

## Planning Nuts and Bolts

In the last section, we talked about the over-riding laws that require BLM to do planning and to develop an Environmental Impact Statement. In this next section, we're going to be talking about the other laws that need to be integrated into the plan process and into the development of the EIS. As BLM, affecting certain resources and being a federal agency needs to make sure they're complying with these other requirements. They may be with another agency, federal agency; they may be with another agency located within the state or they may be a tribe. And so, with these different requirements, as BLM is developing the plan and developing the EIS, they need to make sure that that coordination is happening over and above the coordination required as part of the development of the plan and over and above the requirement of the development of the EIS.

So we're going to be talking about integration. We're going to be talking about these other legal requirements and there are different resources available and understanding these other legal requirements. There are other agencies that have a lot of information on that. We're going to be talking about some of those, scratching the surface on what it is to consider Clean Air Act issues or Clean Water Act issues or Endangered Species issues, Historic Resource issues, and others. But, we will be talking about, at least, the concepts that need to be woven into the plan process.

We'll also just generally be talking about what those other requirements are, little bit of the steps in the process.

So, first, you might be asking yourself, why should we care? Why do we need to integrate? Okay, the law requires it; yes that's true. But it's more than that. It's about being more efficient. It's about showing the public and other agencies that you're not just thinking about this in terms of multiple use and sustained yield, but you're also thinking about it in terms of these other congressional directives that have been laid out through these laws. You're thinking about it in terms of why should I be considering uses that are affecting this resource over and above, maybe, other resources. And how do you communicate that to the public? How do you communicate that to these state and local agencies that may not have a good understanding of these other laws?

So you're trying to integrate and you're trying to understand these other processes in order to better communicate to your collaborators in order to create the best plan possible that's going to be a plan that you can implement and that is going to be consistent with these other laws. You want to be developing a plan that's going to consider these resources and some of the resources you may be able to coordinate and have another agency have over-riding jurisdiction or monitoring requirements of. So, in a way it's also understanding what other players may have a role in your plan process either because the development of the plan or implantation of the plan. And all of these factors can, again, help make a better plan at the end of the process.

As we mentioned, you're going to be creating a document that hopefully will comply with FLPMA and NEPA. But you also might be creating a plan that will comply with some of these other laws. You create, basically, a single document, a one-stop shop, in where these other agencies can get the information they need to show that

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there's compliance with these other requirements. It's going to save, again, time and money if you can send the resource agency folks information that you collected through the plan process that will also meet their other requirements for these other laws. It, literally, identifies the other legal requirements necessary for a federal agency to make a decision at the end of the process. Of course, BLM is going to make a final decision on a plan and approving the Environmental Impact Statement as part of that, and with that they're also making sure that they're complying with these other laws that we're going to get to in just a little bit.

The consistency issue is very important. As your working through a plan, you're going to be thinking about how these resource uses are going to be used, how they're going to be analyzed, how they're going to be implemented, how the different uses are implanted within the plan area. As a part of that, it needs to be consistent with how these other laws may be protecting certain uses. Where you don't consider these other elements within the plan process, you may have a plan, again, that is not implementable as it would conflict with other laws. And it does enhance how other agencies can get involved. As I mentioned, their involvement within the plan process may also help you implement the plan. They may have monitoring programs already in place. They may have certain agency staff that can help you implement the plan. So, that collaborative planning is an important element of the integration process.

Of course there are challenges with integration. What happens to the process along the way to not necessarily allow integration? Well, one of them, of course, is not really understanding what's required because of these other laws. Sometimes the other agencies don't know you're doing a plan process, either developing a new plan or revising the plan. The notice might not have gotten to the agency staff that are appropriate for this. A lot of times staff in these other agencies are not available. And so, one of the challenges in getting the integration of these other laws is to actually get the informed staff to participate and that is a challenge whether it's because it's another federal agency and they have staffing issues. Whether it's because they have other priorities. Same on the state level, same on the local level. So that, definitely, is one of the challenges. You can't integrate if you don't have the input from these other agencies and sometimes these other agencies aren't able to participate as well as they either would like or maybe they wouldn't actually like to participate. I've worked on a number of plans where federal agencies have denied accepting cooperating agencies status and we'll talk about what a cooperating agency is a little bit later. But, in general, it has to do with, in the NEPA process, the lead agency asking other interested agencies if they would actually be formally designated as a cooperating agency. And sometimes the federal agencies and state and local agencies will decline for any number of reasons. And that makes it difficult for the BLM planner to actually get the right information into their process. Now, I always recommend that you continue to coordinate with those agencies, even if they have decided not to participate. You, again, want to create a record that shows that you reached out to those other entities. It's a part of FLPMA, it's a part of NEPA to continue that communication process; maybe staff will change. Maybe priorities will change in these other agencies. When you have somebody possibly higher up in these other agencies at the end of the

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process complaining, you've created a record to show, hey we've tried to integrate their part in the process. It's always good to keep that communication line going.

As you're going through and, again, discussing what laws need to be required, we have some help. We have write-in NEPA. NEPA directs the federal agency to the fullest extent possible. That federal agency needs to be integrating into the EIS process, those studies and those surveys that would be required under the Endangered Species Act; the Fish and Wildlife Coordination Act, the National Historic Preservation Act and other laws. And it's with that that you basically, in the beginning of the plan process, should be thinking about this. As you're doing an assessment of what needs you might have in terms of staff, in terms of the resources that could be affected, you should be creating a separate list that says, oh and there's these other laws that we need to comply with as we're doing the plan process. Endangered Species Act, and with the Endangered Species Act is, and we'll talk about in just a little bit, there might be two different agencies that you're involving. Are there Clean Water Act issues? What is the state agency that might be implementing some of those Clean Water Act issues? Same with Clean Air Act, the same with Historic Resources. There may be a state agency, might be a tribe that you need to coordinate with as a part of the process. So, try and keep a separate list that you're considering these other entities and the legal requirements associated with it as you're developing that work plan, if you will, of how you're going to go through the plan process. And those will be some of the people you'll invite to all the meetings; they'll get the notices. But those are the people you might want to make special effort to reach out to in order to make sure you're going to meet those legal requirements for these other laws.

So, some of the key laws, as we mentioned already, you have the Endangered Species Act and Fish and Wildlife Coordination Act. And that would be coordinating specifically with Fish and Wildlife Service and National Marine Fishery Service. You could also have the National Historic Preservation Act and, with that, coordinating with the State Historic Preservation Officer and possibly the Advisory Council on Historic Preservation. You could also be working with the tribes as well as the Tribal Historic Preservation Officer with the National Historic Preservation Act as well as through many other legal requirements on coordination with the federally recognized tribes. You might also have certain executive orders that need to be complied with. As an example here, we've listed the executive order on environmental justice. There are many other executive orders that apply to federal agency processes that need to be complied with as you're going through your plan process and development of your EIS. You also have the Environmental Protection agency as well as state Water Quality agencies, and we'll talk about how state agencies really implement the federal Clean Water Act. And, again, states also really implement the federal Clean Air Act. And so, both of these laws are a federal requirement that basically requires BLM to coordinate with state agencies. So, it's another important integration process issue. If you've worked within one state, they may not have the same program and process as another state does to implement some of these laws, so you really need to be considering that state by state. So, as we go through, we're going to talk about some of the elements of each one of these laws and how they might apply to the plan process.

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First, the Endangered Species Act. Section 7 of the Endangered Species Act requires that a federal agency for any federal action, that they shall not jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. And they do this in consultation with either Fish and Wildlife Service or National Marine Fishery Service. If you're on a coastal state and somewhat inland, possibly, you might be dealing with National Marine Fishery Service. They are dealing with the marine species and species that live part of their time in the ocean, part of their time in fresh water, called sometimes anadromous fish. And for the other species, there's a broad list of species that terrestrial and freshwater fish that Fish and Wildlife Service has jurisdiction over. And both of those agencies are set up to consult with BLM depending on which species are affected. So as BLM is going through the plan process, they're going to be deciding are there endangered species issues, have I gotten Fish and Wildlife Service, have I gotten National Marine Fishery Service input on a list of the possible species that could be present, a list of the areas that are designated Critical Habitat, which is a formal designation under the Endangered Species Act. And, have I considered that up front in starting the plan?

As you're working through the plan, maybe at the draft plan process, you're talking to Fish and Wildlife Service and National Marine Fishery Service to decide when are they going to want to see what's called a biological assessment. Basically, the federal agency needs to do an assessment. Is there an adverse affect related to any one of these species? Is there a possibility of adverse modification or destruction of critical habitat? If there is, the federal agency is supposed to prepare what's called a biological assessment to study that adverse effect and conclude whether there's, what's called take, associated with the particular species or whether there truly might be adverse modification or destruction of critical habitat.

Then, after the biological assessment is prepared by BLM or the federal agency, and that federal agency turns to Fish and Wildlife Service, National Marine Fishery Service, asks them to, basically, agree that they have the best the scientific and commercial data available that they are submitting and request formal consultation. And it's with this formal consultation process that Fish and Wildlife Service and National Marine Fishery Service will be issuing what's called a biological opinion. And as part of that, and they'll issue a biological opinion on the development of the plan at basically the final stages.

Within that biological opinion, they're going to be talking about whether there's actual jeopardy to the species. Because, remember, that's the ultimate requirement, the federal agency shall not jeopardize the continued existence of a listed species. So they really need to be giving their opinion on jeopardy, giving their opinion on if there are take issues associated with some of the land use designations or uses that are going to be a part of the plan. And then what kind of measures should be incorporated into the plan in the final decision to minimize the adverse affects to the listed species. And all of that is a part of the Endangered Species Act compliance.

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And again, if you're thinking about it, well that seems very complicated; there's a lot of issues there. And that's why we recommend that that be integrated right into the plan process because that way, as you're developing the plan, you can, and I don't like to use this when talking about endangered species, kill two birds with one stone. But, you can use that plan to help scope out your endangered species issues, help develop the ways to offset that. Help to incorporate the minimization measures that Fish and Wildlife Service and NMFS might be recommending, doing that all through this one process.

The next law, National Historic Preservation Act, and I'm going to be talking about just four or five different laws and there are, depending on your particular area and the resources within your area, there may be lots more federal laws that could apply. We're just talking about, maybe, the more common ones that apply to just about every plan.

The next one is the National Historic Preservation Act. In Section 106 of the National Historic Preservation Act, is the requirement that all federal entities, including BLM through their plan process, basically assess how their action could affect those properties that are either on the list, the National Historic Preservation Act, or they're eligible for listing on the National Register. So you have those two considerations; is it on the National Register or is it eligible for listing? And the process, again, includes coordination and, again, it's the delegation of a federal law implementation by a state. Its delegation to the State Historic Preservation Officer. So, depending on what state you're in, you may be coordinating with an entity that's in the state Parks and Rec or state lands. The State Historic Preservation Officer is located in different state, governments depending on which state you're in.

So you're coordinating with that person, getting input on eligibility of the resources, getting input on the possible affects that could be, could occur to those different resources and then having some kind of agreement as to how those resources and the effects could be minimized and then coming up with a more formal documentation of that agreement. So it's those steps in the process that need to happen. Your identification of the resources, what better way to do that through your initial scoping and developing your plan. Your affects assessment, what better way to do that, but in deciding what uses and what kind of affects would happen as you're doing your Environmental Impact Statement.

So again, it's a good law to have you integrate into your plan and into your NEPA process in order to make sure you're complying with not just those laws, but of course with Section 106 in the National Historic Preservation Act.

The end of the process is typically just agreeing that you had these discussions; that you minimized, that you considered all the effects and the recommendations that the State Historic Preservation Officer may have recommended. You may not ever get the Advisory Council on historic properties to participate. They may comment in certain

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instances, especially when there's conflict with the SHPO. But, hopefully, if you're integrating early and considering those issues, you won't have those kinds of conflicts.

The next law that we're going to be talking about relates somewhat to the SHPO. If BLM land and the planning area is overlapping with tribal areas, you may have a requirement not just to coordinate with the SHPO, but also to coordinate with the Tribal Historic Preservation Officer, which when you say it, it sounds like you have a lisp, the THPO. But the THPO is basically steps into place of the SHPO for 106 coordination when it's on tribal land.

There may be other requirements related to coordinating with the tribes. We've listed some of those requirements, not going to go into a lot of detail on NAGPRA, the Native American Graves Repatriation Act, or also the American Indian Religious Freedom Act. But there's a number of different laws related to Indian trusts, Indian religious activities and other coordination that is required as part of the plan process and required as a part of these other laws. And again, making sure you're reaching out to the federally recognized tribes, making sure you're coordinating with all of those different participants. Sometimes that takes a separate process, almost a separate public participation plan in order to get the tribes involved and making sure you're getting meaningful input to understand their considerations. That's an important part of the process also and it's because, not just of FLPMA and NEPA, but some of these other laws.

As you're going through the process, you're thinking about impacts. You're thinking about impacts to different resources. Well, there's an executive order on environmental justice that was signed by President Clinton that requires the federal agency, as you're thinking about these impacts, look at whether these resource impacts are disproportionately larger to low income areas or minority income areas - - or minority areas. Your consideration, really, is to look at population data, census data, and decide, okay, there are certain areas designated low incomes or certain areas designated with high minority populations and do those areas have a disproportionate environmental effect? And if they do, have we done enough to reach out to those different populations to get input on their concerns? And have we done enough to look at alternatives to try and minimize those effects?

It's not, necessarily, a social analysis or economic analysis, which are also required as a part of the NEPA Environmental Impact Statement process. Again, it's really looking at these different populations and saying, but is there a worse effect to clean air issues or water issues or is there a worse effect to the loss of open space in these areas that serve these more disenfranchised populations. Basically, it was an acknowledgement from the federal government standpoint that there are certain populations that aren't able to participate as actively in the NEPA process and the planning processes and so federal government you need to do a better job in reaching out to them to communicate on what you're doing, how you're doing it, and get them involved. We'll be talking about environmental justice in a different segment related to some of that public involvement. But it's important, at this level, to just understand you

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need to be thinking about these populations and designating where they are at the beginning. You need to be developing a consideration and a way to reach out to them and considering their particular concerns and as you're doing these plans, you need to be also considering are there disproportionate effects. And it starts because of this executive order.

There's some more information not just in your handbook, but also through CEQ guidance. The thing about the executive order on environmental justice, it is not specifically a NEPA requirement, but EPA and CEQ basically have directed federal agencies the best way to comply with environmental justice is through the NEPA process and that's why it ultimately should be integrated within the developed of the EIS.

You have the Clean Water Act as another law that needs to be considered as you're doing your plan process. The Clean Water Act developed a program where EPA would set water quality standards and basically delegate implementation of those water quality standards to states that develop sufficient state water quality programs. So, when you're dealing with Clean Water Act compliance, you may be dealing with EPA if the state does not have a water quality program that's been approved. You may be dealing with EPA because you might be on tribal land and state might not have jurisdiction over certain tribal lands. But you're most likely also coordinating with that state water resource agency, that state water quality agency or environmental quality agency. And, again, for each state it might be different so you might work with one state and it's in one agency and another state it's in a totally different agency.

So, as you're working through beginning of the plan process, what water quality considerations do I have, what basin am I in, is there a water quality basin plan that has already been adopted for this area, is there, what are called impaired waters, where there are total maximum daily load limits set, TMDLs, that are set under the Clean Water Act. All of those things should be identified up front. Find out what agencies need to be coordinated with and integrate their concerns. These are legal requirements that BLM basically can't exceed and so, that's an important element as you're developing your plan to make sure you don't conflict with Clean Water Act standards.

Separate from the water quality permitting aspects of the Clean Water Act, you may also have activities that affect what are called Waters of the United States that are jurisdictional in terms of the Army Corps of Engineers program. And the Army Corps of Engineers, basically, oversees discharges of dredged or fill material into these Waters of the U.S. So there may be certain activities that you're considering within your plan that may create discharges within Waters of the United States. The Corps may be involved in those aspects; they may also be involved in some of the flood control aspects that have been set up within your particular plan area, within certain Waters of the United States. They may also oversee certain activities in, under, or over what are called navigable waters under the Section 10 of the Rivers and Harbors Act. So again, you might have a number of different agencies that are getting involved with your plan process to make sure that you're considering their permitting needs, their jurisdiction

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issues, their resource concerns related to clean water or activities within a waterway. And all of those, again, should be integrated into your plan process.

One of the last things that we're going to talk about is the Clean Air Act. The Clean Air Act, again, set up by congress to set certain standards related to air quality within the United States. EPA set up the air quality standards on a national level and then delegated to each of the states who implemented air quality plans. These states, in turn, typically have designated down to certain air quality management districts on how to oversee implementation of those plans and making sure that activities stay within the standards that they've set.

So the federal agency is required to turn to EPA, the state typically and maybe the local agency to say, are these activities consistent with the air quality management plan that you've set up. If there are mission issues associated with certain activities, those should be considered and anticipated whether there's an exceedance issues with some of those areas. As you're working through the Clean Air Act compliance, part of the end of the process would be deciding whether there's consistency within those local requirements.

You have all of those elements that are important to your process. When you're going through FLPMA, developing your plan, when you're going through NEPA, developing your EIS, when you're integrating all of these laws, you should be considering compliance issues. Again, BLM has plenty of other laws that they should be considering as appropriate related to the different resources associated with your action. So think about that as you're developing your plan, create that list.

Don't forget that NEPA actually reminds federal agencies something is significantly affecting the quality of the human environment when there's an inconsistency with federal, state, and local laws that are set to protect the environment. So, this integration isn't just important to create a document that can comply with both things, but literally it's almost the bell whether to tell, are these significant issues, do we need to do more to offset the effects to those resources because of that inconsistency with the other laws.