

Chapter 18
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Chapter 18

EMERGENCY ENVIRONMENTAL COMPLIANCE PROCEDURES

18.1 NEPA EMERGENCY COMPLIANCE PROCEDURES

The Council on Environmental Quality (CEQ) has provided flexibility to agencies for complying with the National Environmental Policy Act (NEPA) (42 USC 4321 et seq.) in emergency situations. Such flexibility is expressly authorized in CEQ's regulations, contained in title 40, Code of Federal Regulations, that implement the procedural provisions of NEPA. NEPA Emergency procedures apply only to compliance with NEPA and not emergency compliance with individual laws or regulations specific to, but not limited to, the National Historic Preservation Act, the Endangered Species Act, or the Clean Water Act.

As summarized by the Federal Highway Administration (FHWA) (*Environmental Compliance During Emergencies* [FHWA Emergency Procedures](#)), the clearest definition of an emergency is when a situation is declared an emergency by the State Governor or by the President under the Stafford Act (PL 100-707), which provides the legal authority for the Federal Government to provide assistance to states and local public agencies during declared emergencies. In emergency situations involving immediate threats to public health or safety, or immediate threats to property or natural resources, emergency repairs can start immediately without environmental reviews, however this approach does not exempt the State or Local Public Agency from liability if their actions caused further harm to a resource. All other repairs, including permanent restoration, require the completion of environmental reviews as noted below prior to the start of permanent repair work.

Emergencies are occurrences requiring highway system/facility repairs necessary to protect the life, safety, or health of the public; or minimize the extent of damage to the highway system/facilities; or protect remaining highway facilities; or restore essential traffic. Subject to the applicability of emergency relief addressed in 23 USC 125, most emergency relief projects and repairs qualify as a categorical exclusion (CE) under 23 CFR 771.117(c)(9), which includes the repair, reconstruction, restoration, retrofitting, or replacement of eligible facilities if the work: 1) occurs within the existing right-of-way; 2) conforms to the pre-existing design, function, and location as the original; and 3) is commenced within two years of the date of disaster.

The following NEPA process applies only to those actions subject to the applicability of emergency relief addressed in 23 USC 125 for construction of a "comparable facility". Any emergency related repairs that provide for something other than a "comparable facility" must follow the standard non-emergency NEPA compliance process.

Typically, the NEPA compliance conducted for a permanent repair meeting the requirements of an emergency assesses both the impacts from the immediate repair response at the time the emergency occurred as well as the permanent emergency action.

If the proposed action does not qualify as a CE, the lead agency should then determine the significance of environmental impacts of the proposed action. If the expected environmental impacts from the proposed action are not considered to be “significant” or the significance of the environmental impacts are unknown, an Environmental Assessment (EA) should be conducted.

If the proposed action is expected to have significant environmental impacts based on the findings from the EA, CEQ regulations (40 CFR 1506.11) provide for alternative arrangements for NEPA compliance in emergency situations when the agency proposal has the potential for significant environmental impacts and would require an EIS, but there is insufficient time to prepare the EIS before taking action. Alternative arrangements do not waive the requirement to comply with NEPA but establish an alternative means for NEPA compliance. NDOT and FHWA will follow the regulatory and policy framework for the NEPA reviews of emergency relief projects in accordance with 23 CFR 771.771(c)(9), 23 CFR 771.131 and the [FHWA Emergency Relief Manual](#).

Additional guidance is provided in Section 1432 of Fixing America's Surface Transportation (FAST) Act. Guidance provided in the [FAST Act Questions and Answers Related to Emergency Exemptions for Reconstruction Projects, Federal Highway Administration, Federal Railroad Administration, and Federal Transit Administration](#) issued in 2016, provides an option to meet environmental requirements for certain reconstruction projects using expedited procedures that currently exist for the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), Sections 402 and 404 of the Clean Water Act (CWA), and Section 7 of the Endangered Species Act (ESA).

18.2 NATIONAL HISTORIC PRESERVATION ACT EMERGENCY COMPLIANCE PROCEDURES

This section describes the procedures for complying with Section 106 of the National Historic Preservation Act (36 CFR 800) for emergency projects where the FHWA is the lead Federal agency.

Procedures Applicable to All Situations

According to 36 CFR 800.12(d), procedures applicable to all situations include the following considerations.

- An emergency for Section 106 purposes occurs only when one is declared by the President of the United States, the state governor, or a Tribal government.
- Emergency undertakings are only applicable for 30 days after the emergency is formally declared. For the compliance actions to be associated with an emergency, they need to be implemented within the 30-day period. Cultural Resources monitoring and reporting are standard in these situations.
- An extension of the 30-day period can be requested.

- Immediate rescue and salvage operations conducted to preserve life and property are exempted from provisions of Section 106 and this part. If the actions can be delayed without endangering lives or property, then the action is not exempted.
- Consultation must proceed.
- After the initial 30-day period, standard Section 106 procedures commence. This is a shift from “response” to “recovery” procedures.
- The process involves the Federal Agency Official (FHWA-NV), the Nevada State Historic Preservation Office (SHPO), the applicable Tribal Historic Preservation Office (THPO), and Tribes.
- Answers to questions about the process can be found at: <https://www.achp.gov/digital-library-section-106-landing/role-section-106-disaster-response-frequently-asked-questions>.
- The agency must first determine whether it will be carrying out, assisting, or permitting an undertaking with the potential to affect historic properties in response to or as a result of a disaster or emergency.
- The assessment is limited to effects that are associated with the response to the emergency, and mitigation should consider treating the effects from the emergency itself.

FHWA/NDOT Cultural Resources Programmatic Agreement

Sections of the FHWA/NDOT Cultural Resources Programmatic Agreement (PA), amended in 2020 (<https://www.dot.nv.gov/home/showpublisheddocument/18177/637401775002270000>), are applicable to emergency procedures. The following apply only if NDOT notifies the SHPO within seven days. These are applicable to all funding sources.

- Triggered by occurrences that require emergency highway system/facility repairs that are necessary to protect the life, safety, or health of the public; minimize the extent of damage to the highway system/facilities; protect remaining highway facilities; or restore essential traffic.
- Undertakings accomplished within the first 30 days will comply with Section VI (PA’s Section 106 Procedures) to the extent possible, but consultation can take place after the fact.
- Undertakings to be accomplished after the first 30 days will comply with Section V prior to the execution of those undertakings.
- Consultation with the FHWA, SHPO, agencies, and Tribes shall start within 24 hours and continue robustly.

18.3 EMERGENCY CONSULTATION PROCEDURES PURSUANT TO THE ENDANGERED SPECIES ACT

An emergency under the Endangered Species Act (ESA) is a situation involving “an act of God, disasters, casualties, national defense, or security emergencies, etc.” (50 CFR 402.05) and includes response activities that must be taken to prevent imminent loss of human life or property. Predictable events usually do not qualify as emergencies under the Section 7 regulations unless there is a significant unexpected human health risk. Emergency Response has three parts: immediate response, emergency opening, and permanent restoration. The procedures here apply to the immediate response and some emergency openings where, for instance, access for first responders meets the definition of “emergency” under the ESA. For roadways to qualify for emergency consultation, they must be used by the general public or emergency crews to access or provide basic necessities, like food, medicine, power, natural gas lines, etc.

The responsibility to conduct emergency ESA consultation with the U.S. Fish and Wildlife Service (USFWS) was not delegated to state DOTs but remains with the FHWA. Therefore, it is important to coordinate with both the FHWA Nevada Division and the USFWS.

During emergency events, protection of human life and property takes precedence over considerations for minimizing adverse effects to listed species under the ESA. The protection of listed species and designated critical habitat is initiated only when it will not interfere with the emergency response to protect human life and property. Emergency response personnel should NOT wait for ESA "approvals" before implementing actions they believe are necessary to protect human lives. Therefore, no emergency response is to be delayed or obstructed because of ESA considerations.

STEP 1: Initiating Contact

The NDOT biologist will contact FHWA Nevada Division and USFWS by telephone and email, providing both with the project location, a description of the emergency response action(s) and timelines.

Initial contact with USFWS staff helps in determining how emergency response activities may affect listed species critical habitats and helps USFWS to develop measures to avoid or minimize potential effects. This coordination facilitates expedited Section 7 consultation under the ESA, as amended (USFWS and NMFS 1998).

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STEP 2: Recommendations by USFWS

During the initial contact, USFWS will offer recommendations to minimize the effects of emergency response activities to listed species or their critical habitat, including ways to minimize take. Such recommendations are strictly advisory and are to be implemented at the discretion of the emergency response personnel. Notes should be taken, and a record kept in project files.

As soon as possible (typically within 48 hours), USFWS will provide formal written correspondence to explain the protective procedures that were identified during the initial contact. This written correspondence provides both agencies with an accurate record of the initial contact and serves as a reminder of the recommendations made during the initial emergency consultation.

STEP 3: Service Evaluation

NDOT biologists will continue to work with the FHWA Nevada Division and USFWS to evaluate the emergency. If this evaluation indicates that the emergency response procedures may result in jeopardy/adverse modification, and no means of reducing or avoiding this impact are available, USFWS will advise NDOT/FHWA of this and document this conclusion. NDOT/FHWA will not stop or delay their emergency response because of this notification. In such a situation, NDOT, FHWA and USFWS will discuss actions to remediate the effects following conclusion of the emergency.

STEP 4: Emergency Actions Conclude

Once emergency actions have concluded, NDOT/FHWA will identify any incidental take of a species, if possible, and any adverse effects to species, their suitable habitats, and critical habitat that resulted from the emergency actions and initiate formal consultation. This formal consultation follows standard procedures, includes a description of what actions NDOT/FHWA took to respond to the emergency, and identifies the final impacts to listed species.

STEP 5: Consultation Completed

The USFWS will prepare an after-the-fact biological opinion to document any adverse effects to species and critical habitats that occurred from implementing the emergency response. This biological opinion could contain measures for after-the-fact remediation in the form of reasonable and prudent alternatives (RPAs), or reasonable and prudent measures (RPMs) when there is an ongoing action related to the emergency. With the finalization of the biological opinion and completion of any RPMs or RPAs, NDOT/FHWA will have completed their compliance with the ESA.

ESA Emergency Consultation Resources

Final ESA Section 7 Consultation Handbook, March 1998, Chapter 8, Emergency Consultation
<https://www.fws.gov/endangered/esa-library/pdf/chapter8.pdf>

18.4 ENDANGERED SPECIES ACT EMERGENCY COMPLIANCE PROCEDURES FOR DESERT TORTOISE

This section describes the procedures for complying with the ESA requirements for desert tortoise under emergency project conditions.

Currently, Ms. Kelly Douglas of the USFWS Field Office in Las Vegas is the USFWS representative for all projects funded by the FHWA. This office has oversight for Section 7 consultations under the ESA involving NDOT's Environmental Division and FHWA-NV Environmental Program Manager.

According to the Final ESA Section 7 Consultation Handbook (March 1998), the ultimate responsibility for compliance with Section 7 remains with the Federal agency (50 CFR §402.08). Section 7 regulations recognize that an emergency (natural disaster or other calamity) may require expedited consultation (50 CFR §402.05). Emergency consultations should be handled with as much understanding of the action agencies' critical mission as possible while ensuring that anticipated actions will not violate ESA sections 7(a)(2) or 7(d).

Emergency ESA compliance procedures include the following.

- **Initial Contact with the FHWA and USFWS Representatives**

Initial stages of emergency consultations usually are done by telephone or email, followed by written correspondence from USFWS as soon as possible (within 48 hours, if possible). The record also provides the requesting agency a formal document reminding them of the commitments made during the initial emergency consultation.

- **Initiate Formal Consultation**

Once the emergency is under control, the NDOT Environmental Division biologist will initiate formal consultation with USFWS if listed species or critical habitat have been adversely affected. The action agency will provide the following information to initiate formal consultation following the emergency:

- a description of the emergency,
- a justification for the expedited consultation, and
- an evaluation of the response to and the impacts of the emergency on affected species and their habitats, including documentation of USFWS recommendations implemented, and the results of implementation in minimizing take.

- **Emergency Biological Opinion**

USFWS will issue an emergency biological opinion. The "effects of the action" section of the biological opinion will document the recommendation provided by USFWS to the action agency and the results of agency implementation of the recommendations on listed species. The timeframe (135 days), format, and contents are the same as under formal consultations.

- **Incidental Take Statement**

If incidental take is anticipated during the emergency response, USFWS can advise the action agency during the informal consultation of ways to minimize take. In some circumstances, the actual or estimated take occurring from the agency's emergency response actions can be determined and should be documented in the biological opinion for future inclusion in the species environmental baseline. The incidental take statement in an emergency consultation does not include reasonable and prudent measures or term and conditions to minimize take, unless the agency has an ongoing action related to the emergency.

- **Conservation Recommendations**

Emergency consultations may contain conservation recommendations to help protect listed species and their habitat in future emergency situations or initiate beneficial actions to conserve the species.

18.5 AIR QUALITY, TRAFFIC NOISE, AND HAZARDOUS MATERIALS EMERGENCY COMPLIANCE PROVISIONS

No specific alternative procedures are in place to comply with air quality, traffic noise, and hazardous materials laws and regulations under emergency situations. All emergency work is subject to the same environmental terms and conditions.

Emergency-related exemptions from project-level conformity are allowed under the Clean Air Act (40 CFR 93.126).

18.6 WATER RESOURCES PERMITTING EMERGENCY COMPLIANCE PROCEDURES

Emergency guidance is provided by the U. S. Army Corps of Engineers (USACE) Sacramento District in Regional General Permit #8 and by the Los Angeles District in Regional General Permit #63. The steps below are what have been used and agreed to by the USACE and US Environmental Protection Agency (EPA) jurisdictions in Nevada, and the Nevada Division of Environmental Protection (NDEP)

Step 1: Review proposed emergency work to be performed, including location, scope of work, and Notice to Proceed (NTP) date.

Step 2: Send email to NDOT Project Coordinator and Environmental Services staff with a Water Quality Permitting Summary (permitting requirements and who is responsible for obtaining the permits). If construction activities involve a discharge of dredged or fill material into Waters of the U.S. (WOTUS), a USACE Section 404 Clean Water Act (CWA) permit and a NDEP Section 401 Water Quality Certification (WQC) may be required. EPA and/or NDEP Stormwater Construction

General Permit (CGP) coverage may be required depending on the amount of land disturbance and/or location of the project. If equipment physically enters a Waters of the State to perform work, an NDEP Temporary Working in Waterways Permit may be required.

Step 3. Emergency Water Resources Permitting.

3a. USACE Section 404 CWA and/or USACE Section 10 Rivers and Harbors Act (RHA) Permit and NDEP Section 401 WQC.

- **USACE Section 404 CWA Maintenance Exemptions:** An exemption from Section 404 permit requirements for maintenance work may potentially allow emergency maintenance work to occur without the need for a Section 404 permit from USACE (Section 404(f)(1)(B)). As stated in USACE regulations (33 CFR 323.4(a)(2)), the exemption allows for “maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures”. This exemption only allows for maintenance that would not change “the character, scope, or size of the original fill design”, so this exemption only allows for “in-kind” replacement of facilities. Also, emergency reconstruction must occur within a reasonable period of time after the damage occurs to qualify for the exemption. When activities qualify for a USACE Section 404 CWA permit exemption, a USACE Section 404 permit is not required. NDEP Section 401 WQC would also not be required unless the activity requires another Federal permit or license that would result in a discharge into a WOTUS. Another Section 404 maintenance exemption that may apply to an emergency repair project is included in Section 404(f)(1)(C) for the maintenance of drainage ditches. See joint Department of the Army, USACE, and EPA memo for more guidance on the application of this 404 exemption (located at: [Joint Memorandum on Ditch Maintenance](#)).
- **USACE Nationwide Permits or Other General Permits:** If the proposed emergency activities don’t qualify for one of the Section 404 exemptions for maintenance activities, the project may qualify for an existing USACE Nationwide Permit (NWP) such as Nationwide Permit 3 (Maintenance), 14 (Linear Transportation Projects), or 23 (Approved Categorical Exclusions), or a Regional General Permit issued by the Sacramento District. For instance, Regional General Permit 8 provides for Section 10 RHA and Section 404 CWA authorization for repair or protection measures associated with an emergency situation, which is defined in the permit as “one which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a Department of the Army permit is not undertaken within a time period less than the normal time to process the request under standard permitting procedures.”
- **USACE Section 404 Individual Permits:** If the work does not qualify for a Section 404 exemption, a Nationwide Permit, or other general permit, the work may be eligible for an individual permit from USACE. In emergency situations, USACE Division Engineers can approve special processing procedures that can expedite the individual permit process (33 CFR 325.2(e)(4)). Any such procedures for emergency situations would be announced via a public notice by the USACE Sacramento District.

- **NDEP Section 401 WQC:** Required if work requires a USACE Section 404 permit or other Federal permit or license involving a discharge into a WOTUS

3b. EPA and NDEP Stormwater Construction General Permit (CGP): Construction projects with > 1 acre of land disturbance (or < 1 acre but part of a larger common plan of development) that discharge to WOTUS.

- **EPA CGP** coverage is required for emergency construction activities that are performed on **tribal lands**. Construction activities may commence prior to notification, but notification and documentation for Storm Water Pollution Prevention Plan (SWPPP) and Notice of Intent (NOI) must be submitted within 30 calendar days after commencing construction activities establishing eligibility for coverage. Documentation must be provided within the SWPPP to substantiate the occurrence of the public emergency. The contractor must contact the EPA to obtain coverage.
- **NDEP CGP** coverage is automatically authorized for emergency-related construction activities on non- tribal lands provided:
 - the operator is conducting earth-disturbing activities in response to a public emergency, and the related work requires immediate authorization to avoid imminent endangerment to human health, public safety, or the environment, or to reestablish essential public services;
 - if the activity continues past 30 calendar days of commencing construction activities, the operator shall prepare a SWPPP and submit an NOI;
 - the operator provides documentation in the SWPPP to substantiate the occurrence of the public emergency; and
 - the operator complies with all other applicable requirements in the permit regarding discharges associated with the construction activities.
 - Operators of emergency-related construction activities are considered provisionally covered under the terms and conditions of the CGP immediately and are fully covered within 14 calendar days after NDEP receives a complete NOI and application fee.
 - If a project is less than 1 acre in size is within ¼ mile of a WOTUS, CGP coverage is at the discretion of NDEP. It is recommended the contractor (operator) contact NDEP to verify that CGP coverage will be required.

3c. NDEP Temporary Working in Waterways Permit coverage is authorized immediately with immediate notification to NDEP until a permit can be initiated (as soon as possible). For after hours or weekends, the spill hotline is always available, and NDEP can be notified through the spill hotline at (775) 687-9485.

18.7 SECTION 4(F) PROCEDURES

FHWA's 2012 Section 4(f) Policy Paper addresses emergencies as follows:

30. Emergencies

Question 30: How does Section 4(f) apply in emergency situations?

Answer: In emergency situations, the first concern is responding to immediate threats to human health or safety, or immediate threats to valuable natural resources. Compliance with environmental laws, such as Section 4(f), is considered later. The FHWA may participate in the costs of repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered serious damage as a result of (1) natural disasters or (2) catastrophic failures from an external cause. The Emergency Relief (ER) Program (23 U.S.C. § 125) supplements the commitment of resources by States, their political subdivisions, or other Federal agencies to help pay for unusually heavy expenses resulting from extraordinary conditions. As FHWA retains discretionary control over whether to fund projects under this program, Section 4(f) applies to all ER funding decisions. The general sequence of events following the emergency is:

1. Restore essential service. State and local highway agencies are empowered to respond immediately, which includes beginning emergency repairs to restore essential traffic service and to prevent further damage to Federal-aid highway facilities. Section 4(f) compliance is not required at this stage.
2. Governor's proclamation
3. Preliminary notification
4. Acknowledgement
5. Damage assessments
6. Formal state request
7. Division Administrator's finding
8. Implementation of projects (this is where Section 4(f) compliance occurs)

Under the ER Program, repairs are categorized either as “emergency” or “permanent.” Emergency repairs are made during and immediately following a disaster to restore essential traffic, to minimize the extent of damage, or to protect the remaining facilities. Permanent repairs to restore the highway to its pre-disaster condition normally occur after the emergency repairs have been completed.

Section 4(f) compliance occurs during the “implementation of projects” stage for both emergency repairs and permanent repairs. For emergency repairs, Section 4(f) compliance is undertaken after the emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as part of the normal NEPA project development process, just as it would be for any other type of Federal-aid or Federal lands project (i.e. it must be completed prior to the authorization of right-of-way and construction).