

**The National Historic Preservation Act is NOT Your Problem,  
But How You are Addressing it for Your CERCLA Project May Be – 12344**

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**ABSTRACT**

The 1995 Environmental Protection Agency (EPA) and U.S. Department of Energy (DOE) joint “Policy on Decommissioning of Department of Energy Facilities Under CERCLA[1] was developed so that decommissioning could occur in a manner that ensures protection of worker and public health and the environment, that is consistent with Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[2], that provides for stakeholder involvement, and that achieves risk reduction *without unnecessary delay*.”[3] The source of the “unnecessary delays” the joint policy intended to avert could be attributed to numerous factors such as obtaining permits, conducting administrative activities, or implementing regulatory processes that could yield, among other things, differing preferred alternatives. Why, you might ask, more than fifteen years later, does DOE continue to struggle through CERCLA projects *with* unnecessary delays? From problem identification, to determination of nature and extent, to alternative analysis and ultimately remedy selection and implementation, reaching a compliant and effective clean-up end-point can be a process that seems to mimic geologic timescales. The source of these delays is often the failure to use all of the tools the CERCLA process offers. As one example, renewed commitment to follow the CERCLA process to address the regulatory reviews pursuant to the National Historic Preservation Act (NHPA)[4] is called for. Project managers implementing CERCLA actions in any agency, not only DOE, do not need to be apprehensive about using the CERCLA process for NHPA review but should welcome it. It is critical that methods are used that address substantive NHPA requirements clearly and consistently, and that they are shared and communicated as frequently as needed to interested and questioning stakeholders.

**CERCLA AND NHPA – ONE DESIGNED TO EFFECT CHANGE, THE OTHER TO CHANGE EFFECTS**

CERCLA and NHPA, like most laws, originated in response to events of their times. NHPA, signed into law in 1966, was a response to progress that was changing the look and cohesiveness of American communities. The construction of interstate highways, in particular interstate highways through older U.S. cities, did much to change, bisect and in some instances destroy communities and ways of life – in the name of progress. Citizens mobilized and became involved with a fledgling “preservation movement” in the desire to change the effects of progress on the places that were important to them.[5] CERCLA, which was enacted in 1980, arose out of a need to take action to address contamination which was causing or had the potential to cause risks and hazards to human health or the environment. Over 30 years has passed since CERCLA was signed into law, but the names, Love Canal in Niagara Falls, NY, and Times Beach, MO, resonate still, as does the recognition of the need that spurred the law into place. CERCLA was designed and determined to do the opposite of NHPA – to effect change.

When faced with clean-up efforts in the interest of public and environmental risk and hazard reduction, however, it is necessary for these laws to work together, and to work together in a timely and coordinated manner. When it is the DOE sites and buildings themselves that are contaminated the necessity of timely coordination to take action is clear. It can be difficult for some to see beyond the contamination and notice that what is contaminated is not simply an old

Quonset hut or the visual landmark of a 100' tall brick stack, but an important piece of American history tied to such major world events as the Manhattan Project or the Cold War. The sites bring new meaning to the world "legacy".

Implementation of each law follows its unique regulations. A summary-level flowchart of the process for each of the laws[6, 7] is shown in Figure 1. Both are aimed at solving problems responsively and responsibly. CERCLA, in its essence, is a systematic way to address an environmental problem. The sequence of events at a site engaged in a CERCLA decontamination and decommissioning (D&D) removal action project, our example, has 3 phases, as shown in Figure 1. The problem is generally identified and assessed via characterization to determine the nature and extent. Working with regulatory stakeholders such as the EPA and/or state clean-up regulators, alternative methods to address the problem are developed pursuant to a number of established evaluative criteria, e.g., feasibility, cost, compliance with laws triggered by the contamination involved, methods to be used to address the contamination, and location of the contamination. Documentation is issued for public review, comments are considered and addressed, an agency decision is made, and ultimately action is taken. There are typically clean-up schedules negotiated, and fines and penalties may be assessed if schedules are not met. CERCLA actions for D&D projects usually occur as "non-time critical removal actions" and generally take between 6 and 18 months to study and reach a decision prior to implementation.

The NHPA review process, referred to as the "Section 106" process, is initiated by the "undertaking" that is the agency action. Instead of trying to address contamination from the effects of the clean-up action, NHPA is aimed at protecting historic properties that may be present from those same effects. The regulatory official most closely involved in NHPA is the State Historic Preservation Officer (SHPO), and may also involve the Advisory Council on Historic Preservation (ACHP), an independent federal advisory body. Section 106 also involves "consulting parties," those individuals or groups who either participate by-right, such as a government official in the town where the proposed action will occur, or by invitation. Consulting parties usually have a demonstrated interest in agency undertakings, for reasons ranging from an economic interest, to a pure historic preservation interest. Members of the public should also play a role in the §106 process and they are an essential voice in federal agency decision-making. The phases of the §106 process move from establishment of an undertaking, identifying the area that may be affected by the undertaking, identifying historic properties in that area, assessing the effects on the identified historic properties, and, where there are adverse effects anticipated, identifying ways to avoid, minimize or mitigate those adverse effects. It is important to note that there are no established timeframes for completion of the §106 level of review that would typically occur with a D&D project that involved an adverse effect to a historic property.

# Two Processes, Two Purposes, Two Decisions

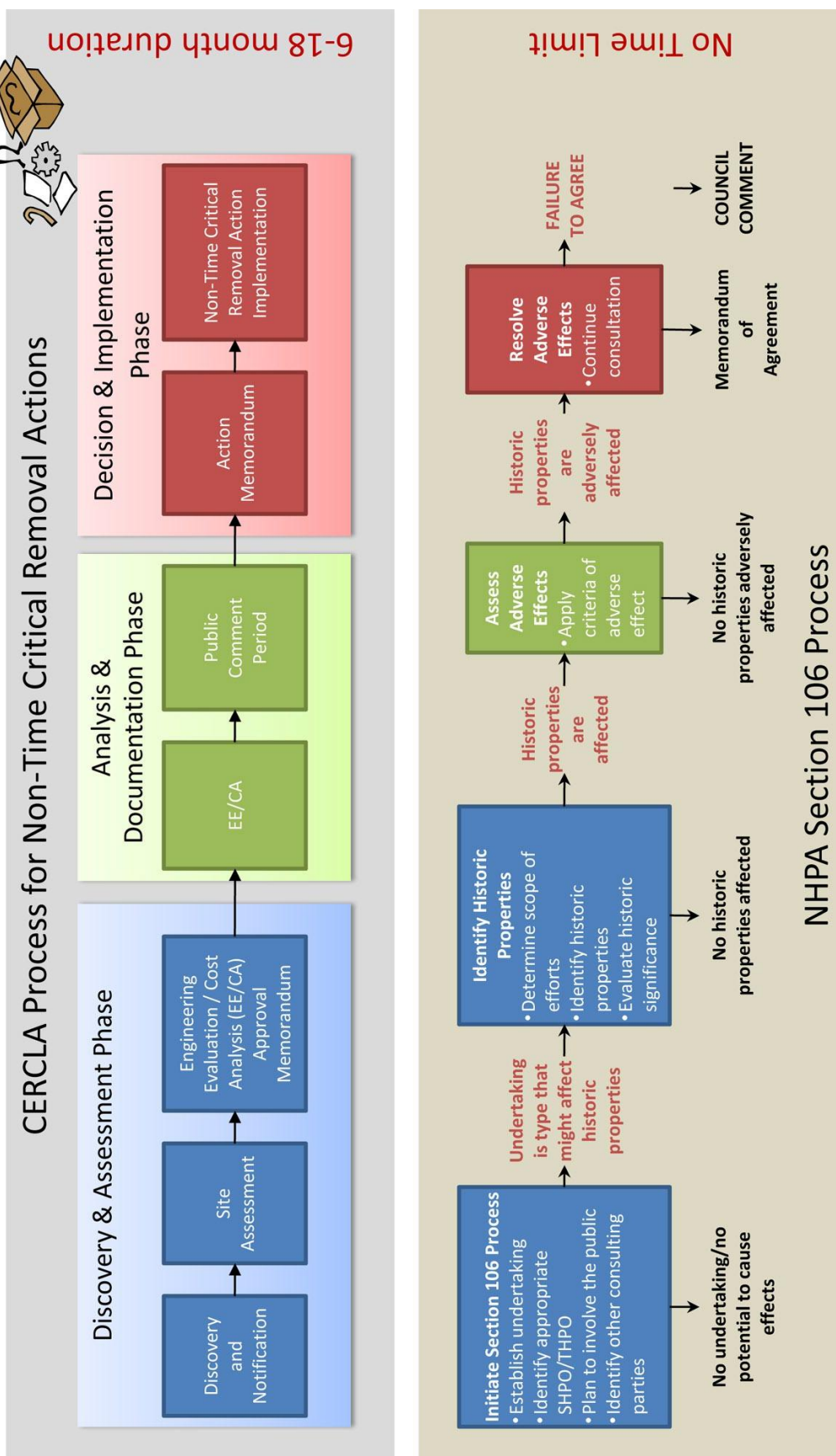


Figure 1. Simplified CERCLA and NHPA 106 processes

### **Opportunities already exist for streamlining clean-up decision-making (and some are being missed)**

With the issuance of the 1995 policy, DOE sites no longer needed to be CERCLA sites in order to use the CERCLA process for D&D work. An escape from the geologic-paced grind was all but guaranteed. DOE's 1994 Secretarial Policy on the National Environmental Policy Act (NEPA)[8], wherein the CERCLA process would be used to address NEPA responsibilities instead of a separate NEPA process provided further streamlining. Based on lessons learned, process knowledge, and sound science, it was anticipated that DOE would be able to move speedily through the sequential and consequential decision trees.

The NHPA and CERCLA processes were designed to work independently, but each also includes options to attain their objectives of clean-up and preservation, respectively. The CERCLA process has a specific method for addressing the individual regulations that are applicable to an action. This method, called the Applicable or Relevant and Appropriate Requirements (ARARs) process, provides for streamlining precisely to expedite risk reduction and clean-up. NHPA also includes opportunities for coordination with other requirements that need to be met by an agency, but no specific objective of streamlining is noted.

The regulatory reviews afforded through the ARARs approach used by CERCLA are - if implemented properly - thorough, informed, informing, structured, and defensible. The CERCLA regulatory reviews provide numerous opportunities for streamlining, public involvement, and progress in attaining mission requirements. All of these objectives are desirable and necessary. Not only is the ARARs method effective and a time-saver for CERCLA projects, it also affords protections against lawsuits[9] and has "as practicable"[10] provisions. From the resource protection point of view, CERCLA decisions are enforceable, so project execution methods or mitigation measures (e.g., that are included in the decision for purposes of protecting historic properties) are binding on the agency. With all of the benefits, the approach is not broadly applied.

The alternative to the consideration of NHPA under CERCLA is to conduct § 106 reviews via the NHPA implementing regulations (36 *Code of Federal Regulations [CFR]* 800.3.6[11]) which can be highly iterative and open-ended. The Secretary of Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs, Standard 5, § 110(a)(2)(D)[12] duly notes "although time limits may be necessary for specific transactions carried out in the course of consultation (*during the 106 process*), there should be no hard and fast time limit on consultation overall. Consultation on a specific undertaking should proceed until agreement is reached or until it becomes clear to the agency that agreement cannot be reached."

While it may be clear to some within the agency that agreement cannot be reached in a §106 process, individuals with decision-making responsibilities are often reluctant to proceed without consensus or to make a decision which can be viewed unfavorably by the media, elected officials, or outspoken critics. The need to continue to work with a SHPO and the ACHP is also a factor to be considered. The consequences of indecision, delayed decisions, or decisions made in conciliation leave the agency in a weakened position while scarce dollars are shifted elsewhere and risks and hazards continue. These are also factors important to be considered.

### **WHERE THE TWAIN CAN MEET – INTEGRATION VIA ARARS**

CERCLA actions must meet certain regulatory standards. In CERCLA, the terms "substantive requirements" and "administrative requirements"[13] are used, as is the construct of the ARARs

process by which a CERCLA action addresses requirements that are either applicable or relevant and appropriate. CERCLA §121[14] notes that procedural requirements are not ARARs under CERCLA. (Refer to the Definitions section for explanation.) The NHPA implementing regulations are silent on what is substantive and what is administrative (procedural). What is *very clear* in the NHPA implementing regulations, though, is the purpose of the implementing regulations – the protection of historic properties.

In reviewing the “CERCLA Compliance with Other Laws Manual,”[13] clarity is offered as to what the NHPA substantive requirements are – the identification of historic properties, identification of effects, examination of feasible alternatives to avoid effects, and minimization or mitigation of the potential effects if avoidance is not possible. Administrative (procedural) actions are also noted, e.g., consultation and coordination between the Federal agency, the ACHP, the SHPO, and other interested parties. The Manual goes on to state, “Although administrative and procedural requirements are not ARARs... adherence to these steps is strongly recommended...because of the effectiveness of these procedures in identifying cultural resources and the expertise of the SHPO and the ACHP in these matters.”

Does this mean that NHPA is entirely procedural and can be dismissed? No. Does it mean that an agency taking an action under CERCLA follows the § 106 process set forth in the NHPA? No. Does it mean that the agency must seek or consider the input of the SHPO and ACHP? No. In these matters discernment is imperative – discernment between what *must* be done, what *should* be done, what *can* be done. The agency has choices to make about how to proceed and there is flexibility. Furthermore, if an agency has a Programmatic Agreement or other established process that works for them *and does not cause mission implementation delays*, the choice to use the existing process is understandable. However, there are instances where the existing and familiar process *is the cause of delays* that the clean-up project cannot sustain without serious adverse consequences. As § 106 practitioners know, familiarity with the § 106 process is no guarantee of a smooth sail or an expedient one. In order to benefit from the expertise of the SHPO, ACHP, and other informed (§ 106) consulting parties, it is recommended that the agency thought-fully carry out its opportunities to seek, discuss, and consider the views of these informed participants *within* the CERCLA process. This will enable the project to maximize the benefits of the CERCLA process’s streamlining effects. It may also help manage a very sensitive aspect of this particular ARAR.

### **An evocative ARAR**

Personal...emotional...these can’t be words used to describe CERCLA clean-up, can they? They definitely can. Clean-up and demolition projects can provoke anger within communities affected by contamination. The stigma can be transcendent of any and all clean-up work. There can also be angry regulators, politicians, and other stakeholders. People, however, don’t generally wed themselves to chemical-specific or action-specific ARARs involving trichloroethylene or PCBs, or clean-up methods using vapor stripping or incineration. Unlike chemical-specific ARARs or action-specific ARARs, location-specific ARARs can trigger highly emotional reactions in people. Stakeholders may completely understand the need to dredge a floodplain or dig up a man-made impoundment that has wetland characteristics to remove contamination, but they hate the idea that what you are doing is destroying a beautiful place to which they have become attached. The emotions can go deeper than can be conceivably grasped by some when the area to be remediated is Native American tribal land, where the land itself is a defining personal attribute. The same is true with many historic properties that are in themselves contaminated and may be the source of contamination - profound personal feelings may be evoked.

This “burden of place” is compounded if a stakeholder worked in a building that is proposed for demolition – demolishing that building is a personal affront. They will no longer be able to point and say, “I worked in that building 60 years ago and what we did in there helped end World War II,” or “I used to work in that lab when I first graduated from college and all of our work was secret and I helped develop something that put an end to the Cold War.” Demolishing contaminated historic properties on DOE sites isn’t necessarily limited to the removal of the building, but can be considered by some to be the removal of an aspect of the identity of the people who worked in the building. Contributorship (an individual’s perspective on how he or she follows or works with a leader, team, or organization, which is essentially an overall self-value judgment) can be diminished or extinguished if that to which they contributed is no longer extant. Groups of people who feel that their identities are being removed or diminished along with the buildings can be found among stakeholders and sensitivity to these individuals and their emotions warrants due consideration.

### **INTEGRATING OPPORTUNITIES ARE BEING MISSED – WHY?**

Given the importance of timely CERCLA actions, as provided for by CERCLA, CERCLA guidance documents, the implementing regulations of NHPA itself, and the DOE/EPA joint policy, it is clear that the CERCLA process can be used to address NHPA instead of the § 106 process for D&D actions, and puzzling why it is not. Moreover, it should be used if there is any need for timely clean-up action. Unlike the procedural aspects of emissions permits or other administrative requirements that use the ARARs process for streamlining, NHPA reviews are rarely conducted as ARARs by DOE.

The less-than-complete use of CERCLA leads one to ask why the ARARs process isn’t being implemented when it offers such advantages to carrying out mission needs. Is it that Cultural Resource Managers (CRM) don’t know that the opportunity exists, or that they don’t have experience with an NHPA review under CERCLA, or with CERCLA itself?

When inquiring about this topic, it was communicated that while many sites taking CERCLA actions do include NHPA as an ARAR in their documentation, they also proceed with a § 106 review, as well. Often the reason for the double work is that “we’ve always done § 106.” If it were *only* a duplication of effort it might be somewhat acceptable as that implies the same solution, with merely a longer wait to reach it. Reaching the same solution is not guaranteed by the separate reviews. Sites can experience a range of delays by doing both CERCLA and NHPA independently, and in some cases, such as with the Oak Ridge K-25 D&D project, some delays likely could have been avoided. DOE began consultation on the K-25 project in 2000, documented several agreements over the next 12 years, and continues to strive to reach an executable NHPA agreement while also striving to complete the demolition of the contaminated K-25 building. The delays are not for lack of trying, that is clear.

What appears to be happening is that CERCLA project managers are either unaware that the ARARs process is available for NHPA, and/or that they are turning the responsibility for NHPA compliance to their CRM and relying on them to “work it out,” no matter how complex it may be or how long it takes. CRMs may or may not be familiar with the CERCLA process option. If they are familiar with the CERCLA ARARs method, they may not be comfortable in trying to follow it when the familiar § 106 process is available and the CERCLA project manager hasn’t indicated that NHPA will be addressed as an ARAR. Project managers for major D&D actions have hundreds of tasks to attend to; relying on a trusted and reliable CRM can be a source of comfort, its one less task that they have to worry about. “Just get it done and let me know when I can demolish my building” is faulty logic on many levels.

Neither DOE, its clean-up projects, or major programs such as Environmental Management (EM), exist to protect historic properties – they exist to carry out their missions and in the case of EM, its mission is clean-up. By affording NHPA an equivalent place in the decision-making process it suggests that NHPA is the mission. By conducting a separate NHPA review from a CERCLA review can reinforce that misunderstanding. NHPA is intended as an important, intrinsic, and early-initiated review of agency actions to ensure that the protection of historic properties is a part of agency decision-making – *the agency action is implied as the initiator of the review*.<sup>[15]</sup> Rather than a separate review for a CERCLA action, NHPA must be considered in the decision-making process like every other ARAR that is in play on the project. If the separate processes are conducted, depending on how challenging or controversial the § 106 review of the CERCLA action is, it is possible that the question of *overall* project definition can arise in the § 106 review. For example, rather than considering the undertaking to be a proposed building demolition put forward in the CERCLA review – why not move back several steps into the CERCLA decision-making itself and push for an alternative to demolition??? This is a do-loop to be avoided at all costs.

## **WORKING THROUGH AN INTEGRATED APPROACH**

One method to avoid the separate processes, its delays and potential do-loops is for project managers to be informed of the ARARs process, be trained and confident of its methods, and to work with their CRMs to help the CRMs help the project manager navigate the NHPA process' substantive requirements. Trust and skill need to be built within the agency's technical team so that the separate and out-of-sequence processes can end.

Trust can only be built cooperatively. Trust built by the project team, and the confidence that comes with it, can ultimately be shared with the public as they work to help the agency make CERCLA decisions. The theoretical has to become the real, the practical can then be followed by commitments that are met. A top-down approach is described below and offered as a means to build knowledge of the process, with the objective of helping people understand the big picture so that they can then understand the details. This is the recommended approach vs. the details followed by the big picture method. Frustrations can ensue if a NHPA stakeholder looks at a CERCLA document and can't find what they are used to seeing and trust can erode rapidly; it is better to provide context before detail in these circumstances.

The information and figures that follow are designed to work together, incrementally. Their applicability and benefit extends beyond DOE's D&D actions, but to all CERCLA actions regardless of the agency conducting them. Individuals who will be presenting this information need to be both fluent and comfortable, which comes from that incremental familiarity. The figures are designed to answer several of the most basic CERCLA/NHPA questions that typically arise when the integrated process is used, namely: How does CERCLA work and how can its integrated approach be explained? What are some terms that need definition for new participants? How can the integrated process be explained so that people who are used to the § 106 process can navigate the CERCLA process? What methods can be used to encourage the public to participate in the process? If it is a matter of unfamiliarity, how can the CERCLA process and its documents be "roadmapped" to offer assurance? More figures can be developed for your stakeholders and may be necessary; they will let you know.

### **First some context**

Individuals tend to seek details when answering questions in order to reply correctly and not be taken out of context. Before we reply, we look for relevance, proportion, relationship, and

perspective and may ask a questioner “Do you mean ‘big picture’?” “Are you looking for specifics, or a specific project, or just this project?” “What will you do with my information?” If we are working with the public, via CERCLA, to meet our NHPA obligations – especially if it is the first time we are conducting the process via CERCLA – it is critically important to put things in context and explain technical and unique terms that speak directly to the context. Because of the emotional complexity that may be associated with some proposed CERCLA actions involving historic properties, the value of context is greater to the stakeholders who have NHPA interests.

Figure 2, How CERCLA Works with NHPA – a visual primer, has a great deal of information that it is aiming to impart. It is not intended to be a quick study or an “at a glance” resource but within all of its component parts it provides numerous “at a glance” facts. It is also purposely not unique to NHPA and CERCLA though it could be made to do so. The reason for explaining the CERCLA process overall, and illustrating it with a number of regulatory examples is to not single out NHPA. Were NHPA singled out it could appear (incorrectly) to be the only regulation that uses the ARARs process. This could not be further from the truth. Again, the context of similarities is important to provide.



# How CERCLA Works with NHPA – a visual primer

## The CERCLA process expedites and streamlines clean-up

Throughout the process the federal agency is seeking, informing and considering - *before* deciding

**Decisions, Decisions**  
Decisions under CERCLA have to consider 9 criteria  
Threshold- must be protective & be ARARs compliant  
Balancing – Long-term effectiveness, short-term effectiveness, cost, reduce toxicity, mobility & volume, implementability  
Modifying – State Acceptance  
Community Acceptance

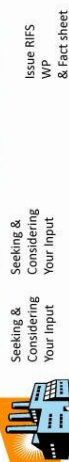
### CERCLA Actions

Building demolition projects – to decide on whether or not to demolish buildings

Soil remediation projects – to address soils not involved in building demolitions

Waste Management actions - to decide how to dispose of wastes from building demolitions, if implemented

### CERCLA Decision Documents



Issue RIFS  
WP & Fact sheet

Issue RIFSPP

Issue ROD

Seeking & Considering Your Input

Issue AM

Issue EE/CA

Seeking & Considering Your Input

Issue RIFSPP

Issue ROD

There is public engagement throughout

**"Other Laws" Like...**

- Clean Air Act
- Clean Water Act
- Resource Conservation Recovery Act of 1976
- National Historic Preservation Act of 1966
- National Environmental Policy Act of 1969

**Compliance with Other Laws under CERCLA**  
VIA APPLICABLE RELEVANT REQUIREMENTS  
PROCESS  
Substantive vs. Administrative requirements are met

**What happens in the RI/FS process?\***

- Characterize the land and buildings
- Sample
- Survey
- Study the site, similar projects
- Research prior results. Lessons learned, etc.
- Consider your thoughts
- Do treatability or other types of studies

\*The EE/CA process is similar

**After a Document is issued, the agency:**

- considers your comments
- and regulator comments
- holds a public meeting
- continues to develop the Administrative Record

What does that mean...  
"Substantive vs. Administrative?"

Substantive pertains to the action or conditions in the environment e.g. quantitative health or risk-based standards, liners in landfills, MCLs in drinking water

Administrative = regulations that facilitate the substantive requirements e.g., permits, approvals, or consent with administrative bodies documentation, reporting, recordkeeping

Figure 2. How CERCLA Works with NHPA - a visual primer

The figure offers facts in digestible bits. It is arranged with the big picture message at the top and is designed to answer questions throughout its dimensions. What is an ARAR? What does substantive and administrative mean? What projects are going on at my site? When will documents be coming out? It can also be used by a stakeholder to generate specific questions. For example, they can go to the list of projects, consult the calendar about a document to be released and go to an agency representative or contractor and discuss the information, ask questions about it, and/or request to obtain a copy for review.

### **Next, some focus**

If the CERCLA process will be used to address NHPA it is important to communicate the process that will be followed in a way that is understandable to stakeholders. CERCLA has its own language, abbreviations, and acronyms which can be barriers to understanding. If you have presented information in a way that cannot be understood, it is not communication, it is perfunctory box-checking. Simply mailing information to someone, is also not communicating, it is informing or notifying.

The CERCLA process (refer to Figure 1 for the summary process) is logical and systematic. Steps include problem identification, understanding the nature and extent of contamination, consideration of a range of remedies to attain satisfactory clean-up, and review (or rounds of reviews) of the proposed action. The proposed action will have been designed with the objective of safe and compliant implementation as expeditiously as possible. Referring a stakeholder to the “CERCLA Compliance with Other Laws Manual” for its example of project phases and activities is an option, but the figures could cause confusion and the text is written in a way that implies knowledge of CERCLA. A visual tool that aims to put project phases into perspective and uses example activities from the specific project site is recommended, such as is shown in Figure 3, More Focus: NHPA for CERCLA Actions.

Figure 3 shows project phases for CERCLA actions. If your site conducts both CERCLA and non-CERCLA actions, the figure could be modified to show how the non-CERCLA actions fit this approach. Projects tend to have similar phases whether they are CERCLA or non-CERCLA. Projects are comprised of planning, analysis, documentation, etc., so the adaptation of the slide and tailoring to your site is readily achievable. The “cartoon” format is informative and friendly. The layout provides adequate space for highlighting phases and activities and could be used to provide examples. Relevance to your site is important as is using process benchmarks familiar to your stakeholders, and the use of examples can provide meaningful reassurance. This slide is a “stepping off” point for understanding more specific topics that follow. The slide also uses words and figures or symbols instead of the flowcharts often used in engineering applications, which can be intimidating to some people. As with Figure 2, Figure 3 lends itself to responding to questions stakeholders may have, and providing the basis for receiving informed questions from stakeholders.

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## More Focus: NHPA for CERCLA Actions

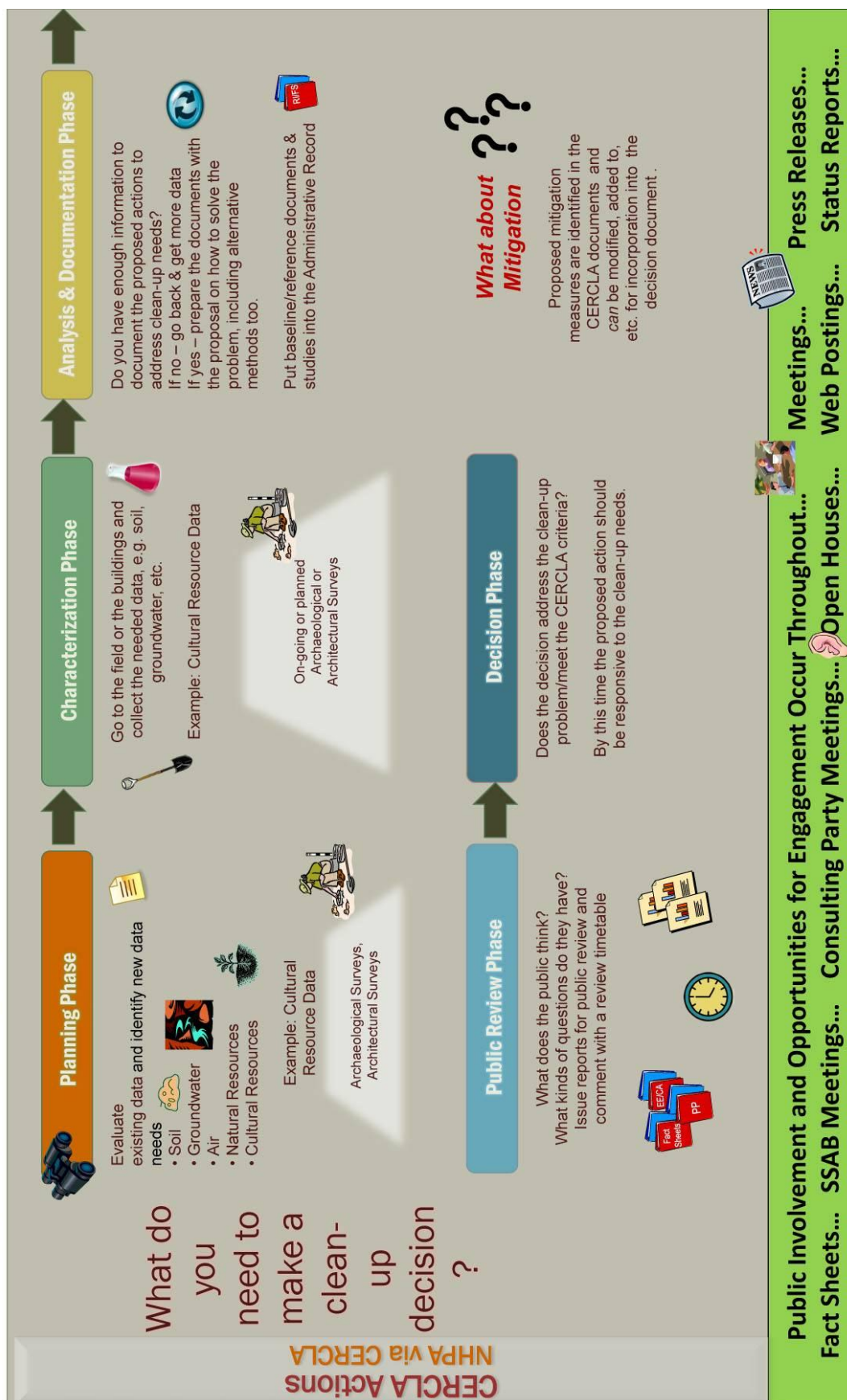


Figure 3. More Focus: NHPA for CERCLA Actions

### **And then some details - a Field Guide to “What has happened to what I’m used to seeing?”**

For individuals versed in the NHPA § 106 process, the review of NHPA via CERCLA can seem limited compared to a § 106 review. CERCLA project managers must dissuade NHPA practitioners from that perspective and demonstrate *how* (and where) NHPA aspects are addressed under CERCLA. A crosswalk is a useful tool for this task. Figure 4, How does CERCLA address what would be done under Section 106? is abbreviated both in its citations of NHPA and its references to how the NHPA regulations are considered in the CERCLA process and in the CERCLA decision documents but it is effective. It is best used in a public forum but could also be used as a stand-alone hand-out. Details could be added to both sides of the crosswalk, but it would get quite lengthy. (If precise and full text citations are needed to make your case, chances are there is more an issue of a trust than compliance.)

A degree of caution is warranted with a tool such as a crosswalk. As noted earlier, CERCLA has its own language. Not surprisingly, NHPA does as well. In some instances the terms are readily understood – such as an action (CERCLA) and an undertaking (NHPA). A project area or site under CERCLA may be a building being evaluated for demolition which is not necessarily the same as an NHPA “Area of Potential Effect,” wherein the latter term considers both direct and indirect effects and is therefore likely to be larger than a CERCLA project area. If NHPA is an ARAR, the need for the CERCLA action to meet the ARAR is clear, e.g., “seek ways to avoid, minimize, or mitigate adverse effects to historic properties.” The CERCLA action may do this through its overall analysis of alternatives, the adjustment of methods of implementation of the preferred alternative to avoid adverse effects via the design of the proposed action, or where no alternative to the proposed action is available, to the development of mitigation measures.

A figure such as Figure 4 is suitable for the public but it can be especially useful within the agency. Project managers are placing trust in their document writers and regulatory compliance specialists and may be too busy or reluctant to ask “how *do* we do this?” Internal education is a valuable tool.

Further detail can be offered such as the preparation of a “pointer”, or a type of “reader’s guide”, designed to point out where the elements of NHPA are found in a particular CERCLA document. “Keys” could be added to the crosswalk, labeled with “go to Section abc” of the EE/CA, as needed. A document’s Table of Contents can be used as a tool and be prepared for each type of document that will be issued for review. As CERCLA documents tend to be prepared in a systematic manner following a prescribed outline, a reader will become familiar with the layout, level of discussion, terminology, and objective of the documents. Both the “pointer” and the “keys” explanations will help the reviewer to review the document and provide meaningful comments by showing both the information of interest and the context of the decision to which it belongs. Information such as this pointer can be provided to all stakeholders.





Figure 4. How does CERCLA address what would be done under Section 106?

## **Avoid the Gordian knot - Use CERCLA for NHPA reviews**

Protracted NHPA consultations conducted pursuant to § 106 are always possible. Where matters of risk and hazard reduction are the objective, following the § 106 process is not recommended due precisely to its open ended nature. Addressing NHPA by using the CERCLA ARARs process is clearly preferable, appropriate, and legal.

Adherence to CERCLA is time-saving and affords the agency some protection from litigation (CERCLA § 113). Additional benefits of a CERCLA review are that it broadens the cultural resource review base from the “focus group/§106 consulting party” size to the public at large. The CERCLA process involves public reviews and public involvement and has as a decision-making criteria called “community acceptance.” There is room in this body, by design, to accommodate all interests. Decisions affecting public funds, especially where funds must balance clean-up obligations and mitigation for adverse effects to historic properties, should be decisions made to a broader public, not a smaller one. Section 106 consulting party groups tend to have an inherent bias as well. Other than state and federal regulators with larger public responsibilities, the SHPO (and/or Tribal HPO where federally recognized tribes and tribal land is involved), ACHP, and self-identified consulting parties with an interest in preservation are not necessarily representative of the larger public, nor are they expected to be. Use of the CERCLA process enables the larger public to be involved throughout and encourages that integration.

Projects performed under CERCLA that choose to follow the separate § 106 process can lead to difficult and confusing situations of their own. If a CERCLA decision is made that specifies that a particular action will occur that involves a historic property, and a separate § 106 process was conducted that reaches a variation on the CERCLA conclusion or no agreement can be reached among the § 106 consulting parties, implementation of the CERCLA decision can be upended. Delays in implementing mitigation agreed to in a § 106 Memorandum of Agreement could delay agency CERCLA action that can be subject to fines and penalties. Also, during this delay, risks and hazards continue. Additional non-environmental risks can ensue as well, namely the loss of jobs due to delayed action and the loss of project funding for implementation of the overall project while consultation under §106 goes on. These regulatory and economic vulnerabilities can be avoided by conducting NHPA reviews under CERCLA.

## **FURTHER ENCOURAGEMENT**

Agency actions to evaluate NHPA considerations under CERCLA need not be and should not be perfunctory or afterthoughts. They need to be communicated throughout the process, identified from the highest level in the program, through the process and specifically set forth in the documents. Information needs from the public, especially those with cultural resource interests, should be identified early and consistently so that the reviewers can provide meaningful commentary.

An important point in both the CERCLA and the § 106 approach is that one should not conclude that the length of the review process is in any way a measure of its effectiveness. With open and informed communication throughout its clean-up program and for individual CERCLA clean-up projects, it is possible to show *by action* that the agency is working with its public, including those with cultural resource interests. Typical 30-day review periods for decision documents are not “short-shrift” reviews. If the public has been informed and engaged throughout the CERCLA process they will know what to expect, when to expect it, how to review it, and how to provide comments that speak to their historic preservation objectives.

An agency does not have to follow the § 106 process to be “ seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process” to be satisfying the substantive aspects of the § 106 process. NHPA’s substance is not in the procedural method or the agreement on specific mitigation measures, which may not be able to be attained via CERCLA or § 106, it is in the conversation.

## SELECTED DEFINITIONS

### 36 CFR 800.1 Purposes

- (a) Purposes of the Section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other 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.

Other definitions are important to understand the purpose – namely “undertaking”, “historic property”, “the Council” and “consultation”. Definitions are as follows (from 36 CFR 800.16).

- (y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.
- (l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.
- (2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.
- (g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.
- (f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary’s “Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act” provide further guidance on consultation.

36 *CFR* 800.3(b) *Coordinate with other reviews*. The agency official should coordinate the steps of the § 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State or tribal law to meet the requirements of section 106.



#### **40 CFR 300.5 (Definitions)**

"Applicable requirements" means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site

"Relevant and appropriate requirements" means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site.

#### **REFERENCES**

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4. *National Historic Preservation Act of 1966*, 16 U.S.C. 470
5. *National Trust for Historic Preservation, With Heritage so Rich*. Richard Moe, Albert Rains (editor), Claudia Alta Johnson (editor), Charles Hosmer Jr. (editor) 1999, 3<sup>rd</sup> Edition
6. *US Environmental Protection Agency, Office of Emergency and Remedial Response. EPA 540-R-93-057, Publication 9360.o-32, PB963402, August 1993*
7. *The National Historic Preservation Program*. Advisory Council on Historic Preservation, website. Retrieved December 1, 2011 from <http://www.achp.gov/overview.html>
8. *DOE Secretarial Policy on the National Environmental Policy Act*, 1994
9. 42 U.S.C. 9621, §113(h) *Comprehensive Environmental Response, Compensation and Liability Act*
10. 40 CFR 300.415(j), *Comprehensive Environmental Response, Compensation and Liability Act*
11. 36 CFR 800.3 et seq., *Protection of Historic Properties*
12. *Secretary of Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs*, National Park Service, U.S. Department of the Interior Advisory Council on Historic Preservation, 1998
13. *CERCLA Compliance with Other Laws Manual, Part I & II*. EPA/540/G-89/009 OSWER Directive 9234.1-02 (August 1989) Office of Solid Waste and Emergency Response, US Environmental Protection Agency
14. 42 U.S.C. 9621(e), §121(e) *Comprehensive Environmental Response, Compensation and Liability Act*
15. 36 CFR 800.1(a), *Protection of Historic Properties, Purposes*