

Statutory Guidance Tool

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Compliance Guidance

See Tools “Northwest Area Contingency Plan Permit Summary Table” and “Permit Tracking Template” during a response.

1000 Statutory Guidance Federal

1100 Comprehensive Environmental Response, Compensation and Liability Act, 1980

The Comprehensive Environmental Response, Compensation, and Liability Act, also known as Superfund, was enacted by Congress in 1980 and is defined in 42 United States Code (USC) 9601 et seq. Its purpose is to provide for liability, compensation, cleanup, and emergency response for hazardous substances or pollutants or contaminants (as defined by the statute) released into the environment and the cleanup of inactive hazardous waste disposal sites. Emergency and time critical actions for pollutants or contaminants may only be taken when these releases pose an *imminent and substantial threat to human health or the environment*. The National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 Code of Federal Regulations (CFR) 300.415 outlines factors that shall be considered in determining the appropriateness of an emergency or time-critical response action. These factors include:

- Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants.
- Actual or potential contamination of drinking water supplies or sensitive ecosystems.
- Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release.
- High levels of hazardous substances or pollutants or contaminants in soil largely at or near the surface, that may pose a threat of release.
- Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released.
- Threat of fire or explosion.
- The availability of other appropriate federal or state response mechanisms to respond to the release; and
- Other situations or factors that may pose threats to public health or welfare of the United States or the environment.

1200 Federal Water Pollution Control Act as Amended by Clean Water Act and Oil Pollution Act 1990

As listed in 33 USC 1251 et seq., the objective of the Federal Water Pollution Control Act (FWPCA) as amended by the Clean Water Act and Oil Pollution Act of 1990 (OPA) is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters. The goals of this act include:

- Eliminate pollutants discharged into navigable waters.
- Attain water quality, which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and around those waters.
- Prohibit the discharge of toxic pollutants.
- Provide federal financial assistance to construct publicly owned waste treatment works.
- Require states to provide waste treatment management plans.
- Conduct research to develop technology to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
- Develop national policy for the control of non-point sources of pollution.

1300 National Historic Preservation Act

This section discusses obligations required of state and federal responders to protect cultural and historic properties during an emergency response and procedures to follow to meet those obligations. For the FOSC, this section adopts the national *Programmatic Agreement on Protection of Historic Properties During Emergency Response Under the National Oil and Hazardous Substance Pollution Contingency Plan (PA)*. This section also fulfills the FOSC’s responsibility to ensure that historic properties are appropriately considered in planning for an emergency response (Section IV. A. of the PA).

See Section 9403, “Compliance Guide for National Historic Preservation Act During an Emergency Response.”

Responses Conducted Under NCP Authority

Overview

The National Historic Preservation Act (NHPA) of 1966 (Public Law 89-665) requires agencies using federal funds to identify, evaluate, and, where significant, protect historic, archaeological, and traditional cultural properties. This act also authorizes the National Register of Historic Places, expanding federal recognition to historic properties of local and state significance. The National Park Service in the United States Department of the Interior (DOI) administers both programs. Regulations for these programs are contained in 36 CFR Part 60, National Register of Historic Places, and 36 CFR Part 65, National Historic Landmarks Program.

Oil can contaminate archaeological, historic, and culturally sensitive resources. Such contamination can prevent carbon dating, damage fragile artifacts, and make restoration and preservation extremely difficult or impossible. In addition, oil spill response activities (e.g., mechanical cleanup and staging area construction) can physically disturb or destroy artifacts and sites.

Archaeological research and inventory in Oregon, Washington, and Idaho are incomplete, and the data that do exist are not disclosed to prevent looting and vandalism. The primary contact for responders seeking information and expertise on local culturally sensitive areas is the State Archeologist in the State Historic Preservation Office (SHPO) for the state and the Tribal Historic Preservation Officer (THPO) for the affected tribal lands. It is important that responders be aware of the types of archaeological, cultural, or historic materials that they are likely to encounter while responding to an oil spill or hazardous materials release and that they immediately notify the FOSC/UC if these types of materials are discovered.

The NWACs and RRT10 will review response strategies outlined in the GRPs when they are developed or revised to identify and revise any strategies that may adversely impact archaeological, cultural, or historic resources. These resources are protected under federal, tribal, and state laws. To avoid any inadvertent impacts on cultural and historic resources, responders are required to utilize existing hardened access paths and paved areas when approaching shorelines, and cleanup teams are to remain on beaches.

An FOSC, as an agency representative, is required to follow the NHPA. Thus, during a response, the FOSC will need to identify, evaluate, and, where significant, protect historic, archaeological, and traditional cultural properties. Under the NHPA, the FOSC is to protect property from 1) oil, hazardous substance, pollutant, or contaminant that has been spilled or released and 2) damage due to the response itself.

The NHPA was written for planned actions and does not adequately address federal actions under an emergency response. To fill that gap for environmental emergencies, the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, and eight federal agencies, including the United States Coast Guard (USCG) and United States Environmental Protection Agency (EPA), developed and signed the PA.

Note that circumstances of a response may involve a THPO. Not all tribes have a formally designated THPO, and the FOSC may need to consult with a tribal representative on cultural issues instead. Wherever this document refers to a THPO, this also implies a tribal representative for tribes with no THPO.

Before the PA can be used, an RRT needs to adopt the NHPA into its Regional or Area Contingency Plan (ACP) (Section VII. C. of the NHPA). As such, RRT 10 incorporates by reference the NHPA into the NWRCP. Subsequently, the adoption of the NHPA into the NWRCP will satisfy the USCG and EPA FOSC Section 106 responsibilities for all individual undertakings carried out in accordance with the NHPA and this plan as allowed under 36 CFR 800.14(b), the implementing regulations for the NHPA.

It is necessary to define the term “emergency response” because, as stated in the title, the NHPA is an agreement regarding protection of historic properties during an “emergency response” under the NCP. The NHPA states that “an ‘emergency’ shall

be deemed to exist whenever circumstances dictate that a response action to a release or spill must be taken so expeditiously that normal consideration of the Section 106 process is not reasonably practicable.” Note that “emergency response” is not defined in the NCP, and instead all cleanups of a discharge or a release are regarded as a “removal,” whether an emergency or planned. A planned removal will follow the requirements under 36 CFR 800.

Nevertheless, the term “emergency response” is widely used to distinguish a planned response from an unplanned response for administrative purposes, particularly within the EPA. With few exceptions, most oil responses under the OPA are unplanned and thus considered emergencies. The USCG deals almost exclusively with oil spills, and so almost all responses performed by the USCG are emergencies. However, with hazardous substances responses under Comprehensive Environmental Response, Compensation, and Liability Act, many are planned and indeed require an Action Memorandum (approval and funding mechanism) before a removal can begin.

The NCP grants the FOSC the discretion to determine what is “reasonably practicable” in consultation with the SHPO/THPO. For consistency with FOSC practices, an emergency response will be considered a response performed in the context of all oil spills and any hazardous substance release that does not require an action memorandum before initiating a removal. In these types of responses, normal consideration of the Section 106 process is deemed not reasonably practicable. However, this does not preclude following the Section 106 process, if the FOSC determines in consultation with the SHPO/THPO that conditions of the response allow for it.

In the context of this section, an emergency response shall be deemed complete using the same determination process as for a removal in the NCP under 40 CFR 300.320(b) – “Removal shall be considered complete when so determined by the OSC in consultation with the Governor or Governors of the affected states.”

Determining Presence of Historic Properties/Cultural Resources

The FOSC must first determine if there are any historic properties or cultural resources to consider during an emergency response. The FOSC may not be trained to recognize such properties or resources, or the resources may be buried and not visible. Therefore, the FOSC should assume that the emergency response location contains historic properties and cultural resources and notify the SHPO/THPO at the beginning of the response to ascertain the status of the response location. Even if the FOSC is given the “all clear” from the SHPO/THPO, he or she should proceed cautiously, especially if the response involves excavations.

To reduce the burden of notifying the SHPO/THPO of all emergency responses, the FOSC can consult the list of types of locations and spills/releases that are categorically excluded, provided in Section 9403, “Compliance Guide for National Historic Preservation Act During and Emergency Response.” However, there are four overriding factors noted in

this list that would still require consultation with the SHPO/THPO. Therefore, the most prudent path is to notify the SHPO/THPO of all emergency responses.

SHPO/THPOs can help the FOSC by monitoring National Response Center (NRC) emails for any potential concerns. SHPOs should note that the EPA and USCG do not respond to all NRC notifications and can verify if an FOSC was dispatched by calling the phone duty officer.

FOSC Obligations

The FOSC will give appropriate consideration to historic properties and cultural resources as defined by the NHPA during an emergency response.

Once the FOSC has determined that a response location involves historic properties or cultural resources, he or she consults with the SHPO/THPO to make informed decisions. By means identified in this plan, the FOSC will inform the SHPO/THPO of the location and nature of the emergency response and actions to take for all emergencies to which the FOSC responds. The SHPO/THPO can respond to the FOSC's notification by telephone or in person.

The FOSC may make emergency response decisions that adversely affect historic properties, but those decisions must take historic property information into account prior to authorizing actions that might affect such property.

An informed decision is one in which the FOSC has:

- Notified, consulted, and taken into account comments of the SHPO/THPO, federal land-managing agencies, and tribes.
- Consulted with a Historic Properties Specialist.
- Reviewed cultural information contained in the GRP for the area; and
- Determined whether a categorical exclusion applies.

The FOSC will notify the SHPO/THPO when an emergency response has been completed. Where an emergency response decision has adversely affected historic properties, the FOSC will consult and discuss restoration and mitigation options with the SHPO/THPO.

Cultural and Historic Property Specialist

Activating a historic property specialist is an important decision that should be made in consultation with the SHPO/THPO. The size and complexity of response and the degree to which a historic property is involved may warrant one or more specialists. Note that any action that adversely affects historic property without having activated a historic property specialist against the recommendation of the SHPO/THPO during the consultation process may be considered an uninformed decision and inconsistent with the NCP.

Under ICS, the Historic/Cultural Resource Specialist will be placed in the EU within the Planning Section. This position is referred to as the “Historical/Cultural Resources Technical Specialist” in the USCG Incident Management Handbook and the “Historical/Cultural Resources Specialist” in the EPA Incident Management Handbook. This position coordinates technical matters with the SHPO/THPO on behalf of the FOSC. However, the FOSC makes all governmental decisions.

If the SHPO or THPO responds to an incident in person or visits the Incident Command Post, the visit would typically be a short one, meant to assess the situation and provide any needed advice to the FOSC. The SHPO/THPO should not serve in the UC as a Historic/Cultural Resource Specialist since that person reports to the FOSC and the FOSC consults with the SHPO/THPO.

Even if the response is led by the potentially responsible party, the obligation to meet the Section 106 requirements of NHPA remains with the FOSC in UC.

1400 Endangered Species Act

Response activities during oil spills or hazardous substance release may impact animals and their habitats, separate from the impacts of the pollutant itself. The Endangered Species Act (ESA) and its implementing regulations (50 CFR 402) require federal agencies to consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS), collectively referred to as the Services, regarding any federal actions that may affect listed species. In the Northwest Region, the Services have developed a procedure to initiate the Emergency ESA Consultation and to incorporate measures into the response to minimize or avoid impacts to threatened or endangered species and their habitats that may be caused by response activities.

For significant incidents (e.g. federal responses lasting more than 96 hours, or when the Regional Response Team is activated to approve the use of chemical countermeasures in navigable waters under NCP Subpart J), or for incidents that may affect listed species or critical habitats outside the action area of the Service’s programmatic biological opinions (See Resources below), the FOSC is responsible for initiating an Emergency ESA Consultation with the Services. The RRT10 Endangered Species Act Compliance Guide has been developed to document this process. NOAA’s Scientific Support Coordinator (SSC) and DOI’s Regional Environmental Officer (REO) should facilitate the consultation process and coordinate subject matter expertise on listed species as appropriate. Ultimately, the FOSC is responsible for ensuring the consultation is initiated, and that mitigation measures provided through the consultation process are incorporated into the response.

Resources

Region 10 Regional Response Team/Northwest Area Committee Endangered Species Action Compliance Guide for Federal Responders During Emergency Response.
[Section 9404.pdf](#)

Programmatic Biological Opinion Addressing Oil and Hazardous Substance Spill/Release Response Activities in Selected Areas of Idaho, Washington, and Oregon (01E00000-2015-F-0001)
[USFWS Biological Opinion](#)

Endangered Species Act Section 7(a)(2) Biological Opinion, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Northwest Area Contingency Plan for the Response to Spills of Oil and Hazardous Substances (WCRO-2018-00065)
[NMFS Biological Opinion](#)

The national inter-agency Memorandum of Agreement between the USCG, EPA, and the Services. This MOA provides guidance on how the USCG, EPA, USFWS, and NMFS work collaboratively before, during, and after an emergency and provides templates for required documentation and processes. <https://www.nrt.org/sites/2/files/ESAMOA.pdf>

1500 Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) was enacted by Congress as 42 USC 6901 et seq. Congress declared it to be the national policy of the United States that, whenever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of to minimize the present and future threat to human health and the environment.

1600 National Environmental Policy Act

As defined by 42 USC 4321 et seq., the purposes of the National Environmental Policy Act 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 ecological systems and natural resources important to the Nation; and*
- *To establish a Council on Environmental Quality.*