

RRT III FACT SHEET

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Programmatic Agreement on the Protection of Historic Properties during Emergency Response Under the NCP

Section 106f of the National Historic Preservation Act (NHPA) requires Federal agencies having direct or indirect jurisdiction over a proposed federal or federally assisted "undertaking" to take into account the effect of the undertaking on historic properties included in or eligible for inclusion in the National Register of Historic Properties. A programmatic agreement (PA) was developed under the guidance of the NRT to clarify the limited role of the FOSC in considering potential effects on historic properties during emergency response, rather than affirmatively requiring the FOSC to protect historic properties. The PA provides some measure of protection to the FOSC in the event their actions are challenged.

The PA was developed over a two-year period by an ad-hoc NRT committee chaired by the Department of Justice. The committee included representatives of the Environmental Protection Agency, Department of Transportation (including the Coast Guard), Department of the Interior (including the National Park Service), Department of Commerce (NOAA), Department of Agriculture and Department of the Defense. The Advisory Council on Historic Preservation (responsible for the administration of the NAPA), and the National Conference of State Historic Preservation Officers also participated in the development of the PA.

The PA is divided into eight sections. The first three sections are introductory and explanatory. Section I explains the purposes of the PA, but makes clear that the priorities set out in the NCP, particularly protecting human health and safety, are the overriding concerns of the FOSC. The PA does not change the national response priorities set out in the NCP; nor does the PA change existing law. Sections II and III describe the NHPA and define "historic property." ("Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register"; such term includes artifacts, records, and remains which are related to such district, site, building, structure, or object.)

Section IV explains the role of the FOSC in considering the effect of emergency response activities on historic properties during planning and emergency response under the NCP. Section IV.A does not interpret the legal requirements of Section 106; it merely specifies the responsibilities of the FOSC "for the purpose of this PA." Assistance to the FOSC is to be provided by the National Program Center of the National Park Service.

Section V further elaborates how historic properties is to be considered during pre-incident planning. Section VI spells out the specific actions to be taken to consider the effect of emergency response actions on historic properties, including activating the mechanisms and procedures developed during pre-incident planning. Section VI also lists potential adverse effects of a spill or release and of emergency response actions on historic properties. Section VII provides for development of regional PA's tailored to address local concerns and conditions.

Section VIII describes the signature and withdrawal process.

Questions & Answers

1. *Does Section 106 of the National Historic Preservation Act (NHPA) apply to emergency responses to spills of hazardous substances and oil?*

Section 106 of the NHPA requires federal agencies to consider the effect on historic properties before a federal or federally assisted undertaking. The NRT ad-hoc committee was charged with deciding if and how Section 106

should be followed, not whether Section 106 is a legal requirement. The committee members and the NRT agreed that it is important to protect historic properties during emergency response and that the OSC, as the federal official most intimately involved in emergency response, should therefore consider the impact of emergency response on historic properties.

2. *Why is a programmatic agreement needed?*

Protecting historic properties is important; understanding how to do so is not that simple, especially during emergency response to a release or spill. The Advisory Council on Historic Properties (ACHP), has promulgated extensive regulations on Section 106. Professionals possess expertise on historic properties. The PA provides a road map for making an informed judgment on protecting historic properties during emergency response to a release or spill.

3. *If the guidelines of the PA are followed, can the responsible federal agency be sued?*

The regulations promulgated by the ACHP provide that compliance with the PA will be deemed to be compliance with Section 106. That means that the government and its employees are much less likely to be sued and much more likely to prevail if they are sued.

4. *Do Section 106 and the PA mean that emergency response can be delayed or stopped entirely?*

No. The OSC's first priority is protection of public health and the environment. The PA does not change that. Neither the PA nor Section 106 is designed to stop an emergency response. They require that the potential effects of undertakings on historic structures be considered.

5. *Is there help in complying with the PA?*

Yes. The PA details a host of federal, state and private parties who will help the OSC. These include professionals in the National Program Center of the National Park Service, State Historic Preservation Officers (SHPO) and historic property experts. (The Governor as part of a State's participation in National Historic Preservation Act programs appoints SHPOs. They are the primary source of information on historic properties on non-federal lands.) The key to considering potential effects on historic structures is pre-incident planning, so that expertise is available when the OSC actually requires assistance. After an environmental emergency arises funding will be available from the Superfund or the Oil Spill Liability Trust Fund to pay for assistance to the OSC. All of this is detailed in the PA.

6. *What are the Advisory Council on Historic Preservation and the National Conference of Historic Preservation Officers and how is their assistance obtained?*

The ACHP and the NCSHPO are signatories to the Programmatic Agreement. The Advisory Council is the federal council responsible for administering the National Historic Preservation Act. The NCSHPO is the

national organization of SHPOs, which signed the Programmatic Agreement on behalf of individual SHPOs. Both groups will provide general assistance to the OSC and help in the event the OSC is unable to enlist the participation of the SHPO.

The Programmatic Agreement is available on the web. The address is www.achp.gov/NCP-PA.html.