



Back to the Basics: Environmental Compliance During Emergencies

Emergencies, such as hurricanes, floods, tornadoes, wildfires, earthquakes, power service disruption, cyber-attacks, and civil unrest are often unexpected and they pose a threat to transportation infrastructure, the natural environment, and public health and safety. However, it can be unclear as to what constitutes an emergency, and how Federal environmental laws, regulations and policies are applied to the development of the Federal Highway Administration's (FHWA) Emergency Relief projects in the aftermath of emergencies. This issue of *Successes in Stewardship* addresses common questions that practitioners may have about environmental compliance and National Environmental Policy Act (NEPA) reviews during emergencies.

What Is an Emergency?

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](#), which provides the legal authority for the Federal Government to provide assistance to States and local public agencies during declared emergencies. The source and context of a situation are also key components when determining whether or not an emergency situation is present. Roadways and bridges that are seriously damaged as a direct result of a natural disaster or other catastrophic event (e.g., civil unrest, terrorist attack) occurring over a wide area can be considered emergencies.

If emergency situations involve immediate threats to public health or safety, or immediate threats to property, including natural resources, emergency repairs can start as soon as possible with the environmental reviews occurring afterward. All other repairs (i.e., permanent restoration) require the completion of environmental reviews prior to the start of permanent repair work.

Look What's New!

On April 9, 2018, the Department of Transportation and several other Departments signed a [Memorandum of Understanding \(MOU\)](#) implementing the One Federal Decision established under [Executive Order 13807](#).

Additionally, FHWA worked with several other agencies to develop a [Working Agreement](#) committing to work together to achieve the goals of the Executive Order.

More information can be found on the [Environmental Review Toolkit](#).

What Funding Sources Are Available for Emergency Response Actions?

FHWA Emergency Relief Program

[The Emergency Relief \(ER\) program](#) was established to assist in the repair or reconstruction of Federal-aid highways which have suffered severe damage as a result of natural disasters or catastrophic failures from an external cause. The program is intended to supplement the commitments of resources from States, local public agencies, tribal governments or other Federal agencies to help pay for unusually heavy expenses associated with the aftermath of emergencies. Funds from the ER program can be used for two categories of projects: emergency repairs and permanent repairs. Emergency repairs are undertaken during or immediately after a disaster to restore essential traffic, to minimize the extent of the damage, or to protect the remaining facilities. Permanent repairs are undertaken after a disaster to restore the highway to its pre-disaster conditions.

Individual States are responsible for submitting an application for ER funding to FHWA within two calendar years of the date of the disaster. If projects are approved for funding through the ER program, States must follow the FHWA's NEPA process unless there is immediate threat to public health and safety.

In 2013, FHWA revised the process for the "quick release" of ER funds to minimize the administrative burden during a natural disaster or other catastrophic event, and streamlined the process by providing an allocation of ER funds as soon as possible after a significant, eligible disaster strikes. Under the new process, Federal-aid Division Administrators and Federal Lands Highway Division Engineers now have the authority to initiate a "quick release" request, based on their determination that the event will qualify for ER funds, and based on oral communications with their State or Federal partners.

Key Definitions in an Emergency

Serious damage is major or unusual damage to a highway which severely impairs the safety or usefulness of the highway or results in road closures. Serious damage must be beyond the scope of work usually done by highway agencies in repairing damage normally expected from seasonal or occasionally different natural conditions.

A natural disaster is an unusual natural occurrence such as a flood, hurricane, severe storm, tidal wave, earthquake, or landslide which causes serious damage.

Catastrophic failure is the sudden failure of a major element or segment of the highway system due to an external cause. The failure must not be primarily attributable to gradual and progressive deterioration or lack of proper maintenance. The closure of a facility because of imminent danger of collapse is not in itself a sudden failure.

A wide area refers to a tract sufficiently large enough to encompass parts or all of several entities such as counties, states, or Federal agency management units and can include areas outside of Federal lands.

FHWA Emergency Relief for Federally Owned Roads Program

The [Emergency Relief for Federally Owned Roads \(ERFO\) program](#) was established to assist Federal land management agencies with funding the repair or reconstruction of federally owned roads that have suffered serious damage due to a natural disaster or catastrophic failure. Federally owned roads are all roads on Federal lands, including forest highways, forest development roads and trails, park roads and trails, parkways, public lands development roads and trails, refuge roads and trails, and Indian reservation roads. The Director of the affected Federal Lands Highway Division makes the final determination if damage from a natural disaster or catastrophic failure is eligible for ERFO funding if the Stafford Act hasn't been declared. Like the ER program, the ERFO program is also intended to supplement committed resources from other agencies for projects deemed as emergency repairs or permanent repairs and those projects are obligated to comply with NEPA.

FEMA Public Assistance Program

The declaration of the Stafford Act opens up opportunities for States, federally recognized tribal governments, U.S. territories, local governments, and certain nonprofits to receive funding from the [Federal Emergency Management Agency's \(FEMA\) Public Assistance \(PA\) program](#) for repairs after emergencies on highways that are classified as neither Federal-aid or on Federal lands. There are two categories of projects that are eligible to receive funding from the PA program: emergency work and permanent work. If projects are approved for funding through FEMA's PA program, the lead agency must follow FEMA's NEPA process.



Hurricane Harvey Damage, 2017; Houston, TX. Image courtesy of [Engineering News Record](#).

Are Environmental and Hazard Mitigation (i.e., Resilience) Measures Eligible for Federal Funding?

ER Program

ER program permanent repair projects developed in accordance with the NEPA process may incorporate added features to mitigate environmental impacts. Generally, if the mitigation feature is related to an ER eligible improvement, the mitigation measure is also eligible for ER funding. For replacement projects, if the NEPA process requires additional project features to mitigate impacts of the project, the added mitigation features are eligible for ER funding if the replacement project itself is eligible for ER funding.

ERFO Program

Improvements that increase resiliency and help protect highway facilities from possible future ERFO eligible damage may be eligible for funding if the applicant demonstrates through a life cycle cost analysis that it is economically justified to the ERFO program. The life cycle cost analysis must be based solely on the present and future expected cost to the ERFO program. It also cannot include normal operation and maintenance costs of pre-disaster deficient facilities, or other factors typically included in highway benefit-cost evaluations such as maintenance costs, traffic delay costs, added user costs, motorist safety, and economic impacts. Based on [FHWA's ERFO Manual](#), the analysis period is typically between 25 and 50 years.

FEMA's PA Program

If a damaged facility is eligible for permanent repairs, it may also be eligible for additional cost-shared assistance under Section 406 of the Stafford Act for cost-effective hazard mitigation measures. Hazard mitigation measures are measures that will prevent similar future damage to the facility. Hazard mitigation measures must be cost-effective to qualify for cost-sharing under the PA program. To be considered cost-effective, the hazard mitigation measure must meet one of the following criteria:

- Cost no more than 15% of the total eligible cost of eligible repair work for the damaged facility
- Cost no more than 100% of the total eligible cost of repair work and appear on the list of FEMA-approved mitigation measures, or
- Have a benefit-cost ratio of greater than or equal to 1.0.

How Is the NEPA Process Different in an Emergency?

NEPA Process through FHWA

Most Emergency Relief projects and emergency repairs qualify as a categorical exclusion 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.

Although some repair actions qualify as categorical exclusions from NEPA, the exclusion does not apply to other regulations such as the Endangered Species Act, National Historic Preservation Act, or the Clean Air Act.

If the proposed action does not qualify as a categorical exclusion, 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, the lead agency would ordinarily conduct an Environmental Impact Statement (EIS). However, the Council on Environmental Quality (CEQ) regulations 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. The lead agency should consult with CEQ as soon as possible to develop the alternative arrangements, outlined in [CEQ’s guidance memorandum about “Emergencies and the National Environmental Policy Act.”](#)

Additional information on quality environmental documentation and what should be included in EAs and EISs can be found in the [April 2017 issue of *Successes in Stewardship*](#) and on the [Environmental Review Toolkit](#).

NEPA Process through FEMA

When proposing a project through FEMA’s PA program, the lead agency must first determine if NEPA is triggered. Some FEMA actions under the PA program may be statutorily exempt from NEPA if an emergency has been declared under the Stafford Act. If the proposed action is not statutorily exempt from NEPA, FEMA then determines if the action may be categorically excluded from the requirement to prepare an EA or an EIS under FEMA’s NEPA implementing regulations.

If the proposed action is neither statutorily exempt nor categorically excluded from the NEPA process, the lead agency should then determine the significance of the environmental impacts of the proposed action. If the potential impacts are unknown or unlikely to generate significant environmental impacts, an EA should be prepared.

Additional Resources for Emergency Categorical Exclusions (CEs) and Exemptions

- [23 CFR 771.117\(c\)](#) outlines which actions for transportation facilities damaged by an incident resulting in declared emergency meet the criteria for CEs.
- [The FAST Act Section 1432](#) provides an option to meet environmental requirements for certain reconstruction projects using expedited procedures that currently exist for NEPA and other environmental laws and regulations.

If the findings from the EA indicate that the proposed action has the potential to result in significant adverse impacts to the human environment, FEMA should prepare an EIS. There are some actions that will automatically trigger an EIS and therefore an EA is not necessary. Those actions include:

- Any action that will result in an extensive change in land use or commitment of a large area of land;
- Actions that result in land use change that is incompatible with existing or planned land use of the surrounding area;
- Any action where environmental impacts are controversial;
- Actions that will substantially affect wildlife populations and their habitats, endangered species, important natural resources, floodplains, wetlands, estuaries, beaches, dunes, unstable soils, aquifer recharge areas, or delicate or rare ecosystems;
- Actions with major adverse impacts on air or water quality;
- Actions that will adversely affect a historic property listed on the National Register of Historic Places;
- An action is one of several actions underway or planned for an area and the cumulative impact of these actions is considered significant; and
- Actions similar to previous actions that required an EIS.

EAs and EISs should identify and evaluate a reasonable number of alternatives. Reasonable actions include all feasible and practical actions from a technical and economic standpoint as well as the no-action alternative required by NEPA. Reasonable actions that are not within FEMA's authority or may not be the preferred alternative should also be considered.



Damage from a landslide in 2015; Santa Clarita, CA. Image courtesy of [SFGATE](#).

What Is the Emergency Protocol for Other Environmental Laws and Regulations?

Although some emergency repair projects may be statutorily exempt or categorically excluded from NEPA, those exemptions and exclusions do not automatically carry over to other Federal environmental laws and regulations. Agencies must still comply with these other environmental laws and regulations which may have their own emergency exemptions and procedures for compliance.

Section 4(f)

[Section 4\(f\)](#) compliance can be done after responding to immediate threats to public health or safety, or immediate threats to property, including natural resources. Section 4(f) compliance can also be completed after emergency repairs have been completed. For permanent repairs, Section 4(f) compliance is undertaken as part of the normal NEPA process during project development prior to the authorization of right-of-way and/or construction as it would be for any other type of Federal-aid or Federal Lands highway project.

Endangered Species Act Section 7

[The Endangered Species Act \(ESA\)](#) defines an emergency as “a situation involving an act of God, disasters, casualties, national defense or security emergencies, and includes response activities that must be taken to prevent imminent loss of human life or property.” Section 7 of the ESA recognizes that an emergency may require expedited consultation. Early consultation can be done over the phone or via email as soon as possible. Once the emergency is under control, the lead agency should initiate formal consultation with the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service (the Services), if applicable, to see if any listed species or critical habitat have been adversely affected by the action. Although formal consultation occurs after the action has been taken, procedurally it is treated like any other formal consultation. ESA compliance in emergencies require the lead agency to provide 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 how the Services’ recommendations were implemented and the results of implementation on minimizing the take.

After concluding formal consultation, the Services issue an emergency biological opinion. The “Effects of the Action” section documents the recommendations provided by the Services to the lead agency and the results of agency implementation of the recommendations on listed species and their critical habitat. If incidental take is anticipated during the emergency response, the Services can advise the lead agency of ways to minimize the take during informal consultation and documentation includes those recommendations. Conservation recommendations to help protect species or critical habitat in future emergency situations may also be documented.

National Historic Preservation Act Section 106

A disaster or emergency situation for the purpose of [Section 106](#) is one declared by the President, tribal government, governor of a State, or other immediate threat to life or property. The emergency situations subsection of Section 106 applies only to undertakings that will be implemented in response to the disaster or emergency within 30 days after the formal declaration of the disaster or emergency, though the lead agency may request of an extension prior to the expiration of the 30 days. Federal agencies cannot waive their Section 106 responsibilities for taking into account the effects of emergency response activities on properties included in or eligible for the National Register of Historic Places, although immediate rescue and salvage operations to preserve life or property are exempted from the provisions of Section 106. Some States have Section 106 Programmatic Agreements that may have additional emergency provisions. However, in the absence of a Programmatic Agreement, the lead agency should notify the appropriate State Historic Preservation Office, Tribal Historic Preservation Office, Advisory Council on Historic Preservation and other organizations that may attach religious and cultural significance to historic properties likely to be affected, to afford them the opportunity for comment and involvement related to the undertakings.

Clean Water Act – Section 404

The U.S. Army Corps of Engineers, which is organized geographically into eight permanent divisions and numerous districts defined by watershed boundaries within the divisions, is authorized to approve special processing procedures in regards to [Section 404 of the Clean Water Act](#) in emergency situations. Emergency situations are those 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 permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. The District Engineer will recommend special procedures and explain the emergency situations to the Division Engineer who will then advise the District Engineer on further processing of the application. Nationwide Permits 3 and 14 are usually applicable to permanent repair projects.

Clean Air Act – Transportation Conformity

Categories of Federal-aid and Federal Lands highway projects listed under [40 CFR 93.126](#) are exempt from the project-level transportation conformity requirements under the [Clean Air Act](#). Emergency relief projects (23 U.S.C. 125) as well as highway projects to “repair damage caused by natural disasters, civil unrest, or terrorist acts (except projects involving substantial functional, locational or capacity changes)” are exempt.

Readiness, Collaboration, and Communication During Emergencies Ensures Compliance with Environmental Laws and Regulations and Accelerates Recovery Efforts

In the case of an emergency, agencies must still comply with NEPA and other environmental requirements. Agencies should recognize that the means for compliance are different in emergency situations depending on the type of repair work and the source of funding. Certain types of repair projects are eligible for exemption from NEPA and other environmental regulations, but those exemptions are independent of one another. As soon as an emergency arises agencies should consult with FHWA, CEQ and other relevant Federal agencies to ensure all compliance needs are met as quickly as possible.

As a best practice, FHWA Division Offices and FEMA Regional Offices may establish emergency protocols in the context of a programmatic NEPA document (or a programmatic agreement) to accelerate the required emergency environmental reviews and the overall recovery efforts. For example, FEMA, FHWA Colorado Division and the FHWA Central Federal Lands Highway Division jointly developed and issued a [Programmatic EA/Finding of No Significant Impact \(FONSI\) for the Post-Disaster Road, Bridge and Trail Replacement, Relocation and Upgrade in the State of Colorado](#) in May 2014. The Programmatic EA/FONSI covers FEMA's actions under their funding programs as well as FHWA's actions under ER, ERFO, and other Federal-aid and Federal Lands highway programs, and it establishes an interagency coordination and collaboration protocol for FHWA and FEMA to be ready to move very quickly and effectively in responding to emergencies.

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