



*Preserving America's Heritage*

## **QUESTIONS & ANSWERS**

### **Consideration and Treatment of Historic Properties During the Response to the Deepwater Horizon Oil Spill**

In response to the Gulf of Mexico Oil Spill: Deepwater Horizon/Mississippi Canyon 252 Incident (Deepwater Horizon Spill), the National Oceanic and Atmospheric Administration and the United States Department of the Interior, on behalf of the United States Coast Guard, have determined that historic properties may be affected by the release of oil and the necessary clean up actions.

The Advisory Council on Historic Preservation (ACHP) developed the following Questions and Answers to provide information regarding the consideration and treatment of historic properties that may be affected by the spill and the federal agencies' actions.

#### **What protection exists for historic properties that may be affected by the Deepwater Horizon spill and clean up actions?**

The National Historic Preservation Act (NHPA) requires federal agencies to consider the potential impacts of projects they carry out, assist, or permit on historic properties. Section 106 of the NHPA seeks to accommodate historic preservation concerns with the needs of such projects ("undertakings" in Section 106 terms) through consultation with parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties. 36 CFR § 800.1(a).

Section 106 of the NHPA is applicable during the emergency spill response. However, immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of Section 106. 36 CFR § 800.12(d). The regulations implementing Section 106 provide flexibility in emergency situations and allow agencies to take necessary actions in a timely manner to address public health and safety.

Federal agencies have in place an agreement that provides this Section 106 compliance flexibility regarding their emergency response actions for oil spills such as the one resulting from the Deepwater Horizon spill. The next question and answer addresses that agreement.

#### **What process will federal agencies follow to accommodate historic preservation while addressing the immediate need for clean up actions?**

A Programmatic Agreement executed in 1997 directs the federal agencies' compliance with Section 106 of the NHPA for emergency response actions under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR Part 300. The parties to that agreement are the ACHP, the National Conference of State Historic Preservation Officers, the Environmental Protection Agency, the Department

of the Interior, the Department of Transportation, Coast Guard, the National Park Service, the Department of Commerce, National Oceanic and Atmospheric Administration, the Department of Energy, the Department of Defense, and the Department of Agriculture.

That agreement is tied to the NCP, which “is the federal government’s blueprint for responding to both oil spills and hazardous substance releases.” <http://www.epa.gov/OEM/content/lawsregs/ncpover.htm> The NCP is required under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9605, and the Clean Water Act, 33 U.S.C. 1321(d). The 1994 revisions to the NCP were made to reflect the oil spill provisions of the Oil Pollution Act of 1990, 33 U.S.C. 2701 et seq.

### **What is the purpose of the Programmatic Agreement on Protection of Historic Properties During Emergency Response Under the National Oil and Hazardous Substances Pollution Contingency Plan?**

The Programmatic Agreement ensures that historic properties are taken into account during the agencies’ planning for and conduct of emergency response actions. It provides an alternative process to the standard Section 106 procedures that allows the agencies to meet their responsibilities to protect public health and safety while considering potential impacts to historic properties. In complying with the agreement, the federal agencies fulfill their requirements under Section 106 of the NHPA during pre-incident planning and emergency response activities.

While this agreement has been in place since 1997, it continues to provide the framework and roadmap for Section 106 compliance for those federal agencies that are signatories to the agreement. A copy of the agreement can be found on the ACHP Web site: <http://www.achp.gov/NCP-PA.html>.

### **What are federal agencies supposed to do with regard to the Deepwater Horizon spill under the Programmatic Agreement?**

Stipulation VI.B. of the Programmatic Agreement sets forth the process for considering historic properties during the emergency response. It outlines a process for consulting with parties concerned with the identification, evaluation, and protection of historic properties that may be affected by the spill and spill response actions.

The federal On-Scene Coordinator (OSC) is the federal official designated to coordinate and direct response actions and is responsible for ensuring that historic properties are appropriately considered in the planning for, and during, emergency response actions. For the purpose of the Deepwater Horizon spill, the OSC responsible for Section 106 compliance is the U.S. Coast Guard.

With the input of technical working groups, including other responsible federal agencies, state offices, and Indian tribes, the Coast Guard is developing cultural resources protocols to provide specific guidance for the identification and treatment of historic properties in the clean up actions. The final protocols will be published soon by the OSC. They will be available on the ACHP’s Web site when published. Those protocols will provide details on what exactly the federal agencies will do, and how they will consult with others, regarding the impacts of the emergency response actions.

### **What constitutes an “emergency” under the scope of the Programmatic Agreement?**

The Programmatic Agreement defines an “emergency” as that which 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.

### **Who else is involved in this Section 106 process?**

As the OSC, the Coast Guard is directing Section 106 compliance with the assistance of the Department of the Interior and the National Oceanic and Atmospheric Administration, and consulting with a number of federal land managing agencies; state agencies; State Historic Preservation Officers from Alabama, Louisiana, Mississippi, and Florida; and representatives of Indian tribes. The OSC may also execute contracts with entities possessing staff that meet the qualifications listed in the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation*, 48 *Federal Register* 44738-39 (September 29, 1983).

### **What is a “historic property”?**

A “historic property” or “historic resource” is defined in the NHPA as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register [of Historic Places], including artifacts, records, and material remains related to such a property or resource.” 16 U.S.C. § 470w(5). A historic property need not be formally listed in the National Register to receive consideration under Section 106. It only needs to meet the criteria for listing in the National Register.

### **What projects are subject to Section 106 compliance?**

A project that meets the definition of an “undertaking” is subject to Section 106 compliance. An “undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a [f]ederal agency, including those carried out by or on behalf of a [f]ederal agency; those carried out with [f]ederal financial assistance; and those requiring a [f]ederal permit, license or approval.” 36 CFR § 800.16(y).

### **Does the Programmatic Agreement address compliance with other federal laws defining and protecting historic properties?**

No. The agreement only addresses compliance under Section 106 of the NHPA. It does not address the federal agencies’ responsibilities under the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, the Antiquities Act of 1906, or the National Marine Sanctuaries Act (also known as Title III of the Marine Protection, Research and Sanctuaries Act). The agreement also does not address the federal agencies’ compliance with state laws that define and protect historic properties.

### **Under the Programmatic Agreement, what type of work might be excluded from further Section 106 review?**

Pursuant to Appendix I of the agreement, the following actions require no further review under Section 106:

Response actions for 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)

Response actions for 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

Response actions for Releases/Spills of:

- Gases (e.g., chlorine gas)

The OSC makes the determination as to whether an action falls within one of these excluded categories. If the spill is greater than 100,000 gallons, as is the case with the Deepwater Horizon spill, Section 106 review must be conducted in accordance with Stipulation VI of the Programmatic Agreement.

### **What types of adverse effects on historic properties may result from the spill?**

The spill may result in the physical destruction, damage, or alteration of all or part of a historic property; isolation of a historic property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register; and introduction of visual, audible, or atmospheric conditions that are out of character with a property or alter its setting. The spill may also result in direct physical contact of historic properties with released or spilled substances that may cause an inability to radiocarbon date the contaminated resources and the acceleration of deterioration of historically significant materials. These impacts present obstacles in the identification of historic properties in the field. As a result, important scientific, historic, and cultural information may be lost.

### **What types of adverse effects on historic properties may result from the emergency spill response actions?**

Certain emergency response actions may include the placement of physical barriers to deter the spread of released or spilled substances, the excavation of trenches to stop the spread of the released or spilled substances, ground disturbing shoreline clean up methods, the establishment of field camps for personnel, the creation of staging areas for materials or equipment, the excavation of borrow pits for fill materials, and the construction of access roads. These actions could directly impact historic properties.

### **When will the OSC take into account the comments of other parties regarding the potential effects to historic properties?**

The OSC will take into account comments from participating agencies, tribes, and other stakeholders during the development of emergency response strategies delineated in implementation plans, in soliciting and sharing information on archaeological sites (particularly site location information), while making arrangements for the reporting of suspected artifact theft, and during arrangements for the disposition of records and collection materials.

### **Will the OSC consult with Indian tribes?**

The OSC remains responsible for consultation with federally recognized Indian tribes under the NHPA.

Such consultation must recognize the government-to-government relationship between the federal government and Indian tribes, and consultation must be conducted in a manner sensitive to the concerns and needs of the Indian tribe.

### **How long will the federal agencies operate under the Programmatic Agreement?**

The federal agencies will continue to operate under the Programmatic Agreement until an “emergency,” as defined in the agreement, ceases to exist. As stated above, under the agreement, an “emergency” is “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.” The OSC, as the entity leading the federal agencies’ response actions and Section 106 compliance, would make a determination as to when such an “emergency” ceases to exist and notify the public about it.

### **What happens once the “emergency” response phase to the spill is over?**

The standard Section 106 process will apply, unless a program alternative (e.g., another Programmatic Agreement) is properly executed to cover those undertakings. More information on program alternatives may be found on the ACHP Web site: <http://www.achp.gov/progalt/>.

**Further information about federal agency responses to the Deepwater Horizon spill can be found in the following links:**

<http://www.whitehouse.gov/deepwater-bp-oil-spill/>

[http://www.usgs.gov/deepwater\\_horizon/](http://www.usgs.gov/deepwater_horizon/)

<http://www.epa.gov/bpspill/>

<http://www.doi.gov/deepwaterhorizon/index.cfm>

<http://www.nps.gov/aboutus/oil-spill-response.htm>

<http://www.fws.gov/home/dhoilspill/>

<http://www.deepwaterhorizonresponse.com>

**More information from the ACHP is available by calling (202) 606-8503 or e-mailing [gulfspill@achp.gov](mailto:gulfspill@achp.gov)**

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