


N A A T A P

Native American and Alaskan Technical Assistance Project



PROJECT GUIDE:

The NEPA Land Use Process for Proposed Development of Correctional Facilities in Indian Country

*Part of A Series of Guides for Planning, Designing
and Constructing Adult and Juvenile Correctional and
Detention Facilities on Tribal Lands*

The Native American and Alaskan Technical Assistance Project (NAATAP) was created pursuant to an interagency agreement between the National Institute of Corrections and the Bureau of Justice Assistance.

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Purpose

The purpose of each NAATAP Guide is to communicate substantive information concerning a range of subjects that are relevant to the development of adult and juvenile detention and correctional facilities in Indian Country. This series of guides grew out of a recognition that there were common concerns and questions being raised by Tribes and consultants developing new correctional facilities on Native lands throughout the country. The guides seek to provide research and information on issues of common concern to the Tribes. These guides also seek to document the knowledge and experience gained by Justice Planners International LLC (JPI) while providing technical assistance to tribes engaged in the facility development process.

Acknowledgements

JPI acknowledges the assistance of the many consultants who contributed their expertise in the preparation of this series of guides. These materials were developed and reviewed by individuals with diverse backgrounds, expertise and experience in planning and design of juvenile and adult correctional and detention facilities, as well as analysis, design and operation of justice programs, facilities and systems on a local, state and national level.

Points of view and opinions in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice or affiliated agencies. The information is not to be taken as a warranty or representation for which JPI assumes legal responsibility. Any use of this information must be determined by the user to be in accordance with the policies of the user's organization and with applicable federal, state and tribal laws and regulations.

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I. Introduction

The National Environmental Policy Act of 1969, signed into law on January 1, 1970 (“NEPA” or the “Act”) was the first major federal environmental law enacted in the United States. It was promulgated in response to a growing environmental consciousness that our nation’s natural resources are finite and must be protected.

NEPA established a national policy to insure that environmental factors are given significant consideration in the decision-making process undertaken by federal agencies prior to executing any action that might adversely impact the environment. It is an “umbrella” law covering all federal agencies, requiring them to consider the potential environmental impacts of any such proposed actions.

Section 2 of NEPA states that its purposes are:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality [NEPA § 2, 42 U.S.C. 4321].

The Act also presents a “Congressional Declaration of National Environmental Policy” that states:

The Congress “...declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans” [NEPA § 101(a), 42 U.S.C. 4331(a)].

In order to reach an informed decision, NEPA requires that jurisdictions follow a prescribed process, including public involvement, scientific analysis and potential mitigation. To foster the required public involvement, NEPA created a public review and comment process that increased awareness and made information on proposed government actions available to the general public.

In order to oversee the efforts of federal agencies and ensure the implementation of NEPA programs, the President's Council on Environmental Quality (CEQ) was created. To remain current and effective, CEQ receives input from all such federal agencies in regard to its programs and NEPA regulations. The agencies are then required to devise their own regulations to further implement NEPA and ensure public involvement in the decision-making process.

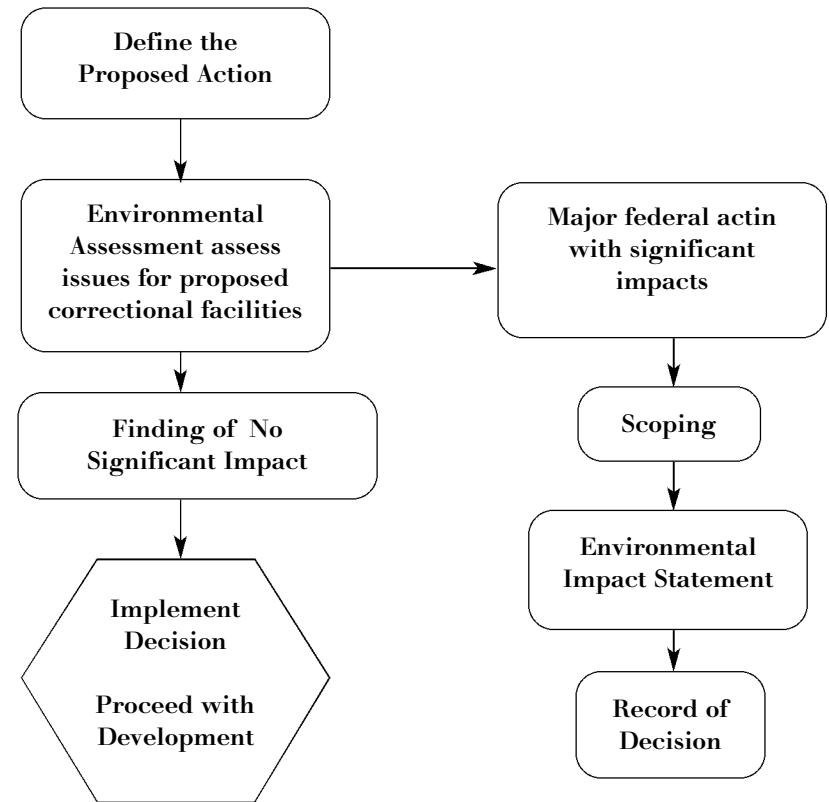
At the same time, NEPA created a public review and comment process that increased awareness and made information on proposed government actions available to the general public. All construction, expansion, and renovation projects initiated by state or local governments with grant funding from the Bureau of Justice Assistance (BJA), U.S. Department of Justice are subject to NEPA.

The Act requires that other existing environmental laws be followed. These other laws include the Clean Water Act, the National Historic Preservation Act, the Pollution Prevention Act, and the Threatened and Endangered Species Act.

II. The Environmental Assessment (EA) Process: Issues for Proposed Correctional Facilities in "Indian Country"

The following steps are required to fulfill NEPA compliance in all new construction, expansion and renovation projects of correctional facilities in "Indian Country" (see Figure 1)

Figure 1. NEPA Considering the Review Process



1. Initiation of the NEPA Analysis

Once informed that they will be receiving federal money for a correctional facility, Environmental Protection Requirements stipulate that Tribes and Native Villages start the NEPA analysis by contacting BJA. This is to determine if the project will have one or more significant environmental impacts. This process must be completed as part of the planning and site selection phase, before the construction and/or renovation can begin. Specifically, the following actions are prohibited before this is done:

- Starting construction;
- Accepting construction bids;
- Advertising for construction bids;

- Initiating the development of, or approval of final plans and specifications; and
- Purchasing property.

2. Development of an Environmental Assessment

The Tribe or Native Village is responsible for developing or contracting for the development of an Environmental Assessment (EA) for its project.

An EA is used as a screening document to determine whether a project may have environmental impacts, and dictates whether an Environmental Impact Statement (EIS) will be required. If BJA determines that the proposed action will not have a significant impact on the human environment, it will prepare a Finding of No Significant Impact (FONSI). A FONSI briefly presents the reasons why a proposed action will not have a significant effect on the human environment and states that no EIS will be prepared. If a FONSI is issued, the NEPA process is over.

The EA should include a brief discussion (10-15 pages) of the following issues. These issues are generally identified during the site design and planning process; however, this is not necessarily always the case. The discussion document provides key information in determining if the facility will involve any significant adverse impact that would require the completion of an EIS.

a. Physical Location:

- Will the facility be located in an area that is zoned for such development and that provides adequate infrastructure (i.e., roads, sewer, electrical)?

b. Topography:

- What is the potential disturbance to the land itself (e.g.: conversion of permeable land to impervious surface such as sidewalks, parking facilities, etc.)?
- What landscaping will be provided to mitigate any potential erosion?
- What measures are proposed to account for surface run-off during and after the proposed development?

c. Climate:

- Will the proposed correctional facilities induce any short or long-term climatic change?

d. Water:

- Will the proposed facility affect any neighboring water bodies?
- How is drinkable water going to be supplied to the facility?

e. Solid Waste Management:

- Is there a sewer system to handle the increased sewage loads?
- Is there a garbage disposal system to deal with the increased garbage?
- Is there a recycling program devised to alleviate excess waste?

f. Air Quality:

- What will be the plan for construction mitigation measures (e.g.: watering to keep any free flowing dust down)?

g. Noise:

- What measures will be taken to mitigate noise during the construction period?

h. Wild and Scenic Rivers:

- Will the project affect a river or portion thereof, which is either included in the National Wild and Scenic Rivers System or designated for potential addition to the system?

Consultation should be made with the National Park Service or the Forest Service when such lands are involved.

i. Endangered Species and Wilderness Areas:

- Will the proposed area to be developed be in a recognized wilderness area or preserve, or will it be in the vicinity of a protected area?

■ Will site development or the facility affect endangered animals?
Note that biologists from the Department of Interior's Bureau of Indian Affairs, the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers or a State agency, such as the Department of Environmental Protection can provide Threatened and Endangered Species records, and information on known habitats on or near the site.

j. Vegetation/Soils/Prime Farmland:

- Will there be any impact on vegetation? If so, will proposed new plantings compensate for the loss?

Regarding these questions, consult with the local Natural Resources Conservation Service.

- Will protected farmland be impacted by the project?

Contact the U.S. Department of Agriculture to inquire about the possibility of impacting any prime farmland identified in the Farmland Protection Policy Act and further defined by the Department of Agriculture in 7 CFR Part 658.

k. Cultural/Archeological:

- Will there be an impact on any Indian cultural, religious or archeological sites?

Consult Tribe/Native Village leaders and the Bureau of Indian Affairs for information.

- Will there be an impact on any non-Indian historic sites?

Consult the designated State Historic Preservation Office or Commission to obtain a Finding of No Significant Impact to properties listed in, or eligible for inclusion into the National Register of Historic Places.

l. Floodplain and Surface Water Features:

- Will the project be located within a 100-year floodplain (500-year floodplain for a critical action) or a wetland area?

When planning the development, review the corresponding National Wetlands Inventory map (NWI), State wetlands maps and a local flood insurance rate map (FIRM) to determine whether the project would affect any wetlands.

Have a district biologist or designated official evaluate the project site to verify that there are no jurisdictional waters of the United States and/or wetlands that exist on the property.

m. Coastal Zone Management Act:

- Will the project be located in a Coastal or Great Lake State?

If so, consult the State agency responsible for implementing the Coastal Zone Management program.

n. Coastal Barrier Resources:

- Will the project be in a state with components of the Coastal Barrier Resources System?

If so, submit the results of consultation with the appropriate regional office of the U.S. Fish and Wildlife Service of the Department of the Interior.

o. Social/Economic:

- Will the proposed location provide economic benefits to residents due to an increase in employment?

This should be a strong consideration.

p. Environmental Justice:

- Will the proposed facility have an adverse human health or environmental effect on any minority or low-income populations?

q. Energy:

- How will energy be supplied to the proposed facility?

r. Land Use:

- Is the proposed site location zoned for development?
- Will other structures be disturbed by the proposed site development?
- Is there expected further development in or within the vicinity of the project site?

s. Transportation:

- How will access be provided to the facility?
- Will the construction of the access road or drive directly impact any natural resources?

In relation to the specific issues addressed above, BJA will review the EA for the following:

1. Has the need for the correctional facility been established?
2. Have the relevant areas of environmental concern been identified?
3. Have other agencies with an interest been consulted?
4. Has the grantee provided opportunities for public involvement?
5. Have reasonable alternatives and mitigation measures been

considered and implemented where possible, including the costs and resources to operate the facility?

6. Has a convincing case been made that the project as presently conceived will have only insignificant impacts on each of the identified areas of environmental concern?
7. Has the grantee adequately documented compliance with other related federal environmental laws as well as relevant Tribal/Native Village and state laws?

If BJA answers “no” to any of the above questions, except question 6, then the EA will be deemed incomplete and will be returned for further work.

If the response to question 6 is “no,” then an EIS will be required (See sec. 4 below). Given the cost and time required to complete an EIS, the grantee may wish to explore an alternative site in that event. (For details, see <http://www.ojp.usdoj.gov/BJA/grant/nepa-gui.pdf>).

3. The Finding of No Significant Impact

a. Gathering Public Opinion

If the reviewing official can answer yes to each of the above referenced questions in section II.2, then a draft FONSI will be issued. The grantee must provide public notice of this draft, and the notice must allow interested parties and the public 30 days for review and comment on the EA.

At a minimum, the grantee must publish a notice of the draft FONSI and the EA in the non-legal section of the local newspaper of the affected community for two consecutive editions. The notice should include a request for comments with a specified closure date for these comments.

If the area to be developed is not covered by a published local newspaper, a notice must be displayed at the local post office.

Notices should be mailed directly to owners and occupants of nearby or affected property and should be posted near the location of the proposed project. The EA and the FONSI must be mailed to those who request it.

b. Reviewing Comments and Modifying Plans

The grantee should review any public comments received and modify its plans accordingly, if appropriate. These changes may include:

- Abandoning the proposed site and selecting an alternative which will have less impact; or
- Modifying the project to mitigate and account for environmental impacts.

Comments and responses are then submitted to BJA for review. If the grantee recommends proceeding with the proposed project regardless of the known impacts, then a rationale must be provided for such a recommendation.

If no significant environmental impact surfaces through the public comments or other means, BJA will issue a FONSI and authorize the grantee to begin construction.

If significant impacts are identified, BJA will require an EIS.

4. Environmental Impact Statements

a. Scoping

Once it is determined that an EIS is required, a process called “scoping” is initiated through BJA to determine the scope of issues to be addressed in the EIS and to identify the significant environmental issues raised by the proposed project. Scoping requires consideration of three types of actions (connected, cumulative, and similar), three types of alternatives (no action, other reasonable courses of action, and mitigation measures), and three types of impacts (direct, indirect, and cumulative).

b. Preparation of the EIS

An EIS is intended to “provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, which would avoid or minimize adverse impacts or enhance the quality of the human environment.”

An EIS should explain in detail the following:

- Existing environmental conditions and natural resources at the site;
- The specifics of the proposed project;
- The impact the project will have on resources, both minor and significant;
- Any mitigative measures proposed to offset adverse impacts; and
- A detailed conclusion.

An EIS is prepared in two stages -- draft and final -- and may be supplemented as necessary. For the most part, a draft EIS should fulfill the requirements of a final EIS. The grantee or lead agency prepares the draft in conjunction with any cooperating agencies and must consult with, and obtain comments from federal agencies that have jurisdiction over the proposed project, that possess expertise regarding the environmental impact, or that have authority to develop and enforce environmental standards. Under 40 CFR 1503.2, such agencies have a duty to provide comments. In addition, the lead agency must request comments from other federal, state, and local agencies, affected Indian Tribes/Native Villages, the applicant (if any), and the public. Any comments on the draft become part of the administrative record. In addition, the regulations require agencies to respond to public comments. Agencies must explain their positions, in writing, in one of five ways: (1) modify the proposed course of action; (2) make factual corrections; (3) supplement, improve or modify its analyses; (4) develop and evaluate new alternatives; or (5) explain why a comment does not warrant further response.

A final EIS should discuss how decisions based on it would achieve the objectives of NEPA, and in doing so, it should respond to comments and issues raised in response to the draft EIS. A supplement to a final EIS is required only if the grantee makes substantial changes in the proposed action or if significant new circumstances or information arise.

No action can be taken within thirty days after the filing of a final EIS. In addition, a public record of decision must be prepared whenever an agency makes a final decision after an EIS has been prepared. The record of decision must discuss all alternatives considered, identify the environmentally preferred alternative, discuss all factors leading to the chosen alternative, and state whether or why not means to avoid or

minimize the environmental effects of the chosen alternative were adopted. No action may be taken until the issuance of the record of decision.

5. Record of Decision (ROD)

As stated in 40 CFR §1505.2, the record of decision (ROD) will:

- State what the decision was.
- Identify alternatives considered by the governing agency in reaching its decision.
- State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not adopted.

6. Implementing the Decision

In conjunction with carrying out the decision about the project, the agency and/or proponent may require monitoring to assure continued compliance with the plans and conditions set forth in that decision.



ALSO AVAILABLE:

Project Guide: Adult Correctional Facility Design Resources

Project Guide: Alternatives to Incarceration of Offenders

Project Guide: Assessment of Project Status
& Technical Assistance Needs

Project Guide: Best Practices - In-Custody Programs
for Juveniles and Adults

Project Guide: Design Review

Project Guide: Existing Facility Evaluations

Project Guide: Objective Classification Analysis

Project Guide: Population Profiles, Population Projections
and Bed Needs Projections

Project Guide: Selecting an Architect-Developing
RFQs and RFPs

Project Guide: Site Selection

Project Guide: The NEPA Land Use Process for Proposed
Development of Correctional Facilities in Indian Country

Project Guide: Tribal Justice System Assessment