFT EIS	FINAL EIS (Modified by comments or final Council Action)
<b>Cover Sheet</b> <b>(40 CFR Part 1502.11)</b>	<ul style="list-style-type: none"> <li>• Not to exceed one page</li> <li>• List of responsible agencies (including lead and cooperating)</li> <li>• Title</li> <li>• Name/Address/Telephone of contact person</li> <li>• Designation as a draft or draft supplemental EIS</li> <li>• One paragraph abstract of the EIS</li> <li>• Date which comments are due</li> </ul>	<ul style="list-style-type: none"> <li>• Updated general information</li> <li>• Updated information on the lead agency contact person</li> <li>• Designation of the document as a final EIS</li> <li>• Identification of the preferred alternative in the Abstract (if not identified in the draft EIS) (Section 1502.14e of CEQ's NEPA regulations)</li> <li>• Refined wording in the Abstract based on changes as contained in the final EIS</li> </ul>
<b>Summary</b> <b>(40 CFR Part 1502.12)</b>	<ul style="list-style-type: none"> <li>• Adequately and accurately summarize:               <ul style="list-style-type: none"> <li>– The EIS contents;</li> <li>– Its major conclusions;</li> <li>– Areas of controversy; and</li> <li>– Issues to be resolved.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Describe updated information and/or changes/refinements based on the comment-response process</li> </ul>
<b>Purpose and Need (Introduction)</b> <b>(40 CFR Part 1502.13)</b>	<ul style="list-style-type: none"> <li>• Briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action</li> </ul>	<ul style="list-style-type: none"> <li>• Summary of Comment and Review Process (also can be part of a new Appendix – see below)</li> <li>• Updated information and/or refinements based on the comment-response process</li> </ul>
<b>Alternatives (Including the Proposed Action)</b> <b>(40 CFR Part 1502.14)</b>	<ul style="list-style-type: none"> <li>• Describe/compare proposed action and reasonable alternatives</li> <li>• Sharply define issues and provide basis for choice, if preferred action is designated</li> <li>• Include No Action/Status Quo</li> <li>• Identify preferred alternative, if known</li> </ul>	<ul style="list-style-type: none"> <li>• Identification of the preferred alternative (if not identified in the draft EIS) based on updated information and additional comparative analyses of the alternatives</li> <li>• Updated information on mitigation measures not previously analyzed</li> <li>• Inclusion of modified alternatives, other combinations of management measures or new alternatives in the comparative evaluations of reasonable alternatives</li> </ul>
<b>Affected Environment</b> <b>(40 CFR Part 1502.15)</b>	<ul style="list-style-type: none"> <li>• Succinctly describe the environment of the area(s) to be affected</li> <li>• Data and analyses to be commensurate with the importance of the impact</li> </ul>	<ul style="list-style-type: none"> <li>• Updated information and/or refinements in the study area and described resources, ecosystems and human communities</li> <li>• Identification of protected species, natural resources of concern and cultural resources not addressed in the draft EIS</li> </ul>
<b>Environmental Consequences</b> <b>(40 CFR Part 1502.16)</b>	<ul style="list-style-type: none"> <li>• Scientific and analytic basis for the comparisons</li> <li>• Environmental impacts (direct, indirect and cumulative) of the alternatives, including the proposed action</li> <li>• Adverse environmental effects which cannot be avoided should the proposal be implemented</li> <li>• Relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity</li> <li>• Any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented</li> </ul>	<ul style="list-style-type: none"> <li>• Updated information on the consequences of the alternatives based on the comment-response process</li> <li>• New or additional evaluations of impacts of concern as a result of the comment-response process</li> <li>• Factual corrections or refinements of the information on environmental consequences</li> <li>• Additional analyses of cumulative effects based on new information on past, present and reasonably foreseeable future actions</li> </ul>



**Table 1 Continued**

<b>EIS Section (CEQ Reference)</b>	<b>DRAFT EIS</b>	<b>FINAL EIS (Modified by comments or final Council Action)</b>
<b>List of Preparers (40 CFR Part 1502.17)</b>	<ul style="list-style-type: none"><li>Names, qualifications of the persons who were primarily responsible for preparing the EIS</li><li>Identify significant background papers, including basic components of the statement</li><li>Identify persons responsible for particular analysis</li></ul>	<ul style="list-style-type: none"><li>Updated as appropriate from the draft EIS</li></ul>
<b>References</b>	<ul style="list-style-type: none"><li>Fully reference citations used in text</li></ul>	<ul style="list-style-type: none"><li>Updated as appropriate from the draft EIS</li></ul>
<b>EIS Distribution List (40 CFR Part 1502.10 (i))</b>	<ul style="list-style-type: none"><li>Circulate entire draft (or summary if unusually long)</li><li>Federal, state, local agencies with jurisdiction by law</li><li>Any person, organization requesting entire EIS</li></ul>	<ul style="list-style-type: none"><li>In addition, distribute to any person, organization or agency who submitted substantive comments on draft EIS</li></ul>
<b>Index (40 CFR Part 1502.10 (j))</b>	<ul style="list-style-type: none"><li>Substantive list of key words</li></ul>	<ul style="list-style-type: none"><li>Updated as appropriate from the draft EIS</li></ul>
<b>Appendices (40 CFR Part 1502.18)</b>	<ul style="list-style-type: none"><li>Material prepared in connection with EIS</li><li>Material which substantiates analyses</li><li>Material that is analytical and relevant to the decision</li><li>Circulate with EIS or be readily available on request</li></ul>	<ul style="list-style-type: none"><li>Summary of Comment and Review Process (also can be part of Chapter 1)</li><li>Responses to Comments</li><li>Copy of comment letters, except when duplicative</li><li>Include additional or modified draft EIS technical appendices as appropriate</li></ul>

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Despite the thoroughness of CEQ's 1979 NEPA regulations, numerous pragmatic questions soon arose as to their practical application. As a result, CEQ published the "40 most frequently asked questions" and their answers in 1981 and as amended in 1986 (Council on Environmental Quality, 1981 and 1986). Agency specific "frequently asked questions" have been addressed by the Program Planning and Integration Office of NOAA (NEPA Coordinator Staff, 2006, pp. 8-9). The answers to the seven included questions are not binding on NOAA, other Federal agencies, or individuals and are not intended to circumvent, modify or replace applicable Federal law or regulations. However, their review can be instructive for planning both draft and final EISs.

The concept of supplemental draft or final EISs was introduced in Section 1502.9 of CEQ's NEPA regulations. Such supplements are appropriate if the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns with bearing on the proposed action or its impacts (Council on Environmental Quality, 1999). Further, the lead agency shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final EIS. The issue of preparing supplemental draft or final EISs may arise when key changes are included in final EISs. Examples of such changes include alterations in the "purpose and need" and revisions in impact significance determinations for certain resources.

An issue related to supplemental EISs is associated with the practice of Fishery Management Councils and the NOAA Fisheries Service to "re-bundle" management measures<sup>1</sup> from various alternatives described in draft or final EISs. This practice could lead to a "preferred alternative" which had not been specifically analyzed in the draft or final EIS. Section 1505.1(e) of the CEQ regulations legitimizes this approach by "... requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the EIS" (Council on Environmental Quality, 1999). The EIS immediately above is presumed to be a final EIS.

A Record of Decision (ROD) is to be prepared subsequent to completion of a final EIS (or final supplemental EIS). Information in the final EIS serves as the basis for the ROD. Section 1505.2 of CEQ's

NEPA regulations delineates the required contents of RODs (Council on Environmental Quality, 1999).

Finally, it is required that a final EIS, or final supplemental EIS, identify the agency's preferred alternative. The preferred alternative is identified as "... the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors" (Council on Environmental Quality, 1981 and 1986, Question 4a). If the agency has a preferred alternative at the draft EIS stage, it should be so identified (Council on Environmental Quality, 1981 and 1986, Question 4b).

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<sup>1</sup> "Re-bundle" means that Councils often propose multiple alternative measures in a draft EIS and re-group a subset of the same alternative measures for proposed action in the Final EIS.


## Filing and Timing Requirements



Internal procedures promulgated by NOAA Fisheries Service guide the review of draft and final EISs and associated documents and the execution of related approval memos and letters. These procedures are to occur prior to filing draft and final EISs with the U.S. Environmental Protection Agency (EPA). Information is available on an informal review process and a formal clearance process used by the NOAA Fisheries Service (NEPA Coordinator Staff, 2005, p. 66).

Draft and final EISs, with the final EISs including comments and responses as appropriate, shall be filed with the EPA. Detailed guidance on the EPA filing system, which is responsive to the requirements of Sections 1506.9 and 1506.10 of CEQ's NEPA regulations, is available online (<http://www.epa.gov/compliance/nepa/submiteis/> U.S. Environmental Protection Agency, 2006). Minimum time periods between the EPA's publication of Notices of Availability (NOAs) of draft and final EISs and agency decisions on the proposed action are included in Section 1506.10 of CEQ's NEPA regulations (Council on Environmental Quality, 1999). Specifically, Section 1506.10(b) denotes that no decision on the proposed action (preferred alternative) shall be made or recorded via a ROD by a Federal agency until the later of the following dates – 90 days after publication of the NOA for a draft EIS; or 30 days after publication of the NOA for a final EIS.

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Section 1502.19 of CEQ's NEPA regulations is related to the circulation of draft and final EISs (Council on Environmental Quality, 1999). Section 5.04c.5 of NAO 216-6 requires that no later than the date the document is filed with the USEPA copies of each draft EIS and transmittal letter to interested parties must be sent to all Federal, state, and local government agencies, public groups and individuals who may have an interest in the proposed action. Copies of each final EIS must be sent to parties who submitted substantial comments on the draft EIS, interested parties specifically requesting a copy and others as determined by the RPM (Responsible Program Manager) or specific NEPA project manager (EIS document manager from the NOAA Fisheries Service). The EIS and related documents must be made available for public inspection at locations deemed appropriate by the RPM (or NEPA project manager); for example, public libraries (NEPA Coordinator Staff, 2005, p. 70). Additional information on distribution, timing and number of copies to be sent to specific agencies is available (Wood, 2003; and NEPA Coordinator Staff, 2005, p. 70). In addition to mailings, posting of draft and final EISs on the Internet is both acceptable and advisable. Further, distributions of CD copies also are acceptable.

### Comment-Response Process on Draft EISs



The agency and public commenting process for draft EISs is described in Section 1503 of CEQ's NEPA regulations (Council on Environmental Quality, 1999). Section 1503.1 addresses proponent (lead) agency responsibilities relative to requesting comments from various agencies, tribes and stakeholder groups. Section 1503.2 highlights the duty of Federal agencies with jurisdiction by law or special expertise to make comments on draft EISs. The specificity of agency comments is stressed in Section 1503.3. Finally, lead agency responses to received comments are the focus of Section 1503.4. This latter section is particularly important since received comments and responses are to be included in final EISs. In fact, the comment-response process may be the primary source of differences between a final EIS and a draft EIS. The key features of Section 1503.4 and associated perspectives are as follows (Council on Environmental Quality, 1999):

- An agency preparing a final EIS shall assess and consider comments both individually and collectively and shall respond by one or more of the following five means, stating its responses in the

final EIS. Possible responses are to: (1) modify alternatives, including the proposed action; (2) develop and evaluate alternatives not previously given serious consideration by the agency<sup>2</sup>; (3) supplement, improve or modify its analyses; (4) make factual corrections; or (5) explain why the comments do not warrant further agency response, citing the sources, authorities or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

- If changes in response to comments only involve factual corrections, agencies may write them on errata sheets and attach them to the final EIS instead of rewriting the draft EIS. In such cases only the comments, the responses and the changes, and not the final EIS, need be circulated (Section 1502.19). The entire document with a new cover sheet shall be filed as the final EIS (Section 1506.9). If considerable changes are necessary in the draft EIS, careful documentation of the rationale for the changes should be included in the final EIS. An option to this approach might be to issue a draft supplemental EIS or a new draft EIS and then subject it to an additional public review process.
- All substantive comments received on the draft EIS, or its summary where the comment has been exceptionally voluminous, should be attached to the final EIS whether or not the comment is thought to merit individual discussion by the agency in the text of the final EIS. All of the received comment letters could be published in a separate volume of the final EIS (note that this approach is favored by NOAA Fisheries Service/NERO). This principle can be achieved via the development of a "comment analysis report" and inclusion of it as an appendix in the final EIS. A comment analysis report typically involves cataloging the received comments, categorizing them by topic and sub-topic, as appropriate, and developing specific responses to the individual topics and sub-topics.

To aid the comment-response process, the U.S. Department of Energy has developed internal guidance (U.S. Department of Energy, 2004). This guidance also contains several useful observations and recommendations regarding modifications in a draft EIS which should be incorporated in the final EIS.

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Selected key recommendations that could be utilized by the NOAA Fisheries Service are included in Appendix I.

<sup>2</sup> That still meet the purpose and need of the action.

### What Does Case Law Tell Us?



These messages came from four Federal court cases that were identified as having relevance to differences between draft and final EISs. The cases are briefly described below and include one district-level decision and three appellate-level decisions. Appendix II includes more background information on the cases.

The first case involved a District Court which ruled on the Golden Tilefish Fishery Management Plan that was prepared by the Mid-Atlantic Fishery Management Council (Council). It illustrates the importance of carefully identifying the changes between a draft and final EIS and of documenting the process and rationale for making the changes (Natural Resources Defense Council ..., 2003). The plaintiffs complained that the agency failed to explain a difference in conclusions about the effects of bottom gear on essential fish habitat between the draft and final EIS, making the agency's decision arbitrary and capricious. The Court upheld the approach of the Council and NOAA Fisheries Service and found that the final EIS had properly documented the rationale for the changes in the proposed action and described the process used to develop the changes.

The Second Circuit case involved a short segment of an interstate highway in New Jersey. Due to a five-year period between the draft EIS and final EIS (1976 to 1981), changes between the two documents, and the inclusion of new information in the latter, the plaintiffs claimed that a draft supplemental EIS should have been prepared. The District Court ruled in favor of the defendants, and this was upheld by the Second Circuit. Key issues basic to these rulings were that the rationale for the changes was carefully documented in the final EIS, and the included changes unquestionably would mitigate adverse environmental effects of the project (The Town of Springfield ..., 1983).

Another Second Circuit case addressed a fill permit for a 242-acre aquatic area of the Hudson River to the immediate west of downtown New York City. At


### *A review of case law on draft and final EIS differences indicated the following messages:*

- Carefully document any changes between draft and final documents;*
- A change in a final EIS from a draft may not require a supplemental EIS when that change mitigates adverse environmental impacts;*
- A final EIS can revise the conclusions of a draft if the final provides a reasoned explanation of the change in effects; and*
- If the purpose and need change between the draft and final EIS, the same range of alternatives may not necessarily be adequate.*

issue were the effects of the fill on juvenile striped bass. A draft supplemental EIS indicated that the proposed highway project (called the Westway project) and associated fill would cause a significant loss of juvenile striped bass habitat. This loss was identified following a four-month study of winter habitat. In the final supplemental EIS, the conclusion was that only minor impacts would occur on the habitat and fishery. Both the District Court and the Second Circuit ruled in favor of the plaintiff because a reasoned explanation for the change in the expected effects between the documents was not provided.

The Ninth Circuit case involved a narrowing of the "purpose and need" statement for a proposed realignment of a state highway project in California. The alternatives analyzed in the draft EIS were related to the broader "purpose and need" statement. The final EIS, with its narrower statement, had only one alternative that could meet the specified "purpose and need." The District Court ruled in favor of the defendants. However, the Ninth Circuit indicated that a reasonable range of alternatives was not analyzed for the narrower "purpose and need" statement. A key lesson is that changes in the "purpose and need" statement in a final EIS may necessitate a re-evaluation of the alternatives addressed, including

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the possibility that new alternatives may need to be identified and a new public review conducted if the new alternatives fall outside of the range previously considered and analyzed in the draft EIS.

### Differences Between Draft and Final EISs

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A final EIS may require modifications of the draft EIS ranging from minor to major. As noted above, a primary determinant of the differences (modifications) will be the changes required in response to the review comments received on the draft EIS. In addition, if the preferred alternative was not identified in the draft EIS, the descriptive rationale for its selection should be included in the final EIS, and editorial changes may be needed throughout the final EIS relative to the identified preferred alternative. Modifications of the alternatives addressed in the draft EIS may be needed for the final EIS, and the rationale for the included changes should be identified. Further, the review of case law as noted above, along with an evaluation of the litigative risk associated with the draft EIS or a modified version, can be instructive for identifying issues which need to be strengthened in the final EIS. Finally, the EIS study team may conduct further analyses, generate new special studies or analyze agency policy changes in the interim period between the public release of the draft and final EISs. The findings from these efforts should be included, as appropriate, in the final EIS.

The potential content differences between a draft and final EIS are described below as specified by CEQ's NEPA regulations and are summarized in Table 1. It should be noted that three new items are identified for a final EIS.

- **Cover Sheet for the Final EIS**

The cover sheet should include any updated information related to the lead agency contact person. Designation of the document as a final EIS should be included. If the preferred alternative was not identified in the draft EIS, it should be listed in the Abstract as per Section 1502.14(e) of CEQ's NEPA regulations. Further, the Abstract may need to be edited or re-written based on the changes as contained in the final EIS.

- **Summary for the Final EIS**

The summary of the final EIS may need to be updated based on changes from the draft EIS.

Updated information on major conclusions based on changes from the draft EIS may need to be added, along with updated information on areas of controversy (including new issues raised during the comment-response process). Of particular importance is the need to identify the preferred alternative.

- **Introduction/Purpose and Need for the Final EIS**

The "purpose and need" for the proposed action is typically described in Chapter 1 (usually the "Introduction") of both draft and final EISs. This section in the final EIS also should include a summary of the comment-response process and the resultant key differences between the draft and final EISs. If the "purpose and need" statement is changed from that in the draft EIS, consideration and discussion should be given to the adequacy of the draft EIS range of alternatives for the final EIS.<sup>3</sup>

- **Alternatives (Including the Proposed Action) for the Final EIS**

Alternatives are typically described in Chapter 2 along with summary comparisons of the features of the alternatives (note that comparative environmental and socioeconomic effects also may be summarized here). Pending the responses to the received comments, comparative evaluations of reasonable alternatives may need to be updated based on the inclusion of modified alternatives, other combinations of management measures, or even new alternatives (such modified or new alternatives could have resulted from the comment-response process). New information on the comparative effects should also be included. The preferred alternative and the rationale for its selection should be identified in Chapter 2 (assuming that it had not been identified in the draft EIS). Further, updated information on new mitigation measures which had not been analyzed in the draft EIS should be included. A new alternative or new combination of previously reviewed alternatives may trigger the requirement for a supplemental EIS and a new public review if it falls outside of the range previously considered and analyzed in the draft EIS.<sup>3</sup>

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<sup>3</sup> Should any questions about this issue arise, the NERO General Counsel and NEPA Coordinator should be consulted.

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- **Affected Environment for the Final EIS**

The affected environment is typically described in Chapter 3. The final EIS should include updated information on, and/or refinements in, the study area and described resources, ecosystems and human communities. This updated information could be based on the comment-response process and/or the results of new analyses, studies and policies. Finally, the identification of protected species, natural resources of concern and cultural resources which were not addressed in the draft EIS should be incorporated in Chapter 3 in the final EIS. Again, a new alternative or new combination of previously reviewed alternatives may trigger a supplemental EIS and a new public review if it falls outside of the range previously considered and analyzed in the draft EIS.

- **Environmental Consequences for the Final EIS**

The biological, physical, social and economic consequences of the alternatives, including the proposed action (preferred alternative), are typically addressed in Chapter 4. This chapter in the final EIS should include updated information on the consequences of the alternatives based on the comment-response process, new analyses and new studies. New types of effects may need to be analyzed, and factual corrections or refinements of the draft EIS information on environmental consequences may be necessary. Further, additional analyses of cumulative effects may be appropriate based on new information on past, present and reasonably foreseeable future actions.

- **List of Preparers for the Final EIS**

This list could be included as a chapter or appendix in the final EIS. If such a list was included in the draft EIS, it may need to be updated for the final EIS.

- **Selected References for the Final EIS**

Selected references should have been included in the draft EIS, either as a separate chapter/appendix or as a special inclusion prior to the appendices. Such references may need to be updated based on the comment-response process and new studies and information.

- **Appendices for the Final EIS**

Appendices from the draft EIS may need to be updated as appropriate based on the comment and review process, and other new information and scientific analyses. One example could be the appendix listing the agencies, organizations and persons to whom the draft EIS was provided. The final EIS may need to incorporate new appendices based on additional analyses conducted as a result of the comment and review process or other policies and studies.

- **Index for the Final EIS (new)**

A new/revised index should be prepared based on the contents of the final EIS.

- **Summary of Comment and Review Process in the Final EIS (new)**

This summary could be included in Chapter 1 or as a separate appendix accompanied by a “Comments Analysis Report.” The summary should include a description of the public participation activities involving the draft EIS and the overall process, including categorization of comments and the development of individual and/or collective responses. Further, a description of how changes were made in the draft EIS and incorporated in the final EIS should be provided.

- **Comment Letters and Other Communications on the Draft EIS (new)**

All substantive comments letters and related communications documents should be included as an appendix in the final EIS or as a separate volume of the final EIS. Further, this information should be made a part of the Administrative Record.

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## Summary and Conclusions

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This guidance is focused on the required and potential differences between the contents of draft and final EISs. The bases for such differences are primarily associated with agency timing of the identification of the preferred alternative, intra-agency reviews of draft EISs along with inter-agency and public stakeholder reviews of draft EISs, and associated agency responses. New analyses, studies and policies also could serve to prompt such differences. The key conclusions from this guidance are:

- (1) The CEQ's NEPA regulations, along with NAO 216-6, provide sound principles and processes for developing and processing EISs on the various actions of the NOAA Fisheries Service.
- (2) Specifications for the contents of draft and final EISs are adequately articulated in CEQ's and NOAA's NEPA regulations. They should be used in the planning and preparation of EISs. Further, the regulations also provide procedural information related to both internal and external reviews of EISs.
- (3) The process for systematically reviewing and classifying received agency and stakeholder comments and for developing appropriate responses needs to be carefully planned and implemented. This process is the primary source of information for prompting differences between draft and final EISs.
- (4) Generic differences in the topical contents of draft and final EISs can be identified. However, study-specific differences will be largely dependent upon the completeness of the draft EIS, the scientific and policy issues identified during the comment-response process, new studies and analyses completed during the post-draft EIS time period, and relevant case law.



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## Selected References



- City of Carmel-by-the-Sea, et al., v. United States Department of Transportation, et al., United States Court of Appeals for the Ninth Circuit, No. 94-16234, 95 F.3d 892, September 13, 1996.
- Council on Environmental Quality (CEQ), “Forty Most Asked Questions Concerning CEQ’s NEPA Regulations,” 46 Federal Register 18026 (March 23, 1981), as amended, 51 Federal Register 15618 (April 25, 1986).
- CEQ, “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,” 40 CFR Parts 1500-1508, July 1, 1999, Washington, D.C.
- National Oceanic and Atmospheric Administration (NOAA), “Environmental Review Procedures for Implementing the National Environmental Policy Act,” NOAA Administrative Order (NAO) 216-6, May 20, 1999, Washington, D.C.
- Natural Resources Defense Council, et al. v. Donald Evans, et al., United States District Court, Southern District, New York, No. 01 Civ. 9453 (RMB), March 31, 2003.
- NEPA Coordinator Staff, “NOAA National Environmental Policy Act Frequently Asked Questions,” January, 2006, NOAA Program Planning and Integration, Silver Spring, MD. (can download this document from : <http://www.ppi.noaa.gov>, then click on NEPA under PPI Offices)
- NEPA Coordinator Staff, “The National Oceanic and Atmospheric Administration National Environmental Policy Act Handbook,” Version 2, December, 2005, NOAA Program Planning and Integration, Silver Spring, MD. (can download this document from : <http://www.ppi.noaa.gov>, then click on NEPA under PPI Offices)
- Sierra Club, et al., v. United States Army Corps of Engineers, et al., United States Court of Appeals for the Second Circuit, Nos. 85-6297, 85-6299, 772 F.2d 1043, September 11, 1985.
- The Township of Springfield, et al. v. Drew Lewis, et al., United States Court of Appeals for the Third Circuit, No. 82-5445, 720 F.2d 426, March 15, 1983.
- U.S. Congress, “The National Environmental Policy Act, as amended,” Public Law 91-190, 42 U.S. 4321-4347, January 1, 1970, as amended by Public Law 94-52, July 3, 1975, Public Law 94-83, August 9, 1975, and Public Law 97-258, § 4(b), September 13, 1982.
- U.S. Department of Energy, “The EIS Comment-Response Process,” October, 2004, Washington, D.C. (can download this document from: [www.eh.doe.gov/nepa](http://www.eh.doe.gov/nepa), then click on guidance tools under menu topics)
- U.S. Environmental Protection Agency, “Filing System Guidance for Implementing 1506.9 and 1506.10 of the CEQ Regulations,” March 23, 2006 (can download this document from: <http://www.epa.gov/compliance/resources/policies/nepa/fileguide.html>)
- Wood, J., “Guidance on Distribution of Draft and Final Environmental Impact Statements to Commenting Agencies,” Memorandum, October 14, 2003, NOAA Program Planning and Integration, Silver Spring, MD (can download this document from: <http://www.ppi.noaa.gov>, then click on NEPA under PPI Offices)

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## APPENDIX I

### Practical Recommendations Related to the Comment-Response Process

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This appendix contains selected recommendations from U.S. Department of Energy guidance associated with changes in a final EIS resulting from the review process conducted for a draft EIS. The selected recommendations include (U.S. Department of Energy, 2004):

- Describe the comment-response process to help readers understand how the agency dealt with their comments and to provide perspective on stakeholder interest and issues. Include this description in the comment-response section (or chapter or appendix) of the final EIS and key aspects of it in the final EIS's summary and introductory chapter. Although the organization of the description will vary among EISs, include such topics as:
  - An overview of the public participation process (length of the comment period and whether there were any extensions; participation in public hearings; the number and format of comment documents received during the comment period and after, if appropriate; and the source of comments, e.g., governmental agencies, individuals);
  - Areas of controversy raised by commenters;
  - Indices to help readers find comments by individual, organization or topic; and
  - A summary of changes made to the EIS in response to comments.
- Explain in appropriate detail whenever no EIS changes were made in response to comments. Particularly for comments on matters in which there is broad public interest or comments that reflect controversy or uncertainty about environmental impacts to ensure that the EIS shows that the agency has taken a “hard look,” even though it did not change the EIS.
- Normally, indicate in the margins of the final EIS (e.g. by vertical bars) where changes were made. The nature of changes also may be indicated (e.g. a code indicating whether the change is in response to a comment or undertaken at the agency's discretion and whether the change is technical or editorial). This helps readers find new information and links responses-to-comments to changes made in the document.
- Ensure consistency. Make sure responses are consistent with each other and appropriately reflected in the text of the final EIS. Make sure that any EIS changes are consistent with responses.
- Reproduce all comment documents received on an EIS in the final EIS (unless the response has been exceptionally voluminous and/or duplicative) whether or not the comments therein are thought to merit individual discussion by the agency in the final EIS. However, if the response to comments is exceptionally voluminous, provide summaries of comments (40 CFR 1503.4(b)), or if identical or very similar comment documents are received in high volume (e.g. multiple faxes, emails, or postcards), reprint one as a sample comment document (keep all comment documents in their entirety in the Administrative Record). Include names and addresses or other identifying information that a commenter provided in the comment document, unless the commenter requests that certain information be withheld. Note that the agency reserves the right to determine what information is published in the final EIS.
- Present any agency summary of comment topics at the beginning of a comment-response section, in the final EIS Summary, and in an introductory chapter of the final EIS. Follow each summary comment with a fully-developed response, including references to related sections of the final EIS and descriptions of any changes made.

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## APPENDIX II

### Summary Information from Relevant Case Law

The Lexis-Nexis court cases information system was utilized to identify Federal case law related to differences between draft and final EISs. Search terms included NEPA, draft EIS, final EIS, and the word “change.” The search strategy involved specifying that the word “change” could be no more than 10 words away from the words “draft” or “final.” This strategy identified four relevant cases (three appellate cases and one district case).

The district court case involved a fishery management action and final EIS prepared by the Mid-Atlantic Fishery Management Council (MAFMC) (Natural Resources Defense Council ..., 2003). One plaintiff claim related to a change in interpretation of the significance of impacts resulting from the use of bottom-tending mobile gear (trawling) for other commercial species within the essential fish habitat (EFH) for tilefish. Although no specific studies had been conducted on trawling effects on tilefish habitat, the draft EIS utilized other studies of the impacts of mobile gear to infer tilefish EFH impacts and thus, to propose management measures for the commercial tilefish industry.

Numerous review comments on the draft EIS prompted NOAA Fisheries Service and the MAFMC to re-examine the scientific data and thus, modify the proposed action in the final EIS. The resultant action incorporated a research program to study the exact effects of bottom-tending mobile gear on tilefish habitat. Further, the final EIS specifically addressed the procedural features of Sec. 1502.22 (Incomplete or Unavailable Information) of the CEQ NEPA regulations. Moreover, the final EIS included the rationale for the changes in the proposed action and described the process used to develop the changes. Accordingly, the U.S. District Court (Southern District of New York) denied the plaintiffs’ motion for summary judgment and granted the defendants’ cross motion for summary judgment. The key issues were that the changes between the draft and final EISs were carefully documented, and the relevant rationale was explained. Thus, it was determined that NOAA Fisheries Service was not arbitrary and capricious in its decision making.


One appellate case (Third Circuit) addressed a decision by the District Court for the District of New

Jersey (The Town of Springfield ..., 1983). The case involved a proposed 5.5 mile segment of Interstate 78 crossing a New Jersey park known as Watcung Reservation. An original draft EIS was issued by the New Jersey Department of Transportation (NJDOT) in November 1973, and a new draft EIS was distributed in May 1976. Following public hearings in June and July 1976, the NJDOT prepared a final EIS which included updated studies related to air quality, noise, ecosystems, industrial impact, traffic and engineering. Extended negotiations between the NJDOT and the Federal Highway Administration occurred over the period from the fall of 1978 through the fall of 1980. The FHWA approved the final EIS in January 1981.

The plaintiffs then filed suit against the I-78 segment in the District Court for the District of New Jersey, also in January 1981. The suit included nine claims and among them was one related to “failing and refusing to redraft or supplement and recirculate” the 1976 draft EIS. The arguments by the plaintiffs were that “substantial changes” had been made between the draft EIS and final EIS and that “new information” was included in the final EIS. The District Court ruled in favor of the defendants in both arguments, noting that the changes and new information were explained and that they improved understanding and enabled mitigation of adverse environmental effects. The Third Circuit affirmed the decisions of the District Court. Additionally, it should be noted that the 1981 plaintiff claims regarding the need to “supplement” the 1976 draft EIS occurred in the early years following the 1979 promulgation of the CEQ NEPA regulations, which introduced the concept of Supplemental EISs. Careful documentation within the final EIS was important in both the District and Appellate court decisions. Finally, the District Court held that ... “when changes made between the draft EIS and final EIS unquestionably mitigate adverse environment effects of the project, as is the case here, those changes generally do not require a supplemental EIS” (The Town of Springfield ..., 1983, p. 14).

The second appellate case (Second Circuit) addressed a decision by the District Court for the Southern District of New York (Sierra Club ..., 1985). The District Court had ruled in 1985 that a Final Supplemental EIS (FSEIS) on a “landfill” (fill) permit for the West Side Highway Project (Westway) in New York City was inadequate. Hence, declaring the permit null and void as well as associated funding approvals for Westway granted by the Federal Highway

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Administration. The District Court judgment also permanently enjoined the New York Department of Transportation from construction of Westway. The Second Circuit affirmed the inadequacy of the FSEIS but reversed the permanent injunction and remanded the matter to the Federal defendants.

A key scientific issue in this case involved the anticipated effects of filling a 242-acre area of the Hudson River to the immediate west of downtown New York City. The 1977 final EIS on Westway failed to reveal to the public the possible importance of the 242-acre aquatic area as a winter habitat for juvenile striped bass. In 1981, the New York District of the Corps of Engineers issued a “fill” permit for the area, and plaintiffs sued the Corps, Federal Highway Administration and other federal and state agencies. In April and July 1982, the District Court enjoined most of the Westway project activities and set aside the 1981 fill permit. The District Court’s April remand order also required the Corps to “keep records of all activities, deliberations and communications (including communications with the FHWA and any other federal official or agency) which occur in relation to [the Westway] permit application” (Sierra Club ..., 1985, p. 3).

In April 1982, the State of New York again applied to the Corps for a fill permit for Westway. The Corps convened two workshops of experts to discuss the fishery habitat issue. One four-month winter study of the striped bass habitat was conducted, and a Draft Supplemental EIS (DSEIS) was issued by the Corps and FHWA in May 1984. The DSEIS concluded that the Westway project would cause a significant loss of habitat to Hudson River juvenile striped bass. In November 1984, the FSEIS was issued and an important change in the fishery habitat findings was included ...“the Corps concluded that the perceptible long-term decline in stock would be difficult to discern from normal yearly fluctuations and would have only “minor impacts” on the fishery.” Even in a worst-case scenario, the Corps continued, the consequence of the landfill would still be “insufficient to significantly impact” the commercial fishery and “though persistent, the magnitude of the depressed population is likely to be relatively small...and not a critical (or even minor) threat to its well being, nor to that of the commercial/recreational fishery.” (Sierra Club..., 1985, p. 4).

In the District Court’s August 1985 opinion, the Court noted that the defendants “. . . had failed adequately to support their conclusion that the impact

on the striped bass fishery would be minor.” The District Court held that the Corps’ finding that the fill would have a minor impact on the striped bass was arbitrary because the Corps had no reasoned basis for the reversal of its analysis of impacts from the DSEIS to FSEIS, and it failed to collect sufficient data to support its analysis (Sierra Club ..., 1985, p. 5). Further, it also was determined that the Corps violated the prior recordkeeping order and that there was no explanation for the key change from the DSEIS to the FSEIS. Finally, the Corps attempted to convince both the District and Circuit Courts that there was no change and that the language of the DSEIS and FSEIS meant the same thing. The Circuit Court supported the District Court’s conclusions that the proffered denial of the change from “significant adverse impact” in the DSEIS to the “minor impact” in the FSEIS was a post-hoc rationalization unworthy of belief and that the Corps failed to provide any reasoned explanation for the change. Finally, it reversed the District Court’s permanent injunction and remanded the matter to the Federal defendants.


The third appellate case (Ninth Circuit) involved several issues related to a proposed realignment of California State Highway 1 from the outskirts of the City of Carmel-by-the-Sea to nearby Hatton County to relieve severe traffic congestion problems along a roughly three-mile stretch near Carmel (City of Carmel-By-The-Sea..., 1996). The relevant issue herein was the material change in the statements of purpose and need between the draft and final EIS. This change rendered inadequate the range of reasonable alternatives. More specifically, the draft EIS “purpose and need” was stated in general terms as follows:

“The purpose of the proposed project alternatives is to improve the capacity of Highway 1 and reduce crossing and turning conflicts associated with several local streets and private driveways. Project alternative solutions would provide for improved level of service for through traffic on Highway 1 and improved road connections between Highway 1 and the existing local street system.” (City of Carmel-By-The-Sea..., 1996, p.11)

The final EIS included a narrower and more specific “purpose and need” stated as follows:

“The purpose of the project is to relieve current traffic congestion, lessen emergency vehicle

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response time, reduce crossing conflicts at local intersections and driveways, improve safety, ameliorate air quality and bring the rural road character back to the local area. Improvement for congestion relief to the area should provide capacity to meet traffic service needs for the next 20 years at Level of Service C in order to be a reasonable expenditure of public funds. Project alternative solutions would provide for improved level of service for through traffic on Highway 1 and improved road connections between Highway 1 and the local street system.” (City of Carmel-By-The-Sea..., 1996, p. 12)

As can be seen from the above, specification of Level of Service C in the final EIS is more limiting than the broader statement of the draft EIS. In fact, only one of the analyzed alternatives in the draft EIS met the Level of Service C criterion in the final EIS. The District Court for the Northern District of California ruled that the narrowing of the purpose and need statement was allowable, and it ruled in favor of the defendants. However, the Ninth Circuit reversed the District Court regarding the final EIS’s consideration of alternatives in light of the change in the purpose and need statement. The Ninth Circuit noted:

“When a statement of purpose and need is materially changed such that the alternatives designed to satisfy the former statement of purpose and need do not satisfy the revised statement of purpose and need, new alternatives are necessary ...to address an appropriate range of alternatives. The choice of an alternative must be made after a consideration of the relevant factors.” This requirement is not met where, as here, one of several relevant factors in the draft EIS is elevated to dominance in the final EIS, and the application of that single factor eliminates all but one of the listed alternatives.” Accordingly, the final EIS “... did not consider a reasonable range of alternatives or make a reasoned choice after considering the relevant factors.” (Carmel-By-The-Sea ..., 1996, p. 19)



**U.S. Department of Commerce  
National Oceanic & Atmospheric Administration  
National Marine Fisheries Service**