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Seminar**

**OSC Readiness Presents...Natural Resource
Trustees and the Laws They are Required to
Enforce**

Sponsored by: U.S. EPA, Office of Superfund Remediation and Technology Innovation

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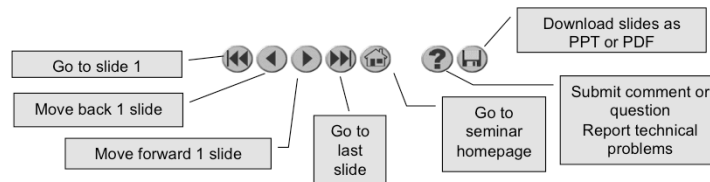
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- Q&A
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With that, please move to slide 3.

Natural Resource Trustees

Course Objectives

- Understand the legal and regulatory basis for notification and coordination activities with Natural Resource Trustees
- Acquire a general understanding of what are natural resources, who are Natural Resource Trustees, and what are trust resources
- Provide guidance for compliance with requirements of the Endangered Species Act and the National Historic Preservation Act during conduct of removal activities

Statutory Framework

- CERCLA and OPA authorize the United States, States, and Tribes to act on behalf of the public as Natural Resource Trustees for natural resources under their trusteeship [CERCLA §107(f)(1); OPA §1006(c)]
- OPA also authorizes foreign governments to act as Trustees [OPA § 1006(b)(5)]

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- OSWER Directive 92004.22A; *CERCLA Coordination with Natural Resource Trustees*, 1997

What are Natural Resources?

- CERCLA and OPA define natural resources broadly to include land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources [CERCLA §101(16); OPA §1001 (20); 40 CFR 300.5]
- Both statutes limit natural resources to those resources belong to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any, State, an Indian Tribe, a local government, or a foreign government

Who are the Natural Resource Trustees?

- Federal - Secretaries of Agriculture, Commerce, Defense, Energy, Interior (40 CFR 300.600)
- State - designated by the Governor (40 CFR 300.605)
- Tribal - designated by Tribal Chairmen or the Secretary of the Interior may serve as trustee at request of the tribe (40 CFR 300.610)
- Other – Under OPA, foreign officials can also act as Trustee (40 CFR 300.612)

Department of Agriculture



- Federal rangeland
- Federally-managed fisheries
- Federally-owned or managed farmland
- Land enrolled in the Wetlands Reserve Program
- National Forest System land

Department of Commerce

- Coastal environments, including salt marshes, tidal flats, estuaries, or other tidal wetlands
- Endangered marine species
- Marine mammals
- Rivers or tributaries to rivers which historically or presently support anadromous fish



Department of Defense



- All lands owned by the Department of Defense or the Air Force, Navy, and Defense Logistics Agency
- These lands include military bases and training facilities, research and development facilities, and munitions plants

Department of Energy

- Natural Resources under its jurisdiction, custody or control
- These lands include national research and development laboratories, facilities, and offices

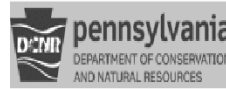


Department of the Interior



- Certain anadromous fish
- Certain endangered species
- Certain marine mammals
- Migratory birds
- National Wildlife Refuges and Fish Hatcheries
- National Parks and Monuments
- Tribal Resources

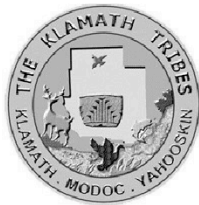
State Natural Resource Trustees



NEW MEXICO OFFICE OF NATURAL RESOURCES TRUSTEE



Indian Tribes



Co-Trusteeship

- Federal and state agencies and Indian Tribes may be co-trustees for the same natural resource [40 CFR 300.615(a)]
- Examples:
 - Department of the Interior and States are co-trustees for migratory birds
 - Departments of Commerce and Interior can be co-trustees for certain natural resources
 - Sea turtles are the trust responsibility of Commerce in water and Interior on land
 - States are co-trustees with Commerce and Interior for sea turtles both at sea and on land

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NCP Directs Federal On-Scene Coordinators and Natural Resource Trustees to work together

- OSCs must work with natural resource trustees in specific preparedness and response activities, to help ensure that natural resources are protected when they are at risk from an actual or potential hazardous substance release or oil spill [40 CFR 300.135(j)]
- Trustees must provide timely advice concerning recommended actions with regard to trustee resources potentially affected by such releases or spills [40 CFR 300.305(e) and 615(c)(3)(i)]
- Trustees must coordinate natural resource damage assessment activities with response operations and provide data from these activities that may support more effective operational decisions to the OSC in a timely manner [40 CFR 300.305(e) and 615(c)(3)(ii)]

What are the OSC Responsibilities to Trustees during Preparedness Activities?

- Consult trustees in writing the Fish and Wildlife and Sensitive Environments Plan of the Area Contingency Plan [40 CFR 300.210(c)(4)]
- Obtain concurrence for preapproval of application of specific countermeasures such as use of dispersants, in situ burning, bioremediation, and so on [40 CFR 300.210(c)(4)(ii)(D) and 910(a)]

What are the OSC responsibilities to Trustees during Response Activities?

- Notify trustees of incidents [40 CFR 300.135(j)(1), 300.305(e), 300.320(a)(5)]
- Consult trustees about protection priorities and methods [40 CFR 300.135(j)(2)]
- Share non-monetary response resources with trustees conducting Natural Resource Damage Assessment activities so long as this does not hinder response activities [40 CFR §300.305(e) and 615(c)(3)(iii)]
- Federal agencies assisting the OSC in response to an oil spill may be reimbursed [40 CFR 300.335(b)]

What are the Trustee responsibilities during Preparedness Activities?

- Participate in area committees to identify fish and wildlife sensitive environments and strategies for protecting and treating them, for inclusion in the Area Contingency Plan [40 CFR 300.210(c)(4) and 615(c)(3)(i)]
- Provide concurrence for preapproval of application of specific countermeasures such as use of dispersants, in situ burning, bioremediation, and so on [40 CFR 300.210 (c)(4)(ii)(D) and 910(a)]

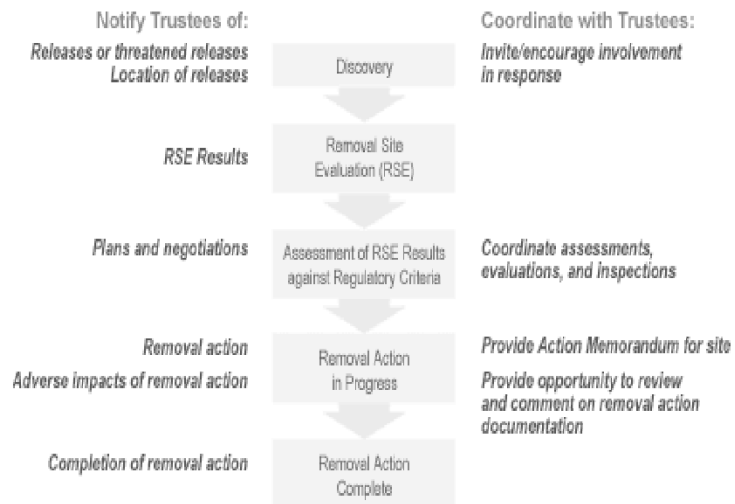
What are the Trustee responsibilities during Response Activities?

- Work with OSCs, who are required to “coordinate all response activities with the affected natural resource trustees and, for discharges of oil . . . Consult with affected trustees on the appropriate removal action to be taken” [40 CFR 300.135(j)(2)]
- Provide timely advice to the OSC on trustee resources that are potentially affected by a discharge of oil, including identifying/recommending preapproved response techniques [40 CFR 300.305(e) and 615(c)(3)(i)]
- Designate a lead administrative trustee to serve as the focal point for coordination between natural resource damage assessment activities and response operations [40 CFR 300.305(e) and 615(c)(3)(ii)]

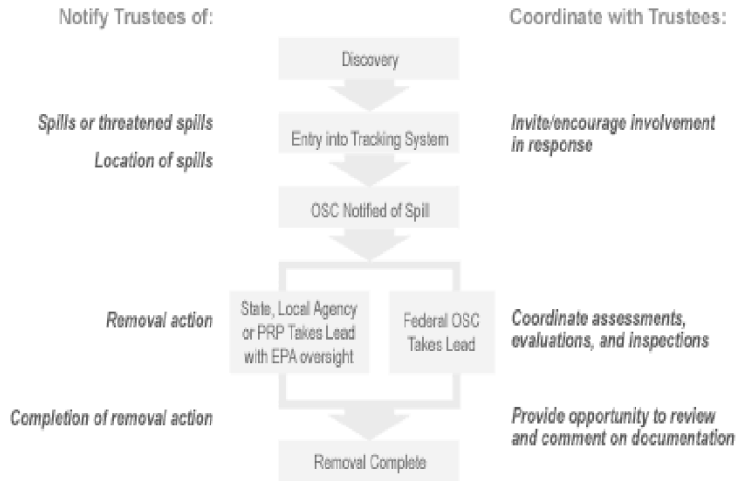
What are the Trustee responsibilities during Response Activities?

- Ensure that natural resource damage assessment activities do not interfere with response operations [40 CFR 300.615(c)(3)(ii)]
- Provide data from natural resource damage assessment activities that may support more effective operational decisions to the OSC in a timely manner [40 CFR 300.305(e)]

Removal Actions – Notification and Coordination Flow Chart



OPA Actions – Notification and Coordination Flow Chart



Trustee Activities in Emergency Response

- Identify/prioritize resources at risk
- Evaluate protective measures and cleanup strategies
- Participate in post-cleanup inspection
- Wildlife rehabilitation

Trustee Participation in ICS/UC in Support of Response

- Command
- Operations
- Planning
- Logistics
- Finance/Administration

Other Trustee Responsibilities for Natural Resource Damage Assessment and Restoration

- Assess the extent of injury to a natural resource and determine appropriate ways of restoring and compensating for that injury
- Natural Resource Damage Assessment (NRDA) is the process of collecting, compiling, and analyzing information to make these determinations [40 CFR 11 and 15 CFR 990]

Major Concepts in NRDA

- Damages are monetary compensation for injuries residual to response actions
- Damages are compensatory, not punitive
- Public and responsible parties are involved in process
- Recovered damages must be used for restoration

NRDA Process

- Framework consists of four sequential phases:
 - Pre-assessment Screen (determine whether an injury has occurred and a pathway of exposure exists)
 - Assessment Plan (how potential damages will be evaluated)
 - Assessment Implementation (gather data necessary to quantify the injuries and determine damages)
 - Post-Assessment (results of Assessment Implementation phase)

Trustee Responsibilities beyond CERCLA and OPA

- Trustees have statutory responsibilities to protect natural resources that may affect their actions and recommendations during a hazardous substance release or an oil discharge
- These laws may authorize them to take protective actions with or without OSC concurrence and to recover their costs from the responsible party

In Review

- EPA is responsible for:
 - Notifying Trustees
 - Coordinating activities
- When a Natural Resource is injured, Trustees are responsible for:
 - Assessment
 - Restoration
- EPA encourages participation by all affected Trustees
- Notification and coordination occurs throughout CERCLA and OPA processes

Questions?

Special Topics

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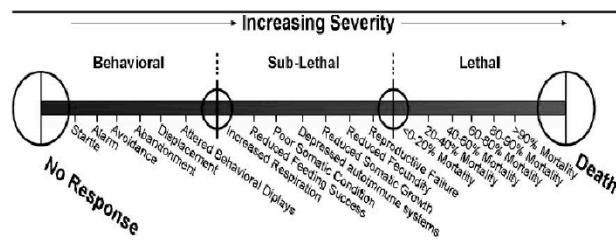
Endangered Species Act (ESA)

- ESA provides a means for conserving various species of fish, wildlife, and plants that are threatened with extinction, and designation of critical habitat
 - Administered by USFWS (terrestrial and freshwater fish species) and NMFS (marine and anadromous fish species)
- 1,372 vertebrate and invertebrate and plant species listed as Threatened and endangered
- Critical habitat designated for 607 of the listed species

Section 7 – Role of Federal Agencies

- Federal agencies shall utilize their authorities to carry out their programs for the conservation of endangered and threatened species [ESA §7(a)(1)]
- Federal agencies insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species [ESA §7(a)(2)]
- Regulations – 40 CFR Part 402

- Are there any species which is listed or is proposed for listing as threatened or endangered that may be present in the area of the proposed action
- Consultation is required if an action “may affect” listed species or critical habitat [40 CFR 402.14]
- Effect: any response to stressor; consider the individual



Effects to Analyze

- Beneficial effects
- Direct effects
- Indirect effects
- Effects of interrelated actions
- Effects of interdependent actions

Factors to be Considered when Determining Effect

- Proximity of the action to listed species
- Duration
- Proximity of the effects to listed species
- Type of effects
- Distribution of the species and listed habitat use
- Frequency, intensity, severity
- Timing of the effects

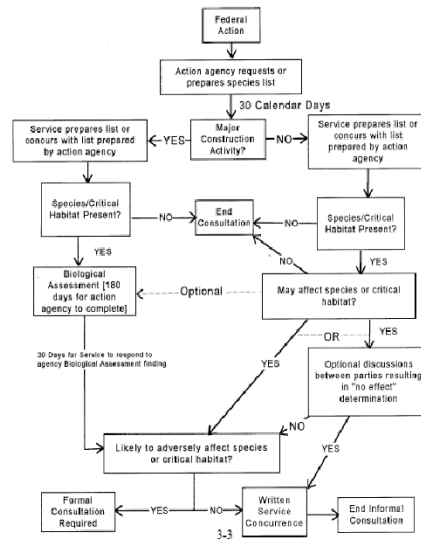
Effects Determinations

- No effect = no consultation
- Is not likely to adversely affect = informal consultation
- Is likely to adversely affect = formal consultation

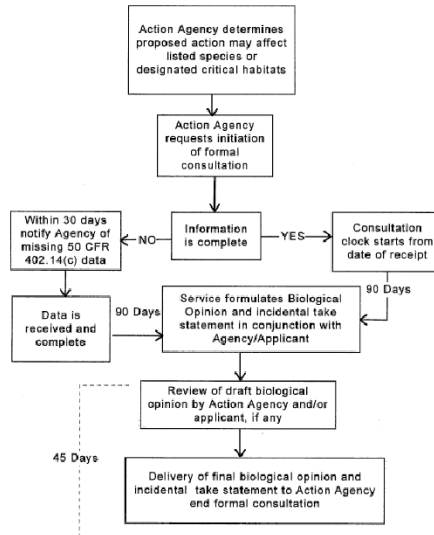
Consultation

- Informal
- Formal
- Emergency

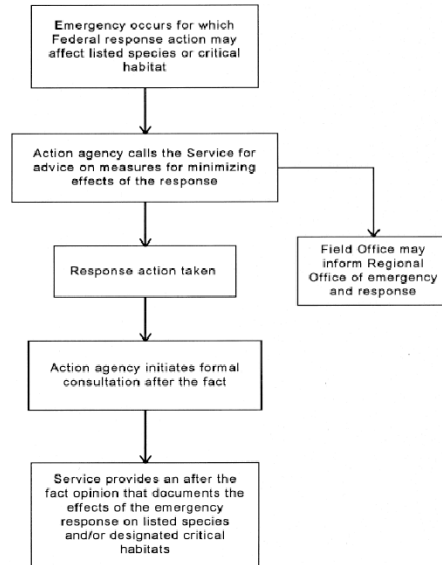
Informal Consultation Process



Formal Consultation Process



Emergency Consultation Process



In Review

- Must determine whether federally listed species or its critical habitat will be affected by a response action
- If so, must avoid the action or take appropriate mitigation measures so that the action does not affect the species or its critical habitat
- Informal consultation, formal consultation, and emergency consultation

Web sites

- US Fish & Wildlife Service Endangered Species Web site

www.fws.gov/endangered/

- NOAA Fisheries Service Endangered Species Web Site

www.nmfs.noaa.gov/pr/species

Questions?

National Historic Preservation Act (NHPA)

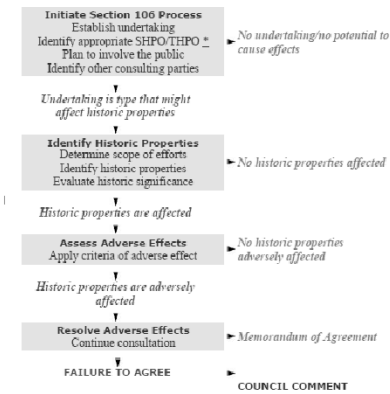
- Directs federal agencies to take into account the effect of any undertaking (a federally funded or assisted project) on historic properties
- “Historic property” is any district, building, structure, site, or object that is eligible for listing in the National Register of Historic Places because the property is significant at the national, state, or local level in American history architecture, archeology, engineering, or culture
 - Typically a historic property must be at least 50 years old and retain integrity

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State Historic Preservation Officers & Tribal Historic Preservation Officers

- State Historic Preservation Officers (SHPOs) administer the national historic preservation program at the State level
- Tribal Historic Preservation Officers (THPOs) have responsibility for preservation of significant historic properties on federally recognized tribal land

NHPA Section 106 Regulations Flow Chart



Cultural Resource Survey

- Archaeology, cultural resource, historic property
- Survey generally consists of:
 - Literature survey
 - Environmental & Cultural Setting
 - Field investigation & Survey findings
 - Analysis
 - Conclusion & Recommendations
 - Consultation

Nationwide Programmatic Agreement for the Protection of Historic Properties during Federal Emergency Response

- 1997 agreement establishes national policy and procedures for protection of cultural resources during emergency response under the NCP
 - Provides an alternate process to ensure appropriate consideration of historic properties within the meaning of NHPA during emergency response to a release or discharge
- An “emergency” exists 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

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Programmatic Agreement for the Protection of Historic Properties during Federal Emergency Response

- Requirements for notification and consultation satisfied if OSC makes reasonable and timely efforts to notify and consult with appropriate parties to the extent reasonably practicable
- Potential effects of emergency response activities include physical destruction
 - Physical destruction, damage, or alteration of all or part of the historic property
 - Isolation of the 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
 - Introduction of visual, audible, or atmospheric conditions that are out of character with the property or alter its setting

Programmatic Agreement for the Protection of Historic Properties during Federal Emergency Response

- Emergency response actions that may have adverse effects on historic properties include
 - Placement of physical barriers to deter the spread of released or spilled substances and the excavation of trenches to stop the spread of the released or spilled substances
 - Establishing camps for personnel, construction materials storage and staging yards, excavating borrow pits for fill materials, and constructing alignments for road access

In Review

- OSC is responsible for ensuring that historic properties are appropriately considered during removal actions
- Programmatic agreement provides process for protection of historic properties during emergency response
- If at any point, the conclusion is reached that cultural resources are not present or will not be affected, no further investigation/action is necessary

Web sites

- National Historic Preservation Program

www.achp.gov

Questions?

Resources & Feedback

- To view a complete list of resources for this seminar, please visit the **Additional Resources**
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