Chapter 11

# Recurring NEPA Issues

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Over a period of time, and as a result of Reclamation training, workshops, and similar activities, it became apparent to Reclamation staff engaged in NEPA activities that certain issues seemed to resurface on a regular basis within the various regions and across a broad spectrum of Reclamation activities in the West. The reasons for this recurrence varied but, in general, it involved attempts to clarify/correct a problem, to deal with decisions being made outside the NEPA process, or to identify the correct approach to a particular application of NEPA. A number of these issues are identified in the following sections, along with a short discussion and guidance, where applicable. There are no clear answers to some of these issues, nor will there be, which is why they recur. When these unanswerable questions arise, the issues should be discussed with other Reclamation practitioners and, perhaps, the Solicitor's Office, and a solution or approach developed that is in compliance with any applicable regulations or procedures. This approach ensures that the decision is not arbitrary or capricious and documents the rationale as a matter of record.

## 11.1 Identifying Purpose and Need Early in the Process

The need for an accurate (and adequate) purpose and need statement early in the NEPA process cannot be overstated. This statement gives direction to the entire process and ensures alternatives are designed to address project goals. Simply stated, the purpose and need statement identifies what is to be accomplished. Before proceeding with a NEPA process, goals should be established and articulated. Purpose and need statements have often been inadequate in describing the necessity for the proposed action and in defining the scope of the alternatives to be considered. An inadequate definition of the purpose of and need for a project can lead to an inordinate array of alternatives—many of which will be beyond the scope of the proposed action. A concise purpose and need statement, at the initiation of the NEPA process, tends to limit the range of alternatives (thereby reducing the level of effort) and serves as a guide for selecting alternatives. In the absence of a concise purpose and need statement, the selection process will appear arbitrary and will be subject to criticism.

## 11.2 Public Involvement Problems

The public involvement process often does not reach all elements of the interested public as well as could be desired. The typical process of one or more scoping meetings generally reaches only stakeholders who are familiar with the process and who have responded, to some degree, to this process. This process does not necessarily ensure the participation or eventual buy-in of persons unfamiliar with the process or holding diverse or uncompromising interests. It is vital that creative, nontraditional means of reaching all publics be considered. This is especially important when involving minorities, members of low-income populations, and members of Indian Nations or tribes fully in the process. These groups often feel alienated from Government decisionmaking, and special efforts are often required to adequately involve them in the process. Greater use of local newspapers, radio and television, and local minority languages is helpful in bringing the full range of publics into the process. Personal visits with local community leaders can be vital to understanding local concerns and improving local involvement.

When dealing with Indian Nations or tribes, it should be kept in mind that Indian tribes are not "just another stakeholder" but are sovereign entities and should be dealt with individually on a government-to-government basis.

The issues identified by the public involvement process often drive the entire NEPA process. The widest reasonable involvement of various interested parties does nothing but improve the validity of the entire process.

## 11.3 Establishing Realistic Timeframes for NEPA Processes

The courts and/or Congress have, at times, established timeframes to complete EISs that are inadequate to meet the goals and procedures of NEPA. These court-mandated or legislation-mandated EISs have put Reclamation in the position of attempting to complete the NEPA compliance process within a timeframe that has been insufficient for a sound and comprehensive EIS. Such circumstances have led to the production of EISs that are inadequate as a means to inform the public and to assist in informed and proper Reclamation decisionmaking.

Another problem may stem from the desire of some within Reclamation to move rapidly forward on an action that appears beneficial without taking the time to initiate and emphasize timely

preparation of NEPA documents as required. It is important to use NEPA as a tool to assist those responsible for making the best decisions possible, not just as a procedural "hoop" that must be jumped through.

It is not unusual for a "typical" EIS to take 2 to 3 years. Areas in which schedules are often longer than expected include scoping, alternative development, analyses (especially if modeling is involved) and data collection, and responding to comments on the DEIS. When developing a schedule, the temptation should be resisted to assume that only factual corrections on the DEIS will be needed and that the FEIS will be easy and quick to prepare. Experience has shown that this is often not the case.

## 11.4 Need for After-Project Followup

As part of any environmental compliance activity, some environmental commitments are invariably made. These may be requirements out of an ESA consultation process; agreement to implement recommendations of a FWCA report; or simply the environmental commitments of a NEPA document which are written statements of intent, made by Reclamation, to mitigate or lessen environmental consequences associated with project activities. Environmental commitments can also address activities that restore or enhance environmental quality. These commitments are made in most environmental compliance documents (e.g., EAs, biological assessments, and EISs). Presently, no consistent effort is being made to ensure that these commitments are actually met, nor is there a consistent effort to monitor the effectiveness of commitments that are actually implemented to ensure that they meet stated goals of mitigation and/or enhancement.

Environmental commitments should be viewed as a part of the action and as important as any other part. The final positions/recommendations on a project are based on the assumption that commitments will be met. If they are not, then reviewing/regulatory agencies would be justified in revisiting approvals granted to completed projects on the premise that the project was not implemented as described. Also, as new projects/activities are proposed, these review/regulatory entities can view past performance as an indication of future performance. Legitimate proposals for new activities can be jeopardized by past failures to honor commitments. NEPA documents, besides just listing environmental commitments, should include a process/program to identify specifically how the commitments will be met. Postdecisional monitoring is required by 40 CFR 1505.2(c), which states (in part): "A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation." Reclamation has historically been inconsistent in applying this requirement.

## 11.5 Becoming Proactive in Natural Resource Recovery Efforts

Resource recovery efforts are those activities that will mitigate current or past impacts to resources caused by Reclamation construction, O&M, or other programs, or that will mitigate effects or simply benefit the environment. Reclamation has tended to react only to clear requirements of NEPA, ESA, the National Historic Preservation Act, and other laws, permits, or regulations when initiating resource recovery efforts, whether they were mitigation or enhancement. At times, this reactive mode of resource recovery has been less than enthusiastic. With the changing mission of Reclamation toward active resource management, resource recovery should be approached in a more proactive way. This view is supported by NEPA's basic policy statement, which directs Federal agencies to promote the well-being of the environment. In addition, other laws (e.g., ESA) direct Federal agencies to utilize existing authorities to further the purposes of environmental laws. Reclamation should identify natural resources recovery activities associated with a proposed action (or in the action area) and may include them, as appropriate, as part of a Reclamation action. This type of recovery action is in concert with the mission statement of Reclamation and is fully supported by the language of NEPA.

## 11.6 Doing NEPA on Previously Made Decisions

NEPA compliance is required before any discretionary Federal action with potentially significant environmental impacts is initiated. Occasionally, in operating, maintaining, or developing Federal facilities, expedient decisions are made and committed to without full compliance with the NEPA process. This is to be avoided. The one exception to this requirement is in emergency situations. CEQ must be contacted directly to develop alternative means to address any requirements after an emergency action has been initiated. Outside this lone exception for emergency situations, if NEPA-triggering decisions are made before completing the NEPA process, the decision is vulnerable to legal challenge, and any future NEPA process is compromised by the need to justify completed decisions. In short, NEPA-triggering decisions should not be made without completing NEPA compliance. No NEPA compliance (or any after-the-fact NEPA) on any controversial issue may result in no action, regardless of the merits of the proposed activity, because of legal challenges.

Additionally, lack of a NEPA analysis may result in selecting an action that is not the best available alternative. The alternative

formulation and analysis process of NEPA provides important information to help support the best possible decision. Any decision made without this support is suspect.

## 11.7 How Much Is Enough?

NEPA sets forth a procedure to assist Federal agencies in making more informed decisions on actions that they undertake. However, before determining how or whether to proceed with a proposed action, there are innumerable process decisions that need to be made. These process decisions, and the depth of analysis and/or scope of effort needed to make them, have led to considerable discussion among NEPA practitioners, often culminating in the question, "How much is enough?" Specific examples of points at which this question frequently arises are: during scoping, while addressing the depth and extent of analysis regarding specific issues, and number/range of alternatives that need to be considered/evaluated. Unfortunately, with the sole exception of page limits, there is no specific guidance provided, in either NEPA or its implementing regulations, on this question.

There are, however, a number of references that suggest NEPA documents should be succinct statements, written in plain language, and detailed only to the point that it helps the reader understand the project, alternatives, and impacts. In the case of incomplete information, some guidance is provided in sections of the NEPA regulations such as 1500.1(b), 1500.4, 1501.2(b), 1501.7(a)(2) and (3), and Section 1502.22. The only tests of what is enough appear to be related to: (1) focusing only upon significant effects, thus allowing a cutoff point to be defined by a lack of significance in the analysis; and (2) providing an adequate range of reasonable alternatives that allows decisionmakers to make informed decisions about the proposed actions.

In responding to a question about how many alternatives must be considered, CEQ states that, “What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case” (NEPA’s *Forty Most Asked Questions by CEQ*, 40 Questions - question 1b). This answer can be applied to any aspect of the NEPA process. The determination of a reasonable range must initially rest with the interdisciplinary preparers of the NEPA document. This can change during scoping, public meetings, and review of draft documents, and, of course, it is heavily influenced by the particular environmental issues involved.