



## **Section 9403**

# **Compliance Guide for National Historic Preservation Act during an Emergency Response**

Quick Guide for Federal On-Scene Coordinators

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# Compliance Guide for National Historic Preservation Act during an Emergency Response

Quick Guide for Federal On-Scene Coordinators (FOSCs)

## 9403.1 Steps FOSCs Must Take if They Respond to an Emergency

**Step 1:** Determine if the emergency is categorically excluded from **Section 106** (This determination may need to be made after the FOSC arrives on scene.)

[If yes, no further action is necessary]

**Step 2:** Notify the State Historic Preservation Office (SHPO) Tribal Historic Preservation Office (THPO) for consultation because of overriding factors to categorical exclusion or FOSC determines there are historic properties or cultural resources that need to be considered

**Step 3:** Activate a qualified Historic Properties Specialist (HPS) and develop protective measures for historic properties or cultural resources if determined by consultation.

**Step 4:** Notify the SHPO/THPO when the emergency response has formally concluded.

## 9403.2 Categorical Exclusions

### 9403.2.1 Spills or Releases Categorically Excluded from Additional Section 106 Compliance:

- Spills/releases onto (and that stay on):
  - Gravel pads
  - Roads (gravel or paved, not including the undeveloped right-of-way)
  - Parking areas (graded or paved)
  - Dock staging areas less than 50 years old
  - Gravel causeways

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- Artificial gravel islands
- Drilling mats, pads, and/or berms
- Airport runways (improved gravel strips and/or paved runways)
- **Spills/Releases into (and that stay in):**
  - Lined pits (e.g., drilling mud pits and reserve pits)
  - Water bodies where the spill/release will not (1) reach land/submerged land, or (2) include emergency response activities with land/submerged land-disturbing components
  - Borrow pits
  - Concrete containment areas
- **Spills/releases of:**
  - Gases (e.g., chlorine gas)

**9403.2.2 Overriding Factors that may call for presence of HPS:**

- Uncertainty regarding applicability of categorical exclusion;
- Specifics of a spill or release change so it no longer fits into one of the categories listed above;
- The spill is greater than 100,000 gallons; and/or
- SHPO/THPO believes the spill or release may have the potential to affect a significant historic property.

**9403.3 Important Concepts about Section 106 for the Federal On-Scene Coordinator**

- The FOSC may have to make an emergency response decision that adversely affects historic properties and cultural resources. However, the emergency response decision must be an informed decision. An informed decision is one in which the FOSC has:
  - Consulted (notified and taken into account professional comments) with SHPO, Federal land-managing agencies, Tribes, native Hawaiian organizations or other interested parties
  - Consulted with an HPS
  - Consulted the Geographic Response Plan/Environmental Unit (EU) under the Incident Command System (ICS)
  - Determined a categorical exclusion applies
- The FOSC must conduct formal consultation with the SHPO/THPO on newly discovered or unanticipated potential historic properties or cultural resources encountered and on adverse impacts due to the response on those properties or resources. This is an inherently governmental responsibility that must be performed by the FOSC and not the HPS.
- National Historical Protection Act Section 106 obligations apply to FOSC response actions and not to impacts caused by the spill or release.
- Consultation with the THPO is not intended to meet government to government consultation required by Executive Order 13175.

#### 9403.4 Integrating Section 106 Obligations into the Incident Command System

- Include in the Incident Objective (ICS-202) a statement on protection of historic properties or cultural resources as the case may be.
- The HPS serves in the EU as the Historical/Cultural Resources Technical Specialist (HCRTS).
- In a Unified Command ICS situation with the potentially responsible party leading the cleanup, it is appropriate for the potentially responsible party to acquire the HPS. However, it should be clear among the Incident Commanders that the relationship of the HCRTS to the FOSC is unique among the Command staff. The HCRTS is responsible for helping the FOSC meet his or her Section 106 legal obligations, which do not apply to the other Incident Commanders.
- If the SOSC has similar legal obligations under their state law, then that should be made clear in Unified Command and added to the list of responsibilities for the HCRTS. The FOSC and SOSC should be clear with the HCRTS on any differences between their legal obligations.
- Provide to the workers any special instructions to ensure protection of historical properties and cultural resources via the Assignment List (ICS - 204).
- Document in the Unit Log (ICS-214) any actions taken that resulted in adverse impacts to historic properties or cultural resources.

#### 9403.5 Activating a Qualified Historic Properties Specialist

##### 9403.5.1 Qualified Historic Properties Specialist

A qualified HPS:

- Must meet *The Secretary of the Interior's Historic Preservation Professional Qualification Standards and Guidelines*, for either the disciplines of prehistoric or historical archeology found at [https://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](https://www.nps.gov/history/local-law/arch_stnds_9.htm);
- Should have demonstrated familiarity with the archaeology and environment of the area in question;
- Should be fully familiar with federal and state laws and regulations governing historic preservation and with the operation of the SHPO;
- Must have the requisite Occupational Safety and Health Administration training for Hazardous Waste Operations and Emergency Response (29 Code of Federal Regulations [CFR] 1910.120) if required to work inside an exclusion zone;
- Should have ICS 300 level ICS training;
- Should have familiarity with the National Contingency Plan for Oil and Hazardous Substances Pollution Contingency Plan (NCP);
- Should have familiarity with the Northwest Area Contingency Plan

(NWRCP);

- Should have familiarity with the Programmatic Agreement on the Protection of Historic Properties during Emergency Response under the NCP; and
- Should have familiarity with the Shoreline Cleanup Assessment Technique (SCAT) process.

**9403.5.2 Provide the Historic Properties Specialist the List of Duties as the Historical/Cultural Resources Technical Specialist**

The HCRTS is responsible for providing the FOSC with reliable and timely expertise and support to ensure that historic properties and cultural resources are taken into account in the conduct of the emergency response.

The major responsibilities of the HCRTS are:

- a. Understand and be able to implement Section 4313 of Northwest Area Contingency Plan.
- b. Coordinate with the SHPO, THPO (or tribal cultural resources program), land management agency, and other concerned parties.
- c. Determine and document the presence of historical properties or cultural resources.
- d. Document the effect of the spill or release on historic properties or cultural resources.
- e. Assess whether emergency response strategies have the potential to affect historic properties or cultural resources and advise the FOSC accordingly.
- f. Identify, prioritize, and develop strategies for protection and cleanup of impacted historic/cultural sites in order to minimize damage.
- g. Participate in the testing and evaluation of cleanup techniques used on historic/cultural sites.
- h. Monitor and provide guidance on the cleanup of historic/cultural sites to reduce or eliminate response-related impacts.
- i. Document adverse effects on historic properties or cultural resources due to the emergency response. For intentional actions that result in adverse impacts, include information to show that the FOSC made an informed decision taking into account professional comments prior to authorizing actions and any mitigative measures considered.
- j. Make arrangements for suspected artifact theft to be reported to the SHPO, law enforcement officials, and the land owner/manager.
- k. Arrange for disposition of records and collected materials.
- l. Ensure the confidentiality of historic property site location information, consistent with applicable laws, so as to minimize opportunities for vandalism or theft.
- m. Provide Special Instruction in ICS-204 to ensure protection of historical properties and cultural resources.
- n. Convene an historic properties technical advisory group if needed due to size and complexity of the incident.
- o. Request additional HSPs as needed.

- p. Accompany SCAT teams.

**9403A Attachment A: Documentation of Emergency Response Decision that Adversely Affects Historic Properties or Cultural Resources**

*Use this form for deliberate or unintentional adverse impacts. Attach this form to the Unit Log (ICS-214) or include in site file. Submit in a reasonable and timely manner to the appropriate entities listed below:*

<b>Emergency Response</b>
Name:
Date:
Location:
<b>Response Action, Impact, and Decision</b>
[Describe response action and adverse impacts to historic properties or cultural resources. Explain why protecting historic properties/cultural resources and public health/safety could not all be met concurrently. Include information that would support this as an informed decision and the date of the decision. Describe any mitigative actions taken.]
FOOSC Name:
FOOSC Signature:
Date of Signature:
<b>Responsible SHPO/THPO/Resource Manager/Trustee</b>
[Allyson Brooks/Robert Whitlam, WA SHPO Dennis Griffin, OR SHPO Suzi Neitzel, ID SHPO THPO]



**9403B Attachment B: Releases or Spills Categorically Excluded from Additional Compliance under National Historic Preservation Act Section 106\***

<ul style="list-style-type: none"><li>➤ <b>Threatened spills/releases:</b></li><li>➤ Response activities related to threatened spills or releases that include the removal of fuel, and which will not include land/submerged land-disturbing activities. For the purposes of this attachment, limited manual subsurface testing (e.g., shovel tests) to assess the presence, amount, and/or extent of oil or hazardous substance contamination is not considered a ground-disturbing activity.</li></ul>
<ul style="list-style-type: none"><li>➤ <b>Spills/releases onto (which stay on):</b></li><li>➤ Gravel pads</li><li>➤ Roads (gravel or paved, not including the undeveloped right-of-way)</li><li>➤ Parking areas (graded or paved)</li><li>➤ Dock staging areas less than 50 years old</li><li>➤ Gravel causeways</li><li>➤ Artificial gravel islands</li><li>➤ Drilling mats, pads, and/or berms</li><li>➤ Airport runways (improved gravel strips and/or paved runways).</li></ul>
<ul style="list-style-type: none"><li>➤ <b>Spills/releases into (that stay in):</b></li><li>➤ Lined pits (e.g., drilling mud pits and reserve pits,</li><li>➤ Water bodies where the release/spill will not: (1) reach land/submerged land; and (2) include emergency response activities with land/submerged land-disturbing components.</li><li>➤ Borrow pits</li><li>➤ Concrete containment areas</li></ul>
<ul style="list-style-type: none"><li>➤ <b>Spills/releases of:</b></li><li>➤ Gases (e.g., chlorine gas)</li></ul>

**Important Note to Federal On-Scene Coordinators:** (1) If you are not sure whether a release or spill fits into one of the categories listed above; (2) if at any time, the specifics of a release or spill change so it no longer fits into one of the categories listed above; (3) if the spill is greater than 100,000 gallons; and/or (4) if the State Historic Preservation Officer or the representative of a Federally-recognized tribe notifies you that a categorically-excluded release or spill may have the potential to affect a historic property, then an Historic Properties Specialist needs to be activated in accordance with the Nationwide Programmatic Agreement and the NWRCP.

*\*This list is from Appendix I – Categorical Exclusion List found in the Programmatic Agreement.*

### 9403C Attachment C: Recommended Historic Properties Specialists Personnel Standards

Individuals contracted to provide technical services to Federal On-Scene Coordinators as Historic Properties Specialists:

1. Must meet *The Secretary of the Interior's Historic Preservation Professional Qualification Standards and Guidelines*, for either prehistoric or historical archeology\*
2. Should have demonstrated familiarity with the archaeology and environment of the area in question
3. Should be fully familiar with Federal and State laws and regulations governing historic preservation, and with the operation of the State's historic preservation office
4. Must have training in compliance with the standards found in 29 CFR 1910 (Hazardous Waste Operations and Emergency Response) if required to work inside an exclusion zone
5. should have ICS 300 level ICS training
6. should have familiarity with the *National Contingency Plan for Oil and Hazardous Substances Pollution Contingency Plan* (NCP)
7. should have familiarity with the NWRCP
8. should have familiarity with the *Programmatic Agreement on the Protection of Historic Properties during Emergency Response under the NCP*
9. should have familiarity with the Shoreline Cleanup Assessment Technique (SCAT) process

\* In general, these require a graduate degree in anthropology (or a closely related field), with a specialization in archeology, and two and one-half years of professional experience. These standards can be found on-line at [https://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](https://www.nps.gov/history/local-law/arch_stnds_9.htm).

### **9403D Attachment D: Notice to Response Personnel Required Actions after Discovery of Cultural Resources**

The Unified Command is required to comply with state and federal laws that protect cultural resources from injury. The Historic/Cultural Resource Specialist helps the Unified Command and Federal On-Scene Coordinator ensure that cultural resources are appropriately considered during emergency response activities. Response personnel including contractors, sub-contractors, emergency responders, cleanup workers, and field crews play a crucial role in this process since they, by the nature of their work, are the people most likely to encounter cultural resources while in the field.

During an incident response in the Pacific Northwest it is possible that you, as a person involved in the response, may discover cultural resources. In the course of your work if you find an item that you believe or suspect is cultural or historic, you must:

1. Stop work immediately at, near, and surrounding the area where you discovered the object, item, or artifact.
2. Leave the suspected cultural item in place, undisturbed, exactly where it was discovered. Do not pick the item up, touch it, or work around it.
3. If possible, mark the location where you discovered the item but do not disturb or penetrate the soil with any object or tool. There may be other artifacts under the soil that could be damaged by your actions.
4. Inform your field supervisor of the discovery as soon as possible.

After these initial actions, your field supervisor will immediately notify the Planning Section's EU and the Historic/Cultural Resource Specialist. Further direction on how to proceed will be provided by the Unified Command. If you are unsure of something discovered being culturally sensitive, consider it to be sensitive and follow the steps listed above so that the Unified Command can be notified and, ultimately, make a determination on the item's historic significance and the actions needed to protect it.

Compliance with these procedures is mandatory. They must be followed by all response personnel. Failure to comply with these procedures by excavating, removing, damaging, altering, or defacing any archaeological resource is a violation of multiple State and Federal laws and may result in fines/penalties, criminal prosecution, and imprisonment.

For more information on actions related to the discovery of cultural resources, consult with your supervisor or contact the Historic/Cultural Resource Specialist.

For the purpose of this guidance, the term “cultural resource” includes, but is not limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Non-fossilized and fossilized paleontological specimens may also be considered cultural resources, depending greatly on the context in which they were discovered.

Additional Resources:

- Washington State Department of Archaeology and Historic Preservation’s “A Field Guide to Washington State Archaeology 2003” provides good reference and explains what certain cultural resources might look like. The guide can be found online <https://dahp.wa.gov/archaeology> (link at bottom of that web-page).
- Oregon State Parks and Recreation Department has a History and Archaeology Library online at <https://www.oregon.gov/oprd/HCD/RESRCH/pages/histarch.aspx>.
- Idaho State Historic Preservation Office is online at <https://history.idaho.gov/location/shpo/>