

## ATTACHMENT 9.8 (12509-SPD EIS SOP) Frequently Asked Questions

### **Q-1. What factors should be considered when determining whether to prepare an EIS?**

Answer: The National Environmental Policy Act (NEPA) states an Environmental Impact Statement (EIS) is necessary for major Federal actions that significantly affect the quality of the human environment. Accordingly, the first step in deciding whether to prepare an EIS is to determine the Corps scope of analysis (SOA) and whether the applicant's proposed activity(s) within the SOA would result in "significant" environmental impacts. In some cases, the need to prepare an EIS can be determined shortly after the receipt of a DA permit application for activities requiring authorization under section 404 of the Clean Water Act (CWA), section 10 of the Rivers and Harbors Act (RHA) of 1899 or section 103 of the Marine Protection, Research and Sanctuaries Act (MPRSA); in other cases, it may not be so clear.

Districts must consider two broad factors to understand whether the proposed action requires the preparation of an EIS: the "context" and "intensity" of impacts. Both terms are defined in regulation and elaborated upon in the main SOP. 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. 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. A resource may be locally significant even if it is not significant from a regional or national perspective. As an example, in *Anderson v. Evans*, 371 F.3d 475 (9<sup>th</sup> Cir. 2004), a Native American tribe proposed to resume whale hunting in a particular part of Puget Sound in the state of Washington. In approving the resumption of hunting, NOAA (as the lead Federal agency) prepared an environmental assessment (EA) and finding of no significant impact (FONSI) in which it concluded the hunt would not significantly affect the quality of the human environment. In the lawsuit that followed, with regard to "context", the court concluded that the relatively small resident whale population in the Puget Sound rendered the context significant.

Understanding the intensity of impacts, or the severity, will involve consideration of the ten factors listed in CEQ's NEPA implementing regulations at 40 C.F.R. § 1508.27. In the context of NEPA and determining whether to prepare an EIS, districts should seek to understand the degree to which the applicant's proposed action would involve one or more of the ten factors.

Districts must consider and explain in the administrative record why the combination of context and intensity of the impacts stemming from the applicant's proposed action would result in significant or non-significant impacts. In doing so, the conclusion districts make regarding significance should be based on substantial evidence (not speculation) that consists of empirical data, analysis and other relevant information. With respect to cumulative impacts and their bearing on "significance", districts should be mindful that significance exists if it is reasonable to

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

anticipate a cumulatively significant impact on the environment. Districts should not avoid “significance” by terming an applicant’s proposed action temporary or by breaking it down into smaller components, or in other words, segmenting the proposed project.

**Q-2. Is mitigation considered as part of the district’s determination of “significance”?**

Answer: Yes. The decision related to “significance” is made *after* considering all mitigation measures (avoiding, minimizing, rectifying, reducing and compensating) and is essentially based on the net impacts of the project or portions of the project that fall within the Corps’ SOA. If not already part of an applicant’s proposed action, districts may identify and commit to specific mitigation measures to support a “mitigated” FONSI to avoid or lessen the potentially significant environmental effects of the applicant’s proposed action that would otherwise need to be evaluated in an EIS. The use of mitigated FONSI is supported by CEQ guidance as a valuable and efficient means to reduce environmental impacts and is appropriate as long as the mitigation measures committed to by the Corps to support a FONSI are implementable (i.e., there are sufficient legal authorities to perform the mitigation, and adequate resources/funding exist) and included as special conditions in the DA permit.

It’s important to note, however, that unlike NEPA the 1990 Memorandum of Agreement between the U.S. Environmental Protection Agency and the Corps concerning the determination of mitigation under the section 404 (b)(1) Guidelines prohibits the consideration of compensatory mitigation as a method to reduce environmental impacts when determining the least environmentally damaging practicable alternative (LEDPA). On this point, the ROD should be clear that compensatory mitigation was not considered in determining the LEDPA.

**Q-3. What approvals, if any, need to be obtained by the district before initiating the preparation of an EIS?**

Answer: No other Federal, State and/or local agency approvals are required before an EIS is prepared, unless it is a programmatic (Tier 1) EIS in which HQUSACE must approve the preparation of such a document. Regulatory PMs should refer to their district’s delegation of signature authority memorandum to determine who has the final authority to determine if an EIS is necessary.

**Q-4. What is a programmatic (tiered) EIS and when would a district undertake a programmatic EIS?**

Answer: Programmatic NEPA documents, often referred to as “Tier 1” documents, typically address a broad, general program, policy or proposal in an initial EIS and analyze a narrower, site-specific proposal related to the initial program, plan or policy in a subsequent EIS or EA. The subsequent project-level (or “Tier 2”) EIS or Supplemental EA (SEA) should contain a summary of the issues discussed in the first EIS and incorporate by reference discussions from the programmatic EIS. Thus, the Tier 2 EIS or SEA should focus primarily on issues relevant to the specific proposal and should not duplicate material and information

**Current Approved Version: 1/30/2013. Printed copies are for “Information Only.” The controlled version resides on the SPD QMS SharePoint Portal.**

contained in the first EIS. Examples of proposed actions that might be evaluated by the Corps under a programmatic EIS are large-scale, multi-phased development projects, long-term and recurring beach nourishment master plans located along specific sections of coastline, or other types of large-scale projects with lengthy or phased construction periods.

A programmatic (Tier 1) EIS usually identifies data gaps and discusses plans to supplement the data and prepare and circulate project-specific EISs or EAs at a later time. Since the Corps makes a permit decision on a discrete project involving the discharge of dredged or fill material into waters of the U.S. or work in, over, under or affecting navigable waters of the U.S. where impacts to the aquatic environment can be clearly identified—not on broad programs or policies—the general nature of a programmatic EIS typically will not lend itself to support a Corps permit decision. While districts might be requested to cooperate on the preparation of another agency’s programmatic (Tier 1) EIS for purposes of providing Corps technical expertise on aquatic resources or facilitating compliance with future Corps permitting requirements for subsequent Tier 2 NEPA analyses, a programmatic EIS generally will not provide a site-specific inventory of aquatic resources or a robust assessment of functional gains/losses to enable the Corps’ use of that programmatic EIS to establish the geographic limits of waters of the U.S. in an approved jurisdictional determination (JD), comply with the Section 404(b)(1) Guidelines or determine appropriate compensatory mitigation requirements pursuant to 33 C.F.R. Part 332. For these reasons, districts generally will not rely upon a programmatic EIS as the sole basis for subsequent Corps permit decisions.

Programmatic EISs often provide cumulative impact analyses which the districts may consider and incorporate into subsequent project-specific EISs or EAs. This may also be a reason why districts might cooperate on the preparation of a programmatic EIS. Districts should participate as a cooperating agency on the development of programmatic (Tier 1) EISs to the extent Regulatory Program budgets and workloads allow and when there is a general understanding that future project-specific (Tier 2) activities or actions stemming from the programmatic (Tier 1) EIS would require DA authorization. Final agency decisions and agreements made as part of the Tier 1 EIS process should not be revisited unless new information or changed conditions (e.g., environmental, policy, technical or other) occur that would warrant a reconsideration of prior Tier 1 decisions.

#### **Q-5. How long does it take to complete an EIS?**

Answer: Based on anecdotal information pertaining to Corps Regulatory-led EISs prepared within SPD, an EIS should generally take no more than 2 to 3 years to complete, although it may take up to four to six years if issues are complex and substantive or legal disputes arise. In rare cases, some Corps-led EISs have taken ten or more years to complete.

#### **Q-6. What factors or circumstances might influence the timeline or cause schedule delays?**

Answer: The time frame for preparing an EIS will be influenced by the scope and complexity of environmental issues; time limits imposed by other laws, regulations and EOs;

**Current Approved Version: 1/30/2013. Printed copies are for “Information Only.” The controlled version resides on the SPD QMS SharePoint Portal.**

degree of public controversy; availability, or lack thereof, of state-of-the-art analytical tools, models and techniques; the time associated with acquiring project information for an EIS (e.g., field surveys and technical studies); and agency or applicant funding constraints. Once established, districts will make the schedule available to the applicant and the public, and should revise the schedule, if needed, based on information gained through the scoping process.

#### **Q-7. How is the lead Federal agency determined?**

Answer: The lead Federal agency will generally be the agency that has a larger federal handle or control over the proposed project; this is usually apparent to the agencies and therefore creates little to no disagreement or ambiguity. If the applicant's proposed project is funded (in whole or in part) by a Federal agency and the Corps' scope of analysis is relatively small, then the lead Federal agency will generally be the agency funding the project. This is often the case with public infrastructure projects involving Federal Highway Administration, Federal Transit Administration, Federal Aviation Administration and Federal Railroad Administration. According to 40 C.F.R. § 1501.5(c), if there is a disagreement between agencies on designating the lead Federal agency, the following factors (in descending importance) will be considered:

- Magnitude of the agency's involvement
- Project approval/disapproval authority
- Expertise concerning the action's environmental effects
- Duration of agency's involvement
- Sequence of agency's involvement

Two Federal agencies may act as joint lead agencies, particularly if both agencies have the same level of involvement in the project.

#### **Q-8. What is the benefit or purpose of inviting other agencies to be cooperating agencies on the preparation of an EIS?**

Answer: CEQ regulations implementing NEPA direct lead Federal agencies to invite other Federal, State, Tribal and local agencies with jurisdiction by law and special expertise to be cooperating agencies on an EIS. In general, the purpose of engaging cooperating agencies in the preparation of an EIS is to promote greater efficiency and value in the environmental review process and obtain the best available information necessary to make informed and timely decisions. The active participation of cooperating agencies helps to address each agency's mandates and statutory responsibilities triggered by the applicant's proposed action as well as to incorporate the technical expertise of each agency with respect to the trust resources or programs for which they manage and/or administer. Input and participation from cooperating agencies with special expertise or jurisdiction by law will contribute to the overall thoroughness and accuracy of the EIS and often leads to improved interagency relationships and intergovernmental collaboration. Lastly, involving cooperating agencies early in the NEPA process facilitates a cooperating agency's ability to adopt the Corps' final EIS should an agency determine a need to do so without the need to supplement or re-circulate the document.

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

**Q-9. What options does the Corps have when a dispute arises with a cooperating agency?**

Answer: During the preparation of an EIS, it is not uncommon for a disagreement to arise between the lead Federal agency and a cooperating agency. Some disputes may be related to the interpretation and application of policy, whereas other disagreements may occur over technical issues or study methodologies. Districts should keep in mind the goal of engaging cooperating agencies in the development of an EIS and therefore, whenever appropriate utilize available conflict management tools to attempt to resolve disagreements in a timely manner. Dispute resolution options exercised by the districts should be consistent with Regulatory Guidance Letter (RGL) 87-04, *Use of Alternative Dispute Resolution in Regulatory Actions*, and may include, but are not limited to:

- Use of third-party (neutral) facilitators or mediators – the U.S. Institute for Environmental Conflict Resolution ([www.ecr.gov](http://www.ecr.gov)) is a recommended resource and starting point for soliciting guidance on alternative dispute resolution options;
- Application of agreed upon inter- and intra-agency elevation procedures; and
- Implementation of the principles outlined in CEQ’s *Collaboration in NEPA – A Handbook for NEPA Practitioners* (October 2007).

**Q-10. Does the cooperating agency(s) name go on the EIS?**

Answer: Yes. According to CEQ NEPA implementing regulations the cover page of the EIS must list all cooperating agencies (refer to 40 C.F.R. § 1502.11).

**Q-11. Does an agency have to be a Federal agency to be a cooperating agency?**

Answer: No. While the CEQ regulations developed the cooperating agency concept primarily with Federal agencies in mind, the benefits of designating State or local agencies as cooperating agencies are similar. Entities such as Indian tribes may also become cooperating agencies (refer to CEQ guidance on non-federal cooperating agencies, dated September 2000 for additional information).

**Q-12. The applicant has hired a consultant who has already done much of the work necessary to complete the EIS prior to the Corps involvement. Can the Corps select the applicant’s consultant as the Corps third-party contractor, if requested by the applicant?**

Answer: Generally, the Corps should not select the applicant’s consultant as the Corps third-party contractor to prepare the EIS, since this can present a conflict of interest or at a minimum, create a perception of bias. However, the Corps and the Corps-selected third-party contractor can independently review the information prepared by the applicant’s consultant and utilize or supplement the information in the development of the EIS, if appropriate and only once

*Current Approved Version: 1/30/2013. Printed copies are for “Information Only.” The controlled version resides on the SPD QMS SharePoint Portal.*

an independent evaluation has occurred that concludes the information is unbiased and accurate. In doing so, districts must document in the administrative record the Corps' independent evaluation and verification of the accuracy of the information.

**Q-13. What should the Corps look for in a qualified third-party contractor to prepare an EIS?**

Answer: There are many criteria to consider when determining a qualified third-party contractor to prepare an EIS. Some factors to consider include: experience with NEPA and preparing EISs; knowledge of and prior experience with the Corps Regulatory Program; familiarity with the project area, issues and environmental conditions; familiarity with State or local regulations (particularly if a joint document is being prepared with another agency); potential sources for conflict of interest; the district's previous experience with the contractor; availability of qualified staff needed to perform specific work or analyses in support of the EIS; and the number of EISs the contractor is currently preparing (current workload).

**Q-14. If the district doesn't believe any of the third-party contractors identified by the applicant are appropriate or qualified to prepare the EIS, can the district request that the applicant provide a list of additional contractors?**

Answer: Yes. If the contractors provided by the applicant are not qualified to prepare an EIS or if there would be a conflict of interest, the Corps may ask the applicant to provide a new list of qualified contractors.

**Q-15. Can the third-party contractor selected to prepare the EIS be terminated?**

Answer: Yes. If the third-party contractor preparing the EIS is not providing quality information determined by the Corps to be necessary for the EIS or the contractor is not meeting agreed upon timelines, the district may request the applicant to terminate its contract with the third-party contractor and select the next qualified contractor.

**Q-16. Can changes be made to the Scope of Work (SOW) after it is developed and executed?**

Answer: Yes. While the SOW is part of a "contract", it is a document that reflects the tasks and services to be performed by the third-party contractor and establishes a clearly defined process and set of expectations. As public input is gained through the NEPA process, the SOW may require amendments or modifications to reflect needed changes, especially following scoping input and comments from the public in response to the Draft EIS. Because changes to the SOW can cause or translate to increased costs for the applicant, the Regulatory PM should coordinate and communicate with the applicant any proposed modifications to the SOW in advance of executing an amended SOW.

**Q-17. Is there a specific format for a Notice of Intent (NOI)?**

*Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.*

Answer: Yes. The format for the NOI is documented at 33 C.F.R. Part 230, Appendix C. The NOI must briefly describe: the proposed project, reasonable alternatives, the Corps' scoping process, proposed public involvement, significant issues to be analyzed in depth, environmental review and consultation requirements, date and/or location of scoping meetings, if appropriate, and the estimated date when the Draft EIS will be made available to the public (refer to Attachment 9.4.1 for a template)

**Q-18. Who prepares or writes the NOI? Do the "wet" signatures on the three originally signed copies of the NOI for publication in the *Federal Register* have to match the name on the signature block?**

Answer: The Corps prepares the NOI, although the third-party contractor may provide a draft NOI. The signature on the three originally signed NOIs must match the official's name typed in the signature block.

**Q-19. Who publishes the NOI?**

Answer: The Army Federal Register Liaison Officer or HQUSACE, Regulatory CoP Federal Register Liaison is responsible for ensuring the NOI is submitted to the Office of the Federal Register, National Archives and Records Administration for publication in the *Federal Register*. Either office may submit the NOI to the Office of the Federal Register, as both co-share this responsibility on behalf of the Corps. The NOI will be published in the *Federal Register* on a Friday, and must be received by the Liaison Officer by the Thursday before the next Friday of publishing (i.e., 8 days before the desired publication date).

**Q-20. How many alternatives need to be evaluated in an EIS?**

Answer: The underpinnings of NEPA mandate an agency take a "hard look" at the environmental impacts of a proposed action and its alternatives and meaningfully integrate the environmental consequences of that action in agency decision-making. The evaluation and consideration of environmental effects should inform an agency's decision rather than justify a decision already made. The agency is required to consider a reasonable range of alternatives, but there is no required number of alternatives to be evaluated in an EIS, although the proposed action and the No Action alternative must always be included. The number of alternatives is a decision that will be made on a case-by-case basis and only after considering the nature of the activity, the overall project purpose and what is reasonable for the type of project under consideration.

**Q-21. When in the EIS process are the requirements of the section 404(b)(1) Guidelines addressed?**

Answer: The objective is to implement early on the requirements of the section 404(b)(1) Guidelines (Guidelines) into the EIS process to reduce redundancy and ensure public

*Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.*

transparency with respect to the evaluation of all “reasonable” alternatives (NEPA) and “practicable” alternatives (Guidelines). Ideally, the alternatives to be co-equally evaluated in an EIS are both reasonable and practicable, but in some cases an alternative may be carried forward that is not practicable (e.g., not available to the applicant). Districts should not defer the draft 404(b)(1) alternatives analysis until the final EIS or Record of Decision (ROD). A final determination by the district as to the applicant’s compliance with the Guidelines will be documented in the ROD.

**Q-22. What is the most effective and efficient way to integrate the section 404(b)(1) alternatives analysis with the NEPA alternatives analysis?**

Answer: NEPA requires that a reasonable range of alternatives be evaluated within the EIS, including the No Action alternative. The Guidelines require that no permit be issued for a project if there is an alternative that would have fewer impacts to the aquatic environment, provided there are no other significant adverse environmental consequences. As such, the overall NEPA alternatives analysis should be thorough and robust enough to provide the information needed to comply with both requirements. Doing so will involve the substantive requirements of the Guidelines be effectively integrated into the EIS. 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. During the EIS development, new or modified alternatives may be developed to comply with the Guidelines or NEPA. In certain circumstances, it may be necessary to analyze alternatives beyond the applicant’s capability to make an informed public interest decision (i.e., to evaluate one or more alternatives that are not “practicable”). When it is appropriate 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 depiction of the integration of NEPA and section 404 of the CWA processes).

**Q-23. When does the Corps make the determination on the least environmentally damaging practicable alternative (LEDPA) within the EIS?**

Answer: While the final EIS should contain sufficient information to identify and substantiate the LEDPA, the final determination on the LEDPA is made within the ROD. The ROD serves as the Corps decision document and the basis for the DA permit decision.

**Q-24. How many public notices are issued during the process of preparing an EIS?**

Answer: Usually, there is a minimum of four public notices issued throughout the EIS process, although under certain circumstances additional special PNs may be issued, if for example, a public review period is extended beyond the original comment period established in the NOA and accompanying PN.

- A public notice is issued concurrent with the publishing of the NOI in the *Federal Register* requesting scoping comments and input from agencies and members of the public;
- A second public notice is issued concurrent with the publishing of the Notice of Availability for the draft EIS (DEIS) in the *Federal Register* announcing the applicant's request for Corps authorization of the proposed action as well as soliciting public comment on the DEIS;
- A third public notice is issued concurrent with publishing of the Notice of Availability for the final EIS (FEIS) in the *Federal Register* notifying the agencies and members of the public the FEIS is available for review and a Corps permit decision will be made subsequent to the 30-day review (wait) period; and
- A fourth special or informational public notice is issued when the ROD is signed to announce to agencies and members of the public the Corps ROD has been issued and is available.

**Q-25. When should the Corps' Public Notice announcing the intent to prepare an EIS be issued?**

Answer: The Corps public notice PN announcing the intent to prepare an EIS should be issued concurrent with the publication of the official Notice of Intent (NOI) in the *Federal Register* or as close as possible to that date.

**Q-26. Should the district ever withdraw the DA permit application when an EIS is being prepared?**

Answer: In cases when the EIS process is no longer moving forward due to an unnecessary and unreasonably long delay in the applicant providing necessary information or the EIS third-party contractor is not being paid by the applicant, the district should withdraw the DA permit application.

**Q-27. Can the applicant review the administrative Draft/Final EIS?**

Answer: Yes. The applicant may review the administrative draft and final EISs. However, in general, the Regulatory PM should primarily consider comments provided by the applicant that relate to the project description, known missing or erroneous information, or the applicant's ability (or inability) to comply with specific mitigation measures proposed by the Corps. Districts may consider comments from the applicant with regard to the characterization of impacts or the how those impacts affect the public interest, but will do so and accept such comments only after conducting an independent evaluation to verify their accuracy. That is, the Corps is not required to automatically accept the applicant's comments or make changes to the EIS based on the applicant's input, but when the district believes the applicant's comments have

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

merit or determines it is appropriate to accept the applicant's comments, the district's administrative record must reflect the Corps' independent evaluation of those comments and/or applicant-furnished information.

**Q-28. What factors should a Regulatory Project Manager consider when deciding on the format of a public meeting?**

Answer: There are advantages and disadvantages to the various formats for holding a public meeting. Factors that may influence whether districts hold a formal or informal meeting may include the known level of public interest and whether there is strong opposition that has created polarizing views; anticipated public attendance (low or high); the breadth of issues and how the issues affect the public; potential language barriers or special cultural practices of meeting attendees; and the existing knowledge of (or lack thereof) potential environmental issues. The Regulatory PM will need to judge on a case-by-case basis, in consultation with Regulatory Division management and the district Public Affairs Office (PAO), the most effective format and venue for holding a public meeting.

*Informal Public Meeting.* An informal open house style public meeting is most likely to elicit the greatest amount of public input on a proposed project since participants are able to ask questions or provide feedback freely at any time without having to sit through a formal presentation. In addition, meeting participants are able to speak one-on-one with a Corps representative rather than be required to speak publicly in front of a large group as is often the case with a formal meeting.

*Workshop.* Workshops are a type of informal public meeting and may be another option, especially when districts lack a complete understanding of the breadth of the issues on a project. Workshops are usually informal scoping meetings and lend themselves to a facilitated back-and-forth dialogue between the Corps, the public and other agencies. Public workshops may also be most appropriate for certain groups where the meeting participants expect to be listened to as much as or more than they expect to be talked to. Workshops can also be effective with other government agencies that often prefer providing verbal input in a more informal setting.

*Formal Public Meeting.* In other situations, a formally structured meeting that provides an initial set of presentations by the Corps and the applicant followed by public comment/testimony may be the most appropriate. This can often be the case when there is strong opposition to the project and individuals or groups expect a forum to speak publicly. Often times, opponents of controversial projects will want to offer testimony and comments in a venue that affords a public stage (and microphone). Districts should weigh the benefits and possible detriments of holding such a formal public scoping meeting, particularly if there is a concern public testimony could incite hostile crowds and cause the meeting to become unproductive and unmanageable. Although rarely necessary, if the latter is a concern, districts should also consider whether there is a need for security and/or local law enforcement to be present at the meeting.

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

**Q-29. What other Federal environmental laws, regulations and Executive Orders must be considered and complied with during the NEPA process?**

Answer: The status of the Corps compliance with all applicable Federal environmental laws, regulations and EOs should be addressed and appropriately documented in the draft EIS and final EIS. Districts will need to document in the administrative record all required determinations of “effect” under applicable Federal laws and regulations and, when required, initiate informal or formal consultation with appropriate agency(s). Common environmental laws, regulations and EOs districts may need to be considered in the EIS include, but are not limited to:

- Section 7 of the Endangered Species Act
- Section 106 of the National Historic Preservation Act
- Fish and Wildlife Coordination Act
- Section 307 of the Coastal Zone Management Act (CZMA)
- Magnuson-Stevens Fishery Conservation and Management Act (Essential Fish Habitat)
- Section 176(c) of the Clean Air Act
- Sections 404, 402 and 401 of the Clean Water Act
- Section 103 of the MPRSA (for proposed ocean dumping of dredged materials at EPA-designated sites)
- EO 12898 Environmental Justice
- EO 13112 Invasive Species
- EO 11988 Floodplain Management
- EO 11990 Protection of Wetlands
- Wild and Scenic Rivers Act
- Migratory Bird Treaty Act
- Prime and Unique Farmlands

**Q-30. When should the Corps initiate consultation under Section 7 of the Endangered Species Act and/or Section 106 of the National Historic Preservation Act?**

Answer: Generally, coordination and informal consultation under section 7 of ESA and section 106 of NHPA should be initiated early in the NEPA process and continue through the ROD. In most cases, the draft EIS will include a detailed project description, an accounting or description of the baseline conditions (affected environment), information pertaining to the presence/absence of federally threatened and endangered species and/or designated critical habitat (if applicable), survey data and an analysis of direct, indirect and cumulative impacts (environmental consequences) at a level of detail sufficient to inform the USFWS or NMFS of the probable impacts to federally-listed species and other biological resources under their jurisdiction. Often times, the information contained in the draft EIS will suffice for purposes of initiating formal consultation or else a standalone biological assessment (BA) may be prepared and appended to the EIS. Generally, when formal consultation is required, districts should initiate section 7 consultation prior to or at the time of the public release of the draft EIS.

**Current Approved Version: 1/30/2013. Printed copies are for “Information Only.” The controlled version resides on the SPD QMS SharePoint Portal.**

Similarly, for consultation under section 106 of the NHPA, the draft EIS will typically identify historic properties and other known cultural resources occurring in the area of potential effect and discuss potential adverse effects to these resources, whereby the Advisory Council on Historic Preservation (ACHP) and the State Historic Preservation Officer (SHPO) may concur or non-concur with the Corps determination of effect. The SHPO and ACHP's section 106 review process should be integrated into the NEPA process so the two move forward in parallel.

Since the development of the draft EIS will usually include a comprehensive project description, scientific information and site-specific evaluations, the Corps' effect determination(s) and any required agency consultation(s) should be carried out during the document preparation and detailed information contained within the NEPA document may be referenced to, as appropriate. At the time the final EIS is released, section 7 and section 106 consultations should be completed and the results addressed within the ROD.

**Q-31. What is U.S. Environmental Protection Agency's (EPA) role in reviewing an EIS? What do EPA's "ratings" mean?**

Answer: Under section 309 of the Clean Air Act (CAA), EPA has a broad review responsibility for proposed Federal actions, including proposed legislation, proposed regulation, EAs, EISs, and any proposal that a lead agency maintains does not require an EIS but that EPA believes constitutes a major Federal action significantly affecting the quality of the human environment so as to require an EIS. EPA, Office of Federal Activities (otherwise known as Environmental Review Office), has developed a set of criteria for "rating" draft EISs. The rating system provides a basis upon which EPA makes recommendations to the lead agency for improving the draft document. If improvements are not made in the final EIS (FEIS), EPA may refer the FEIS to CEQ. Districts should understand there are two broad categories of the EIS that are rated by EPA: the environmental impacts and the adequacy of the EIS under the following criteria:

*Rating the Environmental Impacts*

**LO** – Lack of Objections

**EC** – Environmental Concerns. Impacts identified that should be avoided. Mitigation measures may be required.

**EO** – Environmental Objections. Significant impacts identified. Corrective measures may require substantial changes to the proposed action or consideration of another alternative, including any that were either previously unaddressed or eliminated from the study, or the no-action alternative.

**EU** – Environmentally Unsatisfactory. Impacts identified are so severe that the action must not proceed as proposed. If these deficiencies are not corrected in the FEIS, EPA will refer the EIS to CEQ.

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

## *Rating the Adequacy of the EIS*

**Adequate (1)** – No further information is required.

**Insufficient Information (2)** – Either more information is needed for review or other alternatives should be evaluated. The identified additional information or analysis should be included in the FEIS.

**Inadequate (3)** – Seriously lacking in information or analysis to address potentially significant environmental impacts. The draft EIS does not meet NEPA and/or Section 309 requirements. If not revised or supplemented and provided again as a draft EIS for public comment, EPA may refer the EIS to CEQ.

### **Q-32. How should comments received on the Draft EIS be addressed?**

Answer: Based on clarifying guidance in CEQ's Forty Most Asked Questions, the lead Federal agency may respond to comments received on its draft EIS in a variety of ways, depending on the nature and context of the comment. The five general categories responses are as follows:

*Factual corrections.* If changes to the EIS in response to comments are minor and are confined to factual corrections or do not warrant further Corps response, the district may document the corrections on errata sheets and attach them to the EIS instead of rewriting the DRAFT EIS. In such cases, only the comments, the responses, and the changes and not the final statement need to be circulated (40 C.F.R. § 1502.19). In other cases, the district may elect to make factual and editorial corrections to the EIS by reproducing a revised final statement in its entirety.

*Supplement, improve or modify the analyses.* Comments received on the draft EIS may indicate the assumptions, evaluation criteria, methodology(s) employed for the analyses or the findings of a specific analysis are flawed, incorrect or inadequate. As a result, comments may require the Corps prepare a supplement to the draft EIS. If, however, the analysis is augmented or modified and the changes constitute a minor variation and is qualitatively within the spectrum of alternatives and effects that were discussed in the draft EIS, then a supplemental draft EIS will not be needed and the revisions can be addressed through the final EIS.

*Modify alternatives, including the proposed action.* In some cases, a comment may suggest a particular alternative be modified in order to achieve certain mitigation benefits or for other reasons. If the modification is "reasonable", districts should include a discussion of it in the final EIS.

*Develop and evaluate alternatives not previously given serious consideration.* Districts may receive comments on the draft EIS that recommend an alternative which was not discussed

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

in the draft EIS. Should a newly proposed alternative not discussed in the draft EIS be found “reasonable” to warrant serious agency response, then the district should consider whether to issue a supplement to the draft EIS that discusses this new alternative. If the new alternative was not raised during the NEPA scoping process by the individual or party making the comment, but it could have been, the district may find that there is not sufficient reason to have the alternative analyzed in detail. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the district should consider whether to address it in a supplemental draft EIS.

*Explain why the comments do not warrant further agency response.* A comment on a draft EIS that raises a new alternative not previously considered in the draft EIS, but is found to be unreasonable by the Corps. The Regulatory PM must explain why the comment does not warrant further response and action, citing authorities or reasons that support the district’s position, and if appropriate, indicate those circumstances which would trigger the Corps’ reappraisal or further response. Other comments on the DRAFT EIS may question or challenge the methodology used or the general scope of the environmental evaluation. The district should carefully weigh and consider whether such comments are “reasonable” and therefore merit further Corps action or revisions to the EIS. In doing so, the Regulatory PM should explain the reasons and/or cite relevant regulations, authorities and policies in determining whether to take further action.

**Q-33. What is a “referral” to CEQ and what happens when another agency refers the Corps EIS to CEQ?**

Answer: Although not common, pursuant to 40 C.F.R. § 1504 any Federal agency under NEPA can refer another agency’s FEIS to CEQ during the 30-day review (waiting) period before the lead agency can proceed with the action. In such cases, within twenty-five (25) days after the lead agency has made the FEIS available to the public, the referring agency is obligated to provide early notification to that agency about its intention, and make its referral in writing to CEQ. Once it has received written notification from CEQ, the district would need to respond in writing within 25 days. During that same period, other agencies and the public may submit written comments to CEQ. Then CEQ may publish findings and recommendations; mediate between the disputing agencies; hold public meetings or hearings; refer irreconcilable disputes to the Executive Office of the President for action; or, conclude either that the issue is not of national importance or that insufficient information has been submitted upon which to base a decision.

**Q-34. What does the Record of Decision need to include?**

Answer: While there is no exhaustive list of information to be included in an agency’s ROD, CEQ NEPA implementing regulations identify several items that should be addressed. The SOP has developed a template for preparing a ROD that may be augmented with additional information to address case-specific issues and circumstances. Generally, the ROD should include the following components:

**Current Approved Version: 1/30/2013. Printed copies are for “Information Only.” The controlled version resides on the SPD QMS SharePoint Portal.**

*Introduction.* Briefly describes the project, provide relevant background information and indicate the purpose and need.

*Decision.* A succinct discussion of the Corps NEPA official's decision, including the authorities under which the decision is being rendered (e.g., section 404 of the CWA, section 10 of the RHA or section 103 of the MPRSA) (refer to 40 C.F.R. § 1505.2(a)).

*NEPA Compliance.* A summary of the scoping process and when the NOI was issued; the date the draft EIS was released and reference to the *Federal Register* publication of the NOA; whether a public hearing was held; the final EIS release and the date of the NOA publication; all district public notices issued; and any other pertinent NEPA compliance information (refer to 40 C.F.R. § 1505.2(b)).

*Alternatives Considered.* A discussion of preferences among alternatives based on relevant factors, including economics, technical considerations and agency statutory missions. Districts should identify and discuss all such factors, including any essential considerations of national policy which were balanced by the Corps' responsible official in making his/her decision and state how those considerations entered into its decision.

#### *Basis for Decision*

- Provides a brief and succinct summary of the environmental consequences (evaluation of alternatives)
  
- Identifies the applicant's preferred alternative
  
- Also identifies the "environmentally preferable" alternative. The environmentally preferable alternative in the context of 40 C.F.R. §1505.2(b) 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. This may or may not be the LEDPA.

*Environmental Effects and Measures to Avoid and Minimize Environmental Harm.* A discussion as to whether all practicable means to avoid and minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program will be adopted and summarized where applicable for any mitigation (refer to 40 C.F.R. § 1505.2(c)) and CEQ's January 14, 2011 guidance on mitigation and monitoring. The Regulatory Division PM in charge of the EIS will ensure the mitigation measures for aquatic resources impacts are developed in accordance with the *Compensatory Mitigation for Losses of Aquatic Resources; Final Rule* (FR, Vol. 73, No. 70, April 10, 2008), relevant regulatory guidance letters (RGLs), SOP 12501-SPD for Determination of Mitigation Ratios and applicable district Mitigation and Monitoring Guidelines. The Corps should include all appropriate special

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

conditions in the ROD and the preferred standard individual permit (SIP). Additional guidance on the conditioning of permits to require mitigation is in 33 C.F.R. § 320.4(r) and § 325.4. CEQ notes that a ROD can be used to compel compliance with or execution of the mitigation measures identified therein.

### *Findings*

- A summary of the status of the Corps' and/or the applicant's compliance with all applicable Federal laws, regulations, and EO's.
- ✓ Of special note, if a general conformity determination is required under section 176(c) of the Clean Air Act, within 30 days of making a final general conformity determination, a notice should be prepared and placed in a daily newspaper of general circulation in the region that would be affected announcing the availability of the final general conformity determination. Also within 30 days of making a final general conformity determination, the district will need to prepare and distribute a Corps PN of the same (to those on the project's mailing list) and provide copies of the final general conformity determination document to the applicable regional office of the EPA, any affected federal land managers, applicable state air quality management agencies, districts and local jurisdictions, as well as anyone who requests a copy. As part of the general conformity evaluation, the Corps must document its responses to all comments received on the draft general conformity determination and will make both the comments and responses available upon request by any person within 30 days of making the final general conformity determination. While the general conformity evaluation can occur concurrently with the EIS process, it is not required. However, in cases requiring a general conformity evaluation, the final general conformity determination must be made prior to executing the ROD.
- A brief summary of substantive comments received on the FEIS and the Corps' responses to such comments.
- A brief discussion of the relevant public interest review factors considered and the Corps public interest determination (33 C.F.R. § 320.4(a)).
- A determination of compliance with the section 404(b)(1) Guidelines (40 C.F.R. § 230). A determination of compliance must be based on the factual findings listed in the Guidelines, including:
  - ✓ A demonstration that the applicant's preferred alternative is the LEDPA;
  - ✓ The alternative does not violate any state water quality standard or applicable toxic effluent standard;
  - ✓ The alternative does not jeopardize the continued existence of an endangered or threatened species or adversely modify its designated critical habitat;

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

- ✓ The alternative does not violate any requirement imposed by the Secretary of Commerce to protect designated marine sanctuaries under the MPRSA;
- ✓ The alternative does not cause or contribute to significant degradation of waters of the United States; and
- ✓ All appropriate and practicable steps have been taken which will minimize adverse impacts on the aquatic ecosystem.

*Proffered Special Conditions.* For DA authorizations, the specific details of the mitigation measures should be included as special conditions in the proffered permit.

*Conclusion and Signature Block of NEPA Responsible Official*

**Q-35. How does Section 404(q) of the CWA – Elevation Procedures Fit into an EIS process?**

Answer: As part of the NEPA and DA permit evaluation process, EPA, USFWS and NMFS may provide comments to the Corps on unacceptable adverse impacts in response to the draft EIS and the district’s PN issued concurrent with the availability of the draft EIS. Districts should fully consider each agency’s comments when determining compliance with NEPA and the section 404(b)(1) Guidelines. Most concerns are expected to be resolved through interagency coordination and consultation and documented accordingly in the final EIS and ROD. In some cases, however, this may not be possible and the district will decide to proceed with the permit decision contrary to one or more of the agency recommendations.

While 404(q) elevations are rare, under the 1992 Section 404(q) Memoranda of Agreement between the Corps and EPA, USFWS and NMFS, an agency may elevate a case-specific issue for an individual permit based on a determination that the proposed project would have an unacceptable adverse impact on an ARNI. The district’s issuance of the ROD serves as its notice of intent to proceed under 404(q) to issue a DA permit. Under these circumstances, the Corps must furnish EPA, USFWS and/or NMFS with a copy of the draft permit and decision document (i.e., ROD). Final action on a pending DA permit application for a case-specific project involving an ARNI will be held in abeyance until the time-specific procedures prescribed in the 404(q) MOAs between the Corps, EPA, USFWS and/or NMFS have run their course and a decision is reached. Ultimately, the ASA(CW) may be requested to review the permit decision document (i.e., FEIS and/or ROD) and would either inform the DE to proceed to a final action; inform the DE to proceed to a final action in accordance with case-specific policy guidance; or make a final permit decision in accordance with 33 C.F.R. § 325.8.

**Q-36. Is a supplemental NEPA document required if new information comes to light subsequent to the FEIS?**

Answer: A supplemental analysis or EA may be prepared for any new information made available subsequent to the publication of the FEIS, so long as that new information does not reveal in itself, a significant impact on the quality of the human environment. New information

**Current Approved Version: 1/30/2013. Printed copies are for “Information Only.” The controlled version resides on the SPD QMS SharePoint Portal.**

could include a proposed change in the size and scope of the project (as related to activities or actions that fall under the Corps' jurisdiction). If it were significant, then districts would have to write and circulate a supplemental EIS.

For example, a large-scale residential development project is permitted by the Corps based on a final EIS, but later in time the permittee proposes an expansion of the development's circulation element involving a new roadway, the construction of a recreational park (soccer fields) and two on-site water quality treatment basins, all of which would adversely affect existing wetlands that were originally expected to be protected in place and adjacent upland areas supporting a federally protected species. Although the newly proposed project features are located within the limits of the Corps' original SOA, the resultant environmental impacts were not considered or evaluated in the original EIS because they were not part of the applicant's proposed action. Thus, the district would need to determine the "significance" of the environmental effects and appropriate permitting strategy under which to evaluate the project modifications (e.g., NWP, RGP, SIP, LOP). Depending on the context and intensity of impacts within the Corps' SOA and the type of permit to be processed, the Corps may need to prepare a supplemental NEPA document. An agency is not required to prepare a SEIS every time new information comes to light and a SEIS is required only if changes, new information or circumstances may result in significant environmental impacts in a manner not previously evaluated and considered. The 9<sup>th</sup> Circuit held that an agency may prepare an environmental report (such as a re-evaluation) or an EA to assist the agency in determining whether a SEIS is required (*North Idaho Community Action Network v. U.S. Department of Transportation*, 545 F.3d 1147 (9<sup>th</sup> Cir. 2008)). Districts must determine on a case-by-case basis the appropriate level of supplemental NEPA analysis to support permit modifications or changed environmental conditions and are encouraged to consult with district Office of Counsel in making such determinations.

### **Q-37. What is the process for adopting another agency's EIS?**

Answer: When the Corps intends to adopt another agency's FEIS, or portions thereof, on which it served as a cooperating agency and wherein the Corps' permit action itself warrants an EIS, districts will conduct an independent review of the administrative draft FEIS to determine its overall sufficiency in complying with 33 C.F.R. 325, Appendix B and all other applicable statutory requirements, including the section 404(b)(1) Guidelines (if applicable). As part of this review, districts will make sure the lead agency has adequately addressed all comments on the DEIS related to the Corps' jurisdiction by law and special expertise. If there are unresolved issues regarding the Corps' comments, then the district will work with the lead agency to resolve the outstanding issues. Districts will clearly communicate to the lead agency (and document in writing, if warranted) the potential consequences should the lead agency not adequately address the Corps' substantive concerns, including the possible need to prepare supplemental NEPA documentation in order to support a DA permit decision. This messaging and coordination with the lead agency should occur throughout the NEPA process with the goal that all issues are resolved prior to release of the NOA for the FEIS. If the FEIS is found sufficient for purposes of

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**

adoption, the NEPA document does not need to be re-circulated by the Corps for public comment or review; nor is it necessary for the Corps to file the draft or final EIS again with EPA.

*Issuance of a FEIS Public Notice.* Following the determination the lead agency's AFEIS is sufficient for the Corps' compliance with NEPA and concurrent with the lead agency's publication of the NOA of the FEIS, the district will prepare a FEIS PN to solicit public and agency comments related to the pending DA permit decision for the applicant's preferred alternative that requires authorization under section 404 of the CWA, section 10 of the RHA and/or section 103 of the MPRSA. Upon close of the FEIS PN review period, the district will consider all relevant and substantive comments received on the PN in the preparation of the Corps' draft ROD.

*Notification to HQ EPA of Adoption.* Once the district deems the FEIS adequate for adoption, the district should notify EPA that the Corps intends to adopt the FEIS for its respective Federal action. Notification to EPA should be through direct correspondence from the Corps to EPA (email or letter). The EPA contact information for such notification is: U.S. Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Mail Code 2252A, Ariel Rios Building (South Oval Lobby), 1200 Pennsylvania Avenue, NW, Washington, D. C. 20460 or EIS-Filing@epa.gov. Following notification, EPA will publish an amended NOA in the *Federal Register* that states an adoption has occurred. This will not establish a comment period but will complete the public record for purposes of NEPA.

*Supplemental NEPA Documentation.* If the district finds another agency's final EIS inadequate with respect to the Corps' permit action and substantial doubt exists as to the technical or procedural accuracy of the EIS, the district will incorporate the other agency's EIS, or portions thereof, and prepare an appropriate NEPA document to address the Corps' involvement, noting in the Corps' draft Supplemental EIS (SEIS) or Supplemental EA (SEA) why the lead agency's EIS was considered inadequate. Reference is provided at 33 C.F.R. § 230.21 for further guidance on preparing supplemental NEPA documentation. In determining the appropriate level of NEPA analysis for the supplemental document, districts will apply the same factors prescribed in Appendix B and 40 C.F.R. § 1508.27 for determining whether to prepare a SEIS or a SEA. Districts may first prepare a SEA to confirm the effects of the proposed action within the Corps permit action area are not "significant" and issue a FONSI. Should a SEIS be warranted, a draft and final supplement must be filed and re-circulated in accordance with the procedures for a draft and final EIS (refer to 33 C.F.R. § 230.13(b), 33 C.F.R. § 230.21 and 40 C.F.R. § 1502.9(c)).

- Funding of Supplemental NEPA Documentation. Funding of additional surveys, data collection, analyses and document reproduction needed for the Corps' supplemental NEPA documentation will be the responsibility of the applicant.

**Q-38. If the Corps adopts another agency's EIS does the Corps need to prepare its own Record of Decision?**

*Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.*

Answer: Yes. When a district has adopted another agency's FEIS, or portions thereof, for a proposed action wherein the Corps' permit action itself warrants an EIS, the Corps must prepare its own ROD. In doing so, the ROD should incorporate by reference and cite to the lead agency's FEIS to the extent practicable, as well as consider and integrate any relevant information from the lead agency's draft ROD. At least 30 days following the lead agency's filing of the final EIS with EPA and the public availability of the document, the Corps may issue its ROD. While there is no requirement that a cooperating agency wait for the lead agency to issue its ROD first, as a general rule districts should staff the Corps' ROD for signature concurrent with or subsequent to the lead agency's issuance of its ROD. Copies of the Corps' executed ROD should be provided to the lead agency and any individuals or parties who have requested a copy.

**Current Approved Version: 1/30/2013. Printed copies are for "Information Only." The controlled version resides on the SPD QMS SharePoint Portal.**