

FREQUENTLY ASKED QUESTIONS

MOA FOR SPILL PLANNING & RESPONSE UNDER THE FEDERAL WATER POLLUTION CONTROL ACT'S (FWPCA) NATIONAL CONTINGENCY PLAN (NCP) & ENDANGERED SPECIES ACT (ESA)

Why & how does ESA apply to oil spills?

The ESA requires that Federal agencies ensure that the actions they authorize, fund, or carry out are not likely to jeopardize listed species or destroy or adversely modify their designated critical habitat. Response to an oil spill is an emergency; however, this does not relieve the responding federal agencies of their responsibilities under the ESA. During emergencies, this responsibility can be fulfilled by the responding agency relatively quickly through informal consultation, with formal consultation being completed if needed after the emergency response is complete and the case is closed. The National Contingency Plan (NCP) provides that Area Committees and Federal On Scene Coordinator's (FOSC's) consult with the Services during planning for sensitive areas (40 CFR 300.210(c)(4)(i)), and during response (40 CFR 300.305(e)). The MOA provides guidance for implementing these provisions as well as the emergency consultation provisions in the Interagency regulations implementing Section 7 of the ESA (50 CFR 402.05).

What are the benefits of the MOA?

The MOA provides a general framework and guidance for cooperation and participation among the ESA consultation agencies (USFWS and NMFS) and other agencies (USCG and EPA) in oil spill planning and response. The agreement integrates the provisions for consultation under the ESA with the requirements of the NCP which describes the relationship between the FOSC and natural resource trustees (DOI and DOC) (NCP Sections 300.170 & 300.175) and calls for coordination with USFWS and NOAA on sensitive environment plans that are incorporated in the ACP (40 CFR 300.305(e)).

The MOA will assist the response agencies in meeting their statutory responsibilities under Sections 7(a)(2) and 7(a)(1) of the ESA. Section 7(a)(2) sets out the consultation process with the Services. Section 7(a)(1) of the ESA requires each federal agency to utilize its existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. Following the recommended procedures in the MOA will provide for the conservation of listed species, improve oil spill planning

and response, and streamline the required consultation process. In addition, the MOA provides the Services with direct involvement in oil spill planning and response.

Does the MOA affect FOSC authority to determine response actions?

Nothing in this agreement limits the authority of the FOSC as defined in the NCP. FWPCA Section 311(c)(3) requires that federal agencies conducting removals under Section 311(c) act in accordance with the NCP or as directed by the President. The NCP designates the FOSC as the person responsible for coordinating an oil spill response. The FOSC makes the final determination of appropriate oil spill response actions to minimize or mitigate damage to the public health, safety, and the environment and decides whether to delay or stop an emergency response.

Section 300.317 of the NCP sets forth the national response priorities with “safety of human life” being the top priority during every response. The national response priorities also specifically cover actions for stabilization of the situation and actions to minimize adverse impacts to the environment. However, Section 300.317(e) also makes it clear that the listed priorities are broad and should not be interpreted to preclude the consideration of other priorities that may arise on a site-specific basis, such as the protection of listed species and critical habitat from the potential effects of an oil spill removal action. With adequate planning and ongoing, active involvement by all participants, the FOSC will be provided with information to help reduce or avoid the impacts of spill response on listed species and critical habitat.

Must ACP’s be “redone?”

Planning is an ongoing process, a fact that is recognized in the requirement for Area Contingency Plans (ACPs) to be reviewed and updated every few years. The goal of the MOA is for the Area Committee/Regional Response Team (RRT) to use a process that helps them develop and improve sections of the ACP that relate to listed species and critical habitat. Some important items to include in the ACP relevant to ESA are: who should be notified when a spill occurs, when/under what conditions they should be notified, where the Service representatives would work in the Incident Command System (ICS) established for a spill, and information on listed species and critical habitat. Much of this information is required in the “fish and wildlife annex,” described in 40 CFR 300.210(c)(4)(ii) and can be obtained by from Service representatives participating in the area planning process.

Why have Post-Spill Consultation vs. NRDA?

These are two separate processes authorized under different laws. While some of the information generated as part of post-spill consultation may be useful in Natural Resource Damage Assessment (NRDA), one process cannot substitute for another. The post-spill consultation focuses on the effects of the spill response actions while NRDA is used for the effects of the spill itself.

How do Service representatives fit into ICS?

Every spill and Incident Command System (ICS) is different. Service listed species experts would be involved in the Environmental Unit of the Planning Section and possibly also in the Operations Section. This should be planned before a spill and included in the ACP as well as practiced during exercises.

How can I get help?

The workgroup is continuing to develop more detailed training tools to assist you. More information will be provided through the internet, resident training courses, Regional Response Team meetings, and conferences. Workgroup representatives include:

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