EPA’s Filing Procedures

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Part II

Environmental Protection Agency

Filing System Guidance for Implementing 1506.9 and 1506.10 of the CEQ Regulations

ENVIRONMENTAL PROTECTION AGENCY

Filing System Guidance for the Implementation of 1506.9 and 1506.10 of the CEQ Regulations Implementing the Procedural Provisions of the NEPA

Preamble

In 1978, the Council of Environmental Quality (CEQ) and the Environmental Protection Agency (EPA) entered into a Memorandum of Agreement on the allocation of responsibilities of the two agencies for assuring the government-wide implementation of the National Environmental Policy Act of 1969 (NEPA). These responsibilities are consistent with the 1978 CEQ NEPA-Implementing Regulations (40 CFR Parts 1500–1508).

The Memorandum of Agreement transferred to EPA operational duties associated with the administrative aspects of the environmental impact statement (EIS) filing process. The Office of Federal Activities has been designated the official recipient in EPA of all EISs. It should be noted that the operational duties associated with the administrative aspects of the EIS process are totally separate from the substantive EPA reviews performed pursuant to both NEPA and section 309 of the Clean Air Act.

The purpose of the EPA Filing System paper is to provide guidance to federal agencies on filing EISs, including draft, final, and supplemental EISs. Information is provided on (1) Where to file; (2) number of copies required; (3) information required in the transmittal letter; (4) steps to follow when a federal agency is adopting an EIS or when an EIS is being withdrawn, delayed or reopened; (5) review periods; (6) notice of availability in the **Federal Register**; and, (7) retention of filed EISs.

On August 10, 1988, following consultation with CEQ, EPA sent the draft paper to 26 federal agencies for comment prior to its submission to the **Federal Register** for formal publication and implementation. EPA received comment letters from 16 agencies. Although this preamble does not respond to each comment individually all were carefully considered. A synopsis of the comments, other than editorial, and EPA's response follow:

Section 3—Filing an EIS-Draft, Final and Supplemental

As requested, clarification has been made that completion of the transmittal of an EIS is accomplished simultaneously with the filing with EPA.

It was recommended that the cover letter include the official issuing agency number for the EIS being filed. EPA does not use an agency's number for the EIS being filed; therefore, it is not needed in the cover letter. An agency may, if it wishes, include the number because of internal requirements.

Information has been added to clarify that, in the case of filing an EIS that is not hand carried, the cover letter should state that transmittal has been completed. In addition, EPA will telephone the filing agency to verify that EPA has received the EIS.

At the recommendation of a commenter, EPA will now include a reference in the Notice of Availability when an agency adopts an EIS that does not require recirculation. This will not reopen the public comment period, but will complete the public record.

Several agencies commented on EPA's role in checking an EIS for "completeness and compliance." In response the specific subsection of the CEQ Regulations that recommends the standard format that an agency should follow unless the agency determines that there is a compelling reason to do otherwise has been identified—§ 1502.*10* of the CEQ Regulations—for clarification. EPA's review is to assure that the document meets certain minimum administrative requirements, i.e., there is a cover sheet, a summary of the statement, a table of contents, the name, address and telephone number of the agency is included, cooperating agencies are listed, etc. The format and explanation of each is found in § 1502.10 of the CEQ regulations. The review does *not* address the quality of the document's substance. Further, it is totally independent of EPA's review on environmental impacts under Section 309 of the Clean Air Act.

One commenting agency suggested deleting the sentence concerning reopening an EIS review period after a substantial amount of time has passed since the original review period closed. The commenting agency objected to the use of the word "substantial" without defining the term. EPA believes that the word substantial stands on its own merits and suggests that agencies use their best judgment in deciding what is reasonable. The intent is to keep the public informed. EISs reopened for review will be published in the Notice of Availability to inform all interested parties and to keep the public record current.

Section 4—Notice in the **Federal Register**

Language has been added to clarify that the Notice of Availability is published each Friday in the **Federal Register** for those EISs filed during the preceding week—e.g., the notice is published on January 13th for EISs filed between January 2nd and January 6th.

The last paragraph of this section has been deleted at the request of CEQ. CEQ will remain solely responsible for notification to the public of referral actions due to the process timeframes called for in the current CEQ Regulations.

Section 5—Time Periods

The section heading and opening paragraph have been edited to address many comments requesting clarification of time periods for draft and final EISs. The time period for review and comment on draft EISs shall not be less than 45 "calendar" days. CEQ Regulations do not address a review period for a final EIS. It is a 30 "calendar" day wait period during which no decision may be made to proceed with the proposed action.

Additional information has been added to address the question concerning calculated time periods ending on non-work days. When a calculated time period ends on a non-working day, the assigned time period will be the next working day.

Section 1506.10(b) of the CEQ Regulations allows for an exception to the rules of timing. Language has been included on exceptions relating to cases of an agency decision which is subject to a formal internal appeal. When exceptions are made by an agency, it is important to inform EPA so that it is accurately reflected in the Notice of Availability.

It was requested that the paper cite examples where both extensions and reductions of time periods have been granted by EPA and where CEQ has approved special cases. EPA appreciates the point but has declined to present examples since these are done on a case-by-case basis and each case is considered on its individual merits.

One commenting agency was concerned with having to request reductions and extensions of time periods in writing to EPA. The agency felt this put too much stress on a formal, and possibly time-consuming, process. Language has been added indicating EPA will accept these requests by telephone, but agencies should follow up in writing to ensure that EPA can maintain a complete record of the decision-making process.

One commenting agency requested that guidance be provided for filing of non-federal EISs, i.e., those prepared by state and local governments where

federal statutes specifically identify these governments as the "federal official for the purposes of NEPA compliance." EPA's position is that EISs prepared by state and local governments for these federal programs are considered "federal" EISs by virtue of the fact that they are prepared in response to a federal statute—NEPA. Therefore, the same filing procedures apply to the filing of these "non-federal EISs" as those that apply to filing of federal EISs.

General Comments

EPA appreciates the comment concerning the length of the guidance and that it "burdens rather than provides useful guidance." However, EPA believes that the narrative format is easier to follow and more useful as a reference than a step by step outline or flow diagram of the process.

As indicated by one commenter, it should be noted that this guidance is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officials, or any person.

Dated February 28, 1989.

Richard E. Sanderson,

Director, Office of Federal Activities.

EPA Filing System Guidance

1. Purpose.

These guidelines provide information on filing environmental impact statements (EISs) required by the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500–1508) for implementing the procedural provisions of NEPA. Sections 1506.9 and 1506.10 of the CEQ regulations set forward EPA's basic responsibilities for the filing process and authorize the Agency to issue guidelines to implement its responsibilities under these sections. The process of filing includes the following: (a) Reviewing and recording of the EISs so that information on them can be incorporated into EPA's computerized data base; (b) establishing the beginning and ending dates when draft and final EISs are officially available to the public; (c) publishing these dates in a "Notice of Availability" in the **Federal Register**; (d) retaining the EISs in a central repository; and (e) determining whether time periods can be lengthened or shortened for "compelling reasons of national policy."

EPA duties do not include responsibility for the distribution of EISs or for providing additional copies of already distributed EISs. These are the obligation of the lead agency preparing an EIS and are not addressed in this guidance. Nevertheless, EPA will assist the public and other federal agencies by providing agency contacts on, and information about, EISs.

2. Background

The official EIS filing system was transferred from the Council on Environmental Quality (CEQ) to the Environmental Protection Agency (EPA) effective December 5, 1977, as part of the reorganization of the Executive Office of the President. The functions of the filing system were further delineated by a Memorandum of Understanding between CEQ and EPA, dated March 29, 1978. CEQ promulgated its regulations for implementing the National Environmental Policy Act (NEPA) on November 29, 1978 (see 43 FR 55978).

The EPA filing system was created to provide an official log and public announcement of EISs received by EPA and to guarantee that the requirements of NEPA and the CEQ regulations are satisfied. It is a complete and separate filing system from the Environmental Review Process System which fulfills separate requirements under section 309 of the Clear Air Act for EPA to review and comment on EISs (and other actions) of federal agencies.

3. Filing an EIS—draft, final and supplemental

Federal agencies are required to prepare EISs in accordance with section 1502 of the Regulations and to file the EISs with EPA as specified in § 1506.9. The EISs must be filed no earlier than they are transmitted to commenting agencies and made available to the public. If an EIS is hand carried to EPA, the person delivering the document must complete a form stating that transmittal to all agencies is being made simultaneously with the filing with EPA. This will assure that the EIS is received by all interested parties by the time the EPA Notice of Availability appears in the **Federal Register**, and therefore allows for the full minimum review periods prescribed in § 1506.10. EPA will acknowledge by a phone call to the sender that it has received an EIS forwarded by means other than hand carried.

If EPA receives a request to file an EIS and transmittal of that EIS is not complete, the EIS will not be filed until assurances have been given that the transmittal process is complete. Similarly, if EPA discovers that a filed EIS has not been transmitted, EPA will retract the EIS from filing and not re-file the EIS until the transmittal process is completed. Once the agency has fulfilled the requirements of § 1506.9 and has completed the transmittal process, EPA will reestablish the filing date and the minimum time period, and will publish this information in the next Notice of Availability. Requirements for circulation of EISs appear in § 1502.19 of the regulations.

Federal agencies file an EIS by providing EPA with five (5) copies, including appendices. Material which is incorporated into the EIS by reference is not required to be filed with EPA. The agency filing the EIS (usually the lead agency if more than one is involved) should prepare a letter of transmittal to accompany the five copies of the EIS. The letter should identify the name and telephone number of the official responsible for both the distribution and contents of the EIS; should state that the transmittal has been completed; and should be addressed to:

U.S. Environmental Protection Agency, Attention, Office of Federal Activities, EIS Filing Section (Mail Code A–104), Room 2119 Waterside Mall, 401 M Street SW., Washington, DC 20460.

Telephone inquiries can be made to (202) 382–5076 or FTS 382–5076.

EPA should be notified in writing of all situations where a federal agency is adopting an EIS, whether the document is recirculated and filed or adopted under the provisions of § 1506.3(c) of the regulations. If a federal agency chooses to adopt an EIS written by another agency and it was not a cooperating agency in the preparation of the original EIS, then the EIS must be re-transmitted and filed with EPA according to the requirements set forth in § 1506.3 of the CEQ regulations. In those cases where an agency can adopt an EIS without recirculating it, there is no necessity to file the EIS again with EPA. EPA should be notified, however, in order to ensure that the official log is accurate, and to include this information as a separate section within the Notice of Availability. This will not establish a comment period, but will complete the public record.

EPA also should be notified of all situations where an agency has decided to withdraw, delay or reopen a review period on an EIS. All such notices to EPA will be published in the **Federal Register**. In the case of reopening EIS review periods, the lead agency should notify EPA as to what measures will be taken to ensure that the EIS is available to all interested parties. This is especially important for EIS reviews that are being reopened after a

substantial amount of time has passed since the original review period closed.

Once received by EPA, each EIS is stamped with an official filing date and checked for completeness and compliance with § 1502.10 of the CEQ regulations. If the EIS is not "complete" (i.e., if the documents do not contain those elements outlined in § 1502.10 of the regulations), EPA will contact the lead agency to obtain the omitted information or to resolve any problems prior to publication of the Notice of Availability in the **Federal Register**.

Agencies often publish (either in their EISs or individual notices to the public) a date by which all comments on an EIS are to be received. Agencies should ensure that the date they use is based on the date of publication of the Notice of Availability in the **Federal Register**. If the published date gives reviewers less than the minimum review time computed by EPA, then EPA will send the agency contact a letter explaining how the review period is calculated and the correct date by which comments are due back to the lead agency. This letter also encourages agencies to notify all reviewers and interested parties of the corrected review periods.

4. Notice in the Federal Register

EPA will prepare a weekly report of all EISs filed during the preceding week for publication each Friday under a Notice of Availability in the **Federal Register**. At the time EPA sends its weekly report for publication in the **Federal Register**, the report will also be sent to the CEQ. Information included in the report for each EIS is the same as the data entered in EPA's computerized data file. This includes an EIS Accession number (created by EPA), EIS status (draft, final, supplemental), date filed with EPA, the agency or bureau that filed the EIS, the state and county of the action that prompted the EIS, the title of the EIS, the date comments are due and the agency contact. Amended notices may be added to the Notice of Availability to include corrections, changes in time periods of previously filed EISs, withdrawals of EISs by lead agencies, and recision of EISs by EPA. A recision including nullifying the date the EIS was filed can occur, as explained earlier, if, after a filed EIS is published in the **Federal Register**, EPA is subsequently informed that the EIS has not been made available to commenting agencies and the public by the lead agency.

5. Time Periods

The minimum time periods set forth in § 1506.10(b), (c), and (d) are calculated from the date EPA publishes the Notice of Availability in the **Federal Register**. Review periods for draft EISs, draft supplements, and revised draft EISs shall extend 45 calendar days unless the lead agency extends the prescribed period or a reduction of the period has been granted. The wait periods for final EISs and final supplements shall extend for 30 calendar days unless the lead agency extends the period or a reduction or extension in the period has been granted. If a calculated time period would end on a non-working day, the assigned time period will be the next working day (i.e., time periods will not end on weekends or federal holidays).

It should be noted that § 1506.10(b) allows for an exception to the rules of timing. An exception may be made in the case of an agency decision which is subject to a formal internal appeal. Agencies should assure that EPA is informed so that the situation is accurately reflected in the Notice of Availability.

Under § 1506.10(d) EPA has the authority to both extend and reduce the time periods on draft and final EISs based on a demonstration of "compelling reasons of national policy." A lead agency request to EPA to reduce time periods or another federal agency request to formally extend a time period normally takes the form of a letter to the Director, Office of Federal Activities (OFA), EPA, outlining the reasons for the request. EPA will accept telephone requests; however, agencies should follow up such requests in writing so that the documentation supporting the decision is complete. A meeting to discuss the consequences for the project and any decision to change time periods may be necessary. For this reason EPA asks that it be made aware of any intent to submit requests of this type as early as possible in the NEPA process. This is to prevent the possibility of the time frame for the decision on the time period modification from interfering with the lead agency's schedule for the EIS. EPA will notify CEQ of any reduction or extension granted.

CEQ has the authority under section 1502.9(c)(4) to approve alternative procedures for preparing, circulating and filing supplemental draft and final EISs. The council will notify EPA of any such alternative procedures that are granted.

6. Retention

Filed EISs are retained in the EPA/OFA office for a period of two years and are made available for reviewing only. After two years the EISs are sent to the National Records Center. However, the EPA Library, Room 2904 Waterside Mall, 401 M Street, SW., Washington, DC 20460, houses a microfiche collection of final EISs issued from 1970 through 1977 and all draft, final and supplemental EISs filed from 1978 to the present time. Facilities for limited reproduction of the EISs are available.

A comprehensive collection of EISs is available for viewing and individual EISs are available on a loan basis at:

Northwestern University, Transportation Library–NEPA, 1935 North Sheridan Road, Evanston, Illinois 60201, Telephone: (312) 492–2913.

Final EISs prepared from 1970 through 1977, and any draft, final or supplemental EIS prepared from 1978 to the present time may be purchased in either microfiche or hardback copy from:

Information Resources Press, Herner and Company, 1700 North Moore Street, Arlington, Virginia 22209, Telephone: (703) 558–8275.

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