RRT3 NAGPRA Guidance Document

PURPOSE

The Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001; 43 CFR Part 10) recognizes the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, and provides for the protection and repatriation of human remains and cultural objects to the appropriate descendant communities. Definitions for these terms are included in Appendix 1 of this document. Protection of Native American human remains, and cultural items is mandated on federal or tribal lands. Excavations or inadvertent discoveries of human remains, or cultural items found on private lands by Federal agencies also trigger NAGPRA obligations. RRT3 States and Commonwealth also have statutes on the discovery of human remains. A summary of these statutes is provided in Appendix 2 of this document. Federal On-Scene Coordinators (FOSCs) should refer to these statutes for discoveries of human remains that do not occur on either federal or tribal lands.

This document is intended to serve as guidance for FOSCs to ensure compliance with NAGPRA when responding to an oil spill or hazardous material discharge or release under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA) on federal or tribal lands. It should be used in coordination with the RRT3's Unanticipated Discovery Plan. Ultimately, the owner or manager of the land (landowner) is responsible for complying with NAGPRA. However, the FOSC or their designee should take any and all necessary steps to ensure the proper landowner(s) are given timely notice and provide whatever assistance may be asked of them by the landowner to comply with NAGPRA.

This guidance document may be used by all Federal agencies within the Regional Response Team 3 (RRT3) planning area (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia) during incidents when a federal agency or department is implementing or funding the response to an incident under the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300).

Federal Agencies and Departments may have additional guidance or polices that apply to NAGRPA or for consultation with Indian Tribes or other Stakeholders. This guidance document is not intended to override or replace any existing Agency or Department guidance. To the extent there is conflict between this guidance and any applicable statues, regulations, executive orders, laws, or agency guidance or policies, these (and not this guidance document) will take precedence.

DISCOVERY OF HUMAN REMAINS

If response personnel discover human remains (i.e., any physical part of a body) or a burial site, regardless of ancestry, while conducting response operations to include any response actions or personnel/equipment staging, the following procedures will be implemented:

1. All work and activity that could disturb the human remains must stop;

a. Work and activities that pose no reasonable disturbance to the discovery can continue as normal (e.g. response activities occurring 1 mile downstream from the discovery that can reasonably be assumed to have no adverse effect on the discovery)

2. A reasonable effort must be made to secure and protect the human remains including, as appropriate, stabilizing or covering the human remains;

    a. A general good practice is to maintain a 100-ft radius protective buffer around the location of the discovery.

3. As soon as possible, and no later than 12 hours after the discovery, notify the FOSC or their designee of the human remains; and

4. Report the human remains to local police, State's Attorney, coroner and/or medical examiner requesting them to investigate to determine if the human remains are forensic (recent) or archaeological.

    a. If the human remains are determined by local authorities to be forensic[1], they will conduct an investigation and are responsible for any resulting chain of custody.

5. If the human remains are not forensic and are archaeological, the human remains should be reported to the following:

    a. If the discovery occurs on Federal lands, the Federal agency with primary management authority should be notified as well as any Indian Tribe with potential cultural affiliation, if known.

    b. If the discovery occurs on Tribal lands (including all Tribal, Federal, State, or private lands within the exterior boundary of the reservation), the Indian Tribe should be notified[2]. Notification should be made to an appropriate official of the Tribe who has been delegated authority and responsibility by that Tribe for human remains or cultural items. This may be a Tribal Historic Preservation Office (THPO) though not every Tribe has one in place. The Bureau of Indian Affairs may also be contacted if there is difficulty in notifying the Indian Tribe.

    c. If the discovery is on private lands, State, or Commonwealth managed lands, then the State Historic Preservation Office for the respective area should be notified[3].

        i. The States and Commonwealths within RRT3 may have their own statutes or regulations regarding discovery. Please see Appendix 2 for guidance on those

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[1] If the forensic remains are determined to be Native American, the Not Invisible Act of 2019 may apply. This Act was intended to identify, report, and respond to instances of missing and murdered Indigenous people. Police, coroner, or the medical examiner should make the proper reporting and notifications to Indian Tribes per the Act.

[2] The National Association of Tribal Historic Preservation Officers maintains a directory of Tribal Historic Preservation Officers. https://members.nathpo.org/thpodirectory/FindStartsWith?term=#!.

[3] The National Conference of State Historic Preservation Officers maintains a directory of State Historic Preservation Officers at https://ncshpo.org/directory/.

specific statutes. As entities that receive Federal funds and have possession or control of Native American human remains or cultural items, States and Commonwealths may be required to comply with NAGPRA's collection provisions as well as State law.

6. The FOSC will coordinate with the appropriate Federal, State, Commonwealth, or Tribal agencies regarding the archeological remains to determine next steps. This may include activating a qualified technical expert to advise the FOSC.

    a. Once human remains are determined to likely be Native American, the Federal agency (FOSC) or State or Commonwealth agency with possession or control may not allow viewing of, access to, or research on the remains without obtaining the free, prior, and informed consent from lineal descendants, or culturally affiliated Indian tribes, or Native Hawaiian organizations.

Discovery of Cultural Items (funerary objects, sacred objects, and objects of cultural patrimony)

If response personnel discover Cultural Items (e.g., funerary objects, sacred objects, and objects of cultural patrimony) while conducting response operations to include any response actions or staging areas for equipment or personnel, the following procedures will be implemented. It may not be immediately apparent to response personnel whether an item discovered is a Native American cultural item, but all unanticipated discoveries will follow these procedures until a qualified technical expert can make a determination. A technical expert includes a professional archaeologist that meets the Secretary of the Interior's Professional Qualification Standards[4].

1. All work and activity that could disturb the cultural items must stop;

    a. Work and activities that pose no reasonable disturbance to the discovery can continue as normal (e.g. response activities occurring 1-mile downstream from the discovery that can reasonably be assumed will have no adverse effect on the discovery).

2. A reasonable effort must be made to secure and protect the cultural items including, as appropriate, stabilizing or covering the object(s);

    a. A general good practice is to maintain a 100-ft radius protective buffer around the location of the discovery.

3. As soon as possible, and no later than 12 hours after the discovery, notify the FOSC or their designee of the cultural items; and

4. Report the discovery to the following:

    a. If the discovery occurs on Federal lands, the Federal landowning agency should be notified as well as any Indian Tribe with potential cultural affiliation, if known.

[4] https://www.nps.gov/articles/sec-standards-prof-quals.htm

b. If the discovery occurs on Tribal lands (including all Tribal, Federal, State, or private lands within the exterior boundary of the reservation), the appropriate Tribe should be notified. Notification should be made to an appropriate official of the Tribe who has been delegated authority and responsibility by that Tribe for human remains or cultural items. This may be a Tribal Historic Preservation Office (THPOs) though not every Tribe has one in place. The National Association of Tribal Historic Preservation Offices (NATHPO) maintains a contact list for THPOs[5]. The Bureau of Indian Affairs may also be contacted if there is difficulty in notifying the Indian Tribe.

c. If the discovery occurs on State or private lands, the appropriate State Historic Preservation Office should be notified. As entities that receive Federal funds and have possession or control of Native American human remains or cultural items, State Historic Preservation Officers may be required to comply with NAGPRA's collection provisions as well as State law.

5. Once funerary objects, sacred objects, or objects of cultural patrimony are determined to likely be Native American, by a qualified technical expert, the Federal agency or State or Commonwealth agency with possession or control may not allow viewing of, access to, or research on the cultural items without obtaining the free, prior, and informed consent from lineal descendants, Indian tribes, or Native Hawaiian organizations.

Questions on this document or general questions about NAGRPA can be directed to the Department of the Interior's representative to RRT3 or to other members of the RRT3 Cultural, Historic, and Environmental Resources (CHER) Subcommittee.

[5] https://members.nathpo.org/thpodirectory/FindStartsWith?term=%23%21

APPENDIX 1. DEFINITIONS

BURIAL SITE

- *The term burial site means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains were deposited, and includes rock cairns or pyres which do not fall within the ordinary definition of grave site.*

CUSTODY

- *Having an obligation to care for the object or item but not a sufficient interest in the object or item to constitute possession or control. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, bailing, or otherwise transferring museum or Federal agency.*

FUNERARY OBJECTS

- *Funerary Objects means items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains [or within the burial pit or immediate burial area].*
- *Associated funerary objects shall be understood to mean objects placed intentionally with human remains and still physically associated in space with such remains. The location of objects within the grave fill or in immediate proximity to human remains shall be understood to be evidence of intentional placement with the human remains.*
- *Unassociated funerary objects shall be understood to mean objects that were made exclusively for burial purposes or to contain human remains whose association has been disturbed through road or house building activities and subsequent maintenance, vandalism, erosion, rodent activity, or any other ground disturbing phenomena.*

HUMAN REMAINS

- *Human remains shall be understood to mean the physical remains of a human body of Native American ancestry. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, as defined below, must be considered as part of that item.*

INDIAN TRIBE

- *Any Tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), recognized as eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians by its inclusion on the list of recognized Indian Tribes published by the Secretary of the Interior under the Act of November 2, 1994 (25 U.S.C. 5131).*

LINEAL DESCENDANT

- *A living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to NAGPRA.*

OBJECTS OF CULTURAL PATRIMONY

- *Objects of cultural patrimony shall be understood to mean items having ongoing historical, traditional, or cultural importance central to the [tribe/group], rather than items that could be owned by individual tribe or organization members. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member.*
- *[Consultation will occur to determine whether or not objects recovered fall within this definition.]*

SACRED OBJECTS

- *Sacred objects shall be understood to mean items that are specific ceremonial objects needed by traditional [] religious leaders for the practice of traditional religions by their present-day adherents. While many items might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony.*
- *[Objects falling under this definition have not yet been determined. Consultation will occur to determine whether or not objects recovered fall within this definition.]*

APPENDIX 2 - STATE BURIAL REGULATION SUMMARY

State & Statute on Discovery	Summary / Excerpt of Statute	Year	Other Pertinent Statutes	Timeline	State Land Owner	Municipal Land Owner	Private Land Owner	No Specific Scope	Further Regulations / Guidance
Delaware Delaware Code 5404 – Discovery of remains and notification of authorities	• "Any person who knows or reasonably believes that any human burials or human skeletal remains are being or about to be disturbed, destroyed, defaced, removed or exposed shall immediately notify the Chief Medical Examiner and State Archaeologist of such fact. If human burials or human skeletal remains are encountered during ... activity that might alter, destroy or otherwise impair the integrity of such burials or remains, the activity shall cease and not resume unless authorized by the Chief Medical Examiner and the State Archaeologist provided such authorization shall be made within five days of completion of the investigation of the Chief Medical Examiner." • "After notification ... the Chief Medical Examiner shall determine if the remains represent a human death required to be investigated... After completion of his investigation, if the Chief Medical Examiner determines that the remains may be the remains of a Native American or were found in the subsurface and buried for more than fifty years, the Chief Medical Examiner shall notify the State Archaeologist of such fact. The State Archaeologist, upon such notification, shall in consultation with the Department of Economic and Community Development, the Native American Heritage Advisory Council... the Commissioner of Energy and Environmental Protection, and the landowner determine, within seventy-two hours, if the site where such remains were discovered can be preserved in situ and protected by a preservation restriction." • "If in situ preservation is not prudent and feasible or not agreed to by the landowner, the State Archaeologist, upon consultation with the landowner and, if appropriate, the Native American Heritage Advisory Council, the Department of Economic and Community Development, and the Commissioner of Energy and Environmental Protection shall, if feasible, provide for removal and reburial of the remains at another location or for additional archaeological investigations and scientific analysis prior to reburial. Any excavation and recovery of remains by the State Archaeologist shall be completed not more than five business days after notification by the Chief Medical Examiner under this section unless the landowner consents to additional days."	2024	-	• Director receives notification of discovery of human burials/remains (within 5 days); • Director notifies Committee of discovery of Native American skeletal remains (within 60 days); • Director provides Committee a written plan for proposed treatment and disposition of the remains.	Yes *5401: Applicable to remains "found anywhere in within the State"; 5301: Department of State has the power to enforce laws regulating archaeological resources on state- owned/-controlled lands; 5305: the state has title to all archaeological resources in or on state lands*	Yes *5401: Applicable to remains "found anywhere in within the State"*	Yes *5401: Applicable to remains "found anywhere in within the State"*	-	Division of Historical and Cultural Affairs; Medical Examiner; Native American Heritage Advisory Council
District of Colombia District of Columbia Archaeology Guidelines: Plan for Unexpected Discoveries & Appendix I	"The following steps should be taken when bone that cannot be immediately recognized as nonhuman (animal) is discovered. Immediately stop digging at the discovery site; Contact Metro Police Department (MPD) Command Information Center...Document the preliminary recovery information. a. Who or what company discovered the bone. b. The contact information of the individual who discovered the bone or the appropriate supervisor. c. The date and time the bone was discovered. d. How the bone was discovered. e. The location site of the bone including the approximate depth. f. Any additional items found in the immediate vicinity ... When the bone appears to be within the context of a historical grave, the remains will be left in situ and City Archaeologist ... will be notified."	2018	DC Municipal Regulations 10-C502 - Historic Properties with Potential Archaeological Significance	-	-	-	-	Yes	DC Historic Preservation Office
Maryland Code of Maryland Real Property, Section 14-121.1 – Burial site owner consultation with the Maryland Historical Trust	"An owner of a burial site or of the land encompassing a burial site that has been in existence for more than 50 years and in which the majority of the persons interred in the burial site have been interred for more than 50 years shall consult with the Director of the Maryland Historical Trust about the proper treatment of markers, human remains, and the environment surrounding the burial site."	2023	Code of Maryland Criminal Law, Section Title 10, Subtitle 4 – Crimes relating to human remains	-	-	-	-	Yes *14-121: Burial sites defined as "any natural or prepared physical location ... into which human remains or associated funerary objects are deposited"*	Maryland Historical Trust Archaeology Office; Commission on Indian Affairs
Pennsylvania Pennsylvania Consolidated Statutes – Title 37 § 511	It is illegal if a person "conducts a field investigation on any land or submerged land owned or controlled by the Commonwealth, without first obtaining a permit from the [Pennsylvania Historical and Museum] commission, or ... appropriates, defaces, destroys or otherwise alters any archaeological site or specimen located upon lands owned or controlled by the Commonwealth."	2023	-	-	-	-	-	Yes	Pennsylvania Historical and Museum Commission

State & Statute on Discovery	Summary / Excerpt of Statute	Year	Other Pertinent Statutes	Timeline	State Land Owner	Municipal Land Owner	Private Land Owner	No Specific Scope	Further Regulations / Guidance
Virginia Code of Virginia 10.1-2305 – Permit required for the archaeological excavation of human remains Virginia Administrative Code Title 17, Agency 5, Chapter 20 – Regulations Governing Permits for the Archaeological Removal of Human Remains	"It shall be unlawful for any person to conduct any type of archaeological field investigation involving the removal of human skeletal remains or associated artifacts from any unmarked human burial regardless of age of an archaeological site and regardless of ownership without first receiving a permit from the Director."	2023	-	-	Yes *10.1-2305: "regardless of ownership"*	Yes *10.1-2305: "regardless of ownership"*	Yes *10.1-2305: "regardless of ownership"*	-	Virginia Department of Historic Resources; Virginia Cave Board; Virginia Council on Indians
West Virginia West Virginia Code 29-1-8A – Protection of human skeletal remains, grave artifacts and grave markers	"Upon the discovery of human skeletal remains, grave artifact or grave marker in an unmarked grave on any publicly or privately owned property, the person making such discovery shall immediately cease any activity which may cause further disturbance, make a reasonable effort to protect the area from further disturbance and notify the county sheriff within forty-eight hours of the discovery and its location." The sheriff is responsible for notifying the Director of the Historic Preservation Section, who in turn initiates an on-site inspection.	2024	West Virginia Code 37-13-1a – Improvement, construction or development upon privately owned lands containing graves; West Virginia Code 37-13A-7 – Existence of cemetery or grave site on privately owned lands	• Discovery (within 48 hours): Notify County sheriff of discovery & location; • If unmarked grave, then sheriff notifies Director of Historic Preservation & Director conducts inspection of site; • As necessary, develop permit conditions for excavation/disturbance.	Yes	Yes	Yes	-	State Historic Preservation Office / Division of Culture and History