

National Park Service

U.S. Department of the Interior

Cultural Resources, Partnerships and Science



The National Historic Preservation Act and the 1997 Programmatic Agreement on Protection of Cultural Resources During Oil Spill Response

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Overview

- The **Oil Pollution Act (OPA)** and National Contingency Plan Direct Federal On-Scene Coordinators to Clean Up Oil and Hazardous Material Spills.
- The **National Historic Preservation Act (NHPA)** Directs Federal Agencies to Consider the Effects of their Actions on Historic Properties.
- How Do They Work Together?



Introduction

The National Historic Preservation Act, *Section 106*

- Requires consideration of *Historic Properties*
- Decision-Making Informed By **Consultation**
- Consulting Parties Include:
 - State Historic Preservation Office (SHPO)
 - Federally Recognized Tribes
 - Private Financial Sponsors (e.g., the RP)
 - Interested Non-Governmental Entities
 - Others
- Typically Slow and Iterative
- Roughly analogous to ESA
- Triggered by an **Undertaking**
- Allows for Programmatic Agreements

Historic Properties

Historic Properties are:

any prehistoric or historic districts, sites, buildings, structures, or objects that are eligible for or already listed in the National Register of Historic Places.

Examples include:

- Tradition Cultural Places
- Archaeological Sites (including artifact scatters)
- Bridges, Dams, Docks, Earthworks, etc.
- Historic Buildings, Roads, Railroads, etc.
- Burials, whether marked or unmarked.

What is an Undertaking?

An undertaking magically comes into being whenever the Federal Government:

- Takes an Action
- Directs an Action
- Permits an Action to be Taken
- Spends \$

Many undertakings are categorically excluded under Section 106 because they have no potential to adversely affect historic properties.

Oil Spills are not undertakings. Spill Responses Are...

What is an Adverse Effect?

- One that diminishes the characteristics that qualify an historic property for inclusion in the National Register of Historic Places.
- Multiple Criteria for Assessing Characteristics.
- Adverse Effects may be temporary or permanent.
- Determination is informed by consultation.

Define the APE!

The Area of Potential Effect

- Where Actions Related to the Undertaking **May** Affect Historic Properties
- Define it Broadly..... But Not Too Broadly
- Use Common Sense
- It can be discontinuous
- It can be modified
- Will inform who to consult with
- Often broader than the **Area of Response**
- Can encompass areas categorically excluded

Categorical Exclusions

Activities that are not subject to further review under Section 106 because the stakeholders and consulting parties have agreed that there is no potential to adversely affect historic properties.

Could be because of location

Could be because of nature of activities

How Does It Work On A Spill?

Section 106 was designed to be slow, to ensure input and thoughtful consideration. The normal process does not work in emergencies!

But....

The regulations allow for development of Programmatic Agreements that tailor how the process works in particular circumstances.

How Did We Get Here?

- 1988 – First U.S./U.S.S.R oil spill exercise conducted
- 1989 T/V Exxon Valdez Oil Spill
- 1992 – Alaska RRT established Cultural Resources Working Group
- 1994 – Co-chairs of Alaska RRT request guidance from the National Response Team on historic properties
- 1997 – National Programmatic Agreement signed
- 2010 Deepwater Horizon Oil Spill Exposed problems with the 97 PA

The 1997 Programmatic Agreement

**PROGRAMMATIC AGREEMENT ON PROTECTION OF HISTORIC
PROPERTIES DURING EMERGENCY RESPONSE UNDER
NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION
CONTINGENCY PLAN**

AKA THE 97 PA

What Is It?

- The 1997 PA provides an alternative process to ensure appropriate consideration of historic properties within the meaning of the NHPA during emergency response to a release or spill.
- Compliance with the PA constitutes compliance with Section 106 of NHPA.
- Many (if not all) of the responsibilities and actions outlined in the PA are assigned to the FOSC to perform.
- The Response (not the spill) is the Undertaking

What Does It Require?

- Under the PA, Federal OSC responsibilities include pre-incident planning to lay the groundwork for making informed decisions.
- Knowing who to contact
- Knowing where to get information on historic properties
- Having a plan to obtain necessary expertise
- Pro Tip: Build relationships during Planning Stage!
- Need SHPOs and Tribes and Information Centers to Engage!

This Is Not A Drill....

- When a spill occurs, the OSC should notify SHPO and Tribes and Information Centers as soon as possible.
- Explain the nature of the spill and likely response.
- Indicate that expedited consultation will likely be required in the coming days and remind them of the 97 PA.
- Don't wait for perfect information, but be sure to communicate any uncertainty.
- Coordinate with SOSOC – They have obligations too!

97 PA Categorical Exclusions

Releases/Spills onto (which 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
- Artificial gravel islands
- Drilling mats, pads, and/or berms
- Airport runways (improved gravel strips and/or paved runways)
- Releases/Spills of: Gases (e.g., chlorine gas)

Releases/Spills into (that stay in):

- Lined pits; e.g., drilling mud pits and reserve pits
- 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;
- Borrow pits; Concrete containment areas

Federal OSC Responsibilities Under 97 PA

Notify and consult with identified parties:

- Identification of historic properties that may be affected
- Assess potential impacts from response actions
- Develop and implement emergency response activities

Notification and consultation shall be satisfied if the Federal OSC makes reasonable and timely efforts to notify and consult the identified parties. Thereafter there shall be additional consultation to the extent practicable.

Notify Advisory Council on Historic Preservation (ACHP) that you are using the 97 PA. Renew every 30 days.

Make Informed Decisions

- Information is gained through consultation with experts.
- Hire a Historic Properties Specialist

The HPS: What's Your Job?

Advise FOSC

- Responsibilities Under NHPA Section 106 / 97 PA
- Identify and Communicate Concerns of Consulting Parties
- Identify Resources at Risk and Sensitive Areas
- Recommend Resource Protection Strategies
- Develop Best Management Practices
- Document Document Document

Facilitate Consultation

- Identify and Communicate with Stakeholders
- Represent FOSC (if delegated)
- Educate Response Personnel and Consulting Parties
- Data Management
- Document, Document, Document

What's Your Job....continued...

- Explain and help FOSC follow related laws, regulations, and policies
 - State Burial Laws
 - Archaeological Resources Protection Act (ARPA)
 - Native American Graves Protection and Repatriation Act (NAGPRA)
 - Others?
- Bring Solutions
 - Incident-specific PA?
 - How to Resolve Adverse Effect?
 - Be Creative
- Be Flexible
- Maintain Credibility
- Keep a Sense of Humor
- Be Safe

Response Actions and Adverse Effects

- What is the potential for Adverse Effects?
- How can it be reduced or eliminated?
- Without significantly impeding the Response?
 - Appropriate Tools and Techniques
 - Training Responders
 - Buffers
 - Monitoring
 - Avoidance
- Document Adverse Effects

Questions?

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