

Emergency Projects Environmental Process and Requirements

1. What is an “Emergency” for Environmental Compliance Purposes?

One of the most important elements of an emergency under most environmental laws and regulations is that the event be sudden or unexpected. Natural disasters, catastrophes, or events such as storms, floods, fires, earthquakes, tsunamis (tidal waves), or volcanic action are included in the definition of emergency. Responses to man-made disasters such as large-scale civil unrest, sudden hazardous material and chemical spills, explosions, and acts of war or terrorism are also included in the definition of emergency. Gradual and progressive deterioration or lack of proper maintenance does not qualify as an emergency. Closing a facility because of danger of imminent collapse or damage is not considered an emergency; actual failure is necessary. However, such situations can be identified as urgent when discussing them with the resource agencies. The second important element is that immediate response is necessary to prevent or lessen loss of, or damage to life, health, property, or essential public services.

It is essential to note that the definition of emergency for environmental compliance and Federal-aid emergency relief differs from the definition used for emergency contracting purposes. California Public Contract Code, § 10122(a), which authorizes Director’s Orders for emergency contracting, includes “threat of failure” as an emergency. For Federal-aid assistance and under most environmental laws, threat of failure does not qualify as an emergency. This means that environmental approval and permitting will still be needed for some Director’s Order projects.

In addition, while a governor’s proclamation of a state of emergency is enough to statutorily exempt a project under the California Environmental Quality Act (CEQA) (see CEQA § 21080(b)(3) and CEQA Guidelines § 15269); a Categorical Exclusion will still be needed for compliance with the National Environmental Policy Act (NEPA). Additionally, a CEQA exemption does not necessarily remove the Department’s responsibility to comply with other state environmental laws. Please see Question #3 below for additional information regarding environmental documentation (environmental document or determination) for emergency projects.

For Local Assistance projects, please see [Local Assistance Emergency Relief Program](#).

For CEQA’s definition of “Emergency” please see § 21060.3.

For current Emergency Declarations, please see “[Declarations](#)” listing.

2. Can Work Begin in Response to an Emergency Before an Environmental Document is Prepared and Permits/Approvals are Obtained?

YES. State and local transportation agencies are empowered to begin emergency repairs (a.k.a. emergency openings [EO]) immediately. Emergency repairs (emergency opening work) are repairs made during and immediately following a disaster to restore essential travel, to minimize the extent of damage, to protect the remaining facilities, and to ensure public safety where this is in imminent danger. As soon as possible and concurrent with the repair, the environmental document and any needed permits and approvals are prepared and/or obtained. Informal consultation and further environmental studies may need to be initiated with applicable resource agencies, such as the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, U.S. Coast Guard, California Coastal Commission, park officials, U.S. Department of Interior/National Park

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Service, Advisory Council on Historic Preservation, and State Historic Preservation Officer to obtain agreement on expedited environmental processes to address the requirements of other federal environmental laws. See Question #4 below for additional guidance. State permanent repairs (a.k.a. permanent restoration) and betterments will need to wait for environmental compliance (normal Federal-aid NEPA procedures).

Environmental staff should be invited to and should attend the initial field review of the emergency repair site. Note: The fact that the Governor and/or the District Director have declared an “emergency” does not guarantee that the damaged facilities will be eligible for Federal Highway Administration (FHWA) Emergency Relief funding.

For a detailed discussion of FHWA’s emergency relief funding including definitions and discussion on the distinction between “emergency repairs” and “permanent repairs,” see the Federal Highway Administration [Emergency Relief Manual](#) (2013). The FHWA CA Division also has a list of [frequently asked questions and electronic files of the needed forms](#).

Note: For both emergency repairs and permanent repairs, the Categorical Exclusion form found on the [Forms and Templates](#) page of the SER is to be used.

3. What Type of Environmental Document is Needed for Emergency Repairs (Emergency Openings) under NEPA Assignment and CEQA?

NEPA and FHWA Regulations

Repair projects under the Emergency Relief (ER) program must comply with the requirements of NEPA. Emergency repairs to restore essential travel, minimize the extent of damage, or protect remaining facilities are normally classified as Categorical Exclusions under 23 CFR 771.117(c)(9). **Under the 23 USC 327 NEPA Assignment Memorandum of Understanding (MOU) and the 23 USC 326 CE Assignment MOU, for emergency repairs (a.k.a. emergency openings), the FHWA damage assessment form (DAF) NO LONGER serves as the Categorical Exclusion.** It is necessary to complete a [Categorical Exclusion/Categorical Exemption form](#) and [CE checklist](#) for emergency openings either simultaneously or a reasonable time after the DAF. However, if protected or otherwise sensitive or high-value resources may be affected, advance coordination with the appropriate local, state, and federal resource agencies should be considered to avoid or minimize project delays or shutdowns.

The 23 USC 326 CE Assignment MOU Appendix A (Activity 4) added a Categorical Exclusion for “routine repair of facilities due to storm damage, including permanent repair to return the facility to operational condition that meets current standards of design and public health and safety without expanding capacity (e.g., slide repairs, construction or repair of retaining walls).”

Note: Improvements for fish passage or resilience may be a part of bringing the facility up to current design standards. Projects meeting these criteria also require completion of a [Categorical Exclusion/Categorical Exemption form](#) and [CE checklist](#).

For FHWA’s definition of “resilience” please see [“FHWA Order 5520, Transportation System Preparedness and Resilience.”](#)

On occasion, an emergency relief project that includes a betterment, whether or not the betterment is eligible for emergency relief funding, may require further NEPA review. Although,

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on the surface, a project may appear to qualify for a Categorical Exclusion, *certain betterments may need either an Environmental Assessment (EA) to determine whether or not the project will cause significant environmental impacts, or an Environmental Impact Statement (EIS) if significant impacts are predicted.*

See [Chapter 5 of the FHWA Emergency Relief Manual](#)

[FHWA Emergency Guidance on 'Fixing America's Surface Transportation \(FAST\) Act](#)

[FHWA Emergency Relief Program and Resilience](#)

[FHWA Order 5520, Transportation System Preparedness and Resilience](#)

Projects undertaken, carried out, or approved by a public agency to maintain, repair, or restore an existing highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, provided that the project is within the existing right of way of that highway and is initiated within one year of the damage occurring are statutorily exempt from CEQA (CEQA Guidelines § 15269(d)). The Department's standard [Categorical Exclusion/Categorical Exemption form](#) also contains checkboxes and language for statutory exemptions.

This exemption does **not** apply to:

- highways officially designated as State Scenic Highways (however, a statutory exemption may be used for highways that are "eligible" for scenic designation, but that have not been officially designated)
- any project undertaken, carried out, or approved by a public agency to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide.

Further, emergency projects on facilities damaged or destroyed as a result of a disaster, for which the Governor has proclaimed a state of emergency, are also statutorily exempt. In some cases this statutory exemption is applicable even if the project involves historic resources (see CEQA Guidelines § 15269(a)).

A Class I Categorical Exemption (CEQA Guidelines 15301(c)) may be used for emergency projects IF: 1) repairs or minor alterations involve negligible or no expansion of an existing use of the facility; and 2) the project does NOT meet the criteria for an "exception" to the categorical exemptions (CEQA Guidelines § 15300.2).

See [Public Resources Code § 21080 et seq.](#) and CEQA Guidelines §§ 15269, 15300.2(d), and 15301(d).

4. What if the Emergency Repair Area Contains Cultural Resources, or Sensitive Species or Habitat? Do Emergency Repairs (Emergency Openings) Require Permits and Approvals from Applicable Resource Agencies Prior to Work?

If the emergency repairs (emergency openings) will require work in an area with cultural resources, or sensitive species or habitat, work may commence without obtaining permits and approvals from the applicable resource agencies. However, consultation and coordination must

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begin either simultaneously with the emergency repair (emergency opening) work or as soon as practicable after the emergency opening is under control. Please see full discussion below.

Federal Endangered Species Act (FESA)

There is no exemption from consultation but there is a process for emergencies. According to Title 50 Code of Federal Regulations (CFR) Parts 402.05 (a) and (b):

- a) Where emergency circumstances mandate the need to consult in an expedited manner, consultations may be conducted informally through alternative procedures that the Director of US Fish and Wildlife determines to be consistent with the requirements of sections 7(a)-(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.
- b) Formal consultations shall be initiated as soon as practicable after the emergency is under control. The Federal Agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

Contact the U.S. Fish and Wildlife Service as soon as possible (usually within 48 hours) by telephone or facsimile followed by written correspondence. Once the emergency is under control, formal consultation will be initiated if necessary.

The same procedures apply to emergency consultation with NOAA Fisheries as well.

For additional information, see the [U.S. Fish and Wildlife/NOAA Fisheries Endangered Species Consultation Handbook](#).

Section 1432, Article 7 of the FAST Act creates new exemptions from the requirements of the Migratory Bird Treaty Act, Wild and Scenic Rivers Act (16.U.S.C. 1271 et seq.) and the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.). This exemption only applies when the reconstruction of a damaged transportation facility is exempted first as a result of a FESA exemption process triggered by Section 1432(b)(5) of the FAST Act.

California Department of Fish and Wildlife (CDFW) – Section 2081 California Endangered Species Act (CESA)

Similar to the FESA process, there is no exemption for Section 2081 (CESA), but coordination with CDFW can be conducted informally and concurrently while responding to the emergency action followed by formal consultation as soon as is practicable after the emergency is under control. Caltrans should submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats.

See the text of [Section 2081](#).

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Section 404 Clean Water Act

The Los Angeles District of the Army Corp of Engineers has reauthorized [Regional General Permit #63](#) for repair and protection activities in emergency situations and [RGP 63 procedures](#).

Discharges not requiring permits

33 CFR Part 323.4(a)(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

Nationwide Permit #3 (2017):

This nationwide permit (NWP) covers the repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. This NWP authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage.

Note that there are several conditions to this NWP.

See the full text of [NWP 3 and conditions](#).

Discharges to Land or Surface Waters

Section 13269(c) of the California Water Code waives the normal permitting requirements for discharges in emergency situations. The appropriate Regional Water Quality Control Board should be notified prior to discharges to land or waters that occur under emergency situations.

Coastal Zone Requirements:

Emergency projects within the jurisdiction of the San Francisco Bay Conservation and Development Commission (BCDC) may begin prior to obtaining a coastal permit as long as the work begins within one year of the damage and BCDC must be notified within one working day after the commencement of the emergency repair. Emergency repairs to an existing highway located within the jurisdiction of a local coastal program, or the California Coastal Commission may also begin prior to obtaining a coastal permit, but the local program or Commission must be notified 14 days after the commencement of the emergency repair. Projects to expand or widen a highway damaged by fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide, however, do require a coastal permit. See [Public Resources Code § 30600\(e\)](#) and [Public Resources Code § 21080.33](#).

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California Department of Fish and Wildlife (CDFW) – Fish and Game Code Section 1600 Lake and Streambed Alteration Agreement

Immediate emergency repairs (emergency openings) are exempt from consultation requirements set forth in Section 1600 of the Fish and Game Code, and are subject to the same conditions listed above under CEQA. However, CDFW must be notified within 14 days of the start of work. Concurrent with the emergency repairs, coordination with the CDFW is necessary in the same manner outlined above for FESA.

See text of [Section 1610](#).

Cultural Resources

Section 106

Emergency projects are covered by the [Section 106 Programmatic Agreement](#) (PA), as are any Federal-aid Highway projects in which FHWA (or Caltrans, as assigned by FHWA) is the lead agency (excluding those that are on or affecting tribal land).

For emergency projects that will (or have the potential to) affect historic properties, additional Section 106 review is required in accordance with [36 CFR 800.12](#). The emergency provisions in Stipulation XVI of the PA are only applicable if the project work will begin within 30 days after an emergency or disaster is formally declared by the appropriate authority (the President, tribal government, or state governor). At the earliest opportunity, Caltrans District Professionally Qualified Staff (PQS) notifies the State Historic Preservation Officer (SHPO), FWHA where responsibilities have not been assumed, Caltrans Cultural Studies Office (CSO), and any Indian tribes that might attach religious or cultural significance to the affected property. Notification should include, to the extent such information is available, a description of the property(ies), the type and extent of an damage to the property(ies), a description of any emergency actions taken, such as immediate rescue and salvage operations conducted to preserve life or property, and any treatment measures to protect the property(ies). These parties are given up to 7 days to comment.

If an emergency project does not meet the 36 CFR 800.12 definition of “Emergency,” regular procedures for identification, evaluation, and assessment of effects to historic properties pursuant to Stipulations VII-XI of the PA will be followed.

CEQA

Most projects undertaken to demolish or replace property or facilities damaged as a result of a disaster for which a state of emergency has been formally declared by the Governor are statutorily exempt from CEQA (subdivision (b)(3), Section 21080). Notwithstanding that exemption, actions in the aftermath of a disaster that might adversely affect historical resources are subject to state laws governing consideration of historical resources.

Public Resources Code 5024.5

Public Resources Code (PRC) 5024.5 stipulates that no state agency shall alter, transfer, relocate, or demolish a state-owned historical resource without providing the SHPO with a summary of the action and the opportunity to review and comment on the proposed action. This requirement applies even when the action is statutorily exempt from CEQA.

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Emergency projects are covered by the PRC 5024 Memorandum of Agreement (MOU), as are any projects, activities, and permits that affect state-owned cultural resources. The emergency provisions in Stipulation XV of the MOU are only applicable if the project work will begin within 30 days after an emergency or disaster is formally declared by the appropriate authority (the President, tribal government or state governor).

At the earliest opportunity, Department District PQS notifies the SHPO, CSO, and any Indian tribes that might attach religious or cultural significance to the affected resource(s). Notification should include, to the extent such information is available, a description of the resource(s), the type and extent of any damage to the resource(s), a description of any emergency actions taken, such as immediate rescue and salvage operations conducted to preserve life or property, and any treatment measures undertaken to protect the resource(s). The parties are given up to 7 days to comment.

If an emergency project does not meet the definition of an “Emergency” set forth in Stipulation XV of the MOU, regular procedures for identification, evaluation and assessment of effects to state-owned cultural resources pursuant to Stipulations VII-X of the MOU should be followed.

Public Resources Code Section 5028

This section provides that no structure listed in the National Register of Historic Places, the California Register, or a local register that has been damaged as a result of a natural disaster is to be demolished, destroyed, or significantly altered (except for alterations to preserve or enhance historic value) unless: (1) the structure represents “an imminent threat to the public of bodily harm or of damage to adjacent property,” or (2) the action is approved by the SHPO. That section further establishes the procedure for review of proposed actions by the SHPO. In the wake of an earthquake, flood, fire, or other natural disaster, the local agency may only demolish or destroy those structures that are an “imminent threat.” In all other cases, the local agency must notify and consult with SHPO immediately if there are damaged historical resources that may require demolition, destruction, or significant alterations.

Wild and Scenic Rivers

Section 1432, Article 7 of the FAST Act states, “Any reconstruction that is exempt under paragraph (5) (Federal Endangered Species Act) shall also be exempt from requirements under the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.). This is only in the case of a Presidentially Declared Disaster.

While the federal Act may provide for a specific emergency exemption, the state Wild and Scenic Rivers Act does not have specific exemptions for emergency projects. Contact the appropriate federal river-managing agency: Bureau of Land Management, U.S. Forest Service or the National Park Service, and the California Natural Resources Agency (for California Wild and Scenic Rivers).

Executive Order (E.O.) on Floodplain Management

Section 8 of E.O. 11988 states: “Nothing in this order shall apply to assistance provided for emergency work essential to save lives and protect property and public health and safety, performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (42 USC 5145 and 5146).”

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5. Will Mitigation Be Required For Impacts Due to the Emergency Repair (Emergency Opening) Work?

Resource agencies will most likely require the Department to mitigate for impacts caused by the emergency repair (emergency opening) work. This does not mean, however, that the Department cannot do the work immediately.

Environmental staff should work with maintenance and construction crews to implement avoidance and minimization measures whenever and wherever possible; however, restoring travel service is the number one priority during an emergency.

When possible, take photos of the work area prior to work commencing. These photos can be useful during consultation and coordination with resources agencies and are needed for the administrative record.

6. Are Mitigation Costs Reimbursable?

Eligibility determinations for environmental mitigation measures can follow a general rule-of-thumb: if the mitigation measure is related to an emergency relief-eligible betterment, the mitigation measure is also eligible. For example, if a roadway grade raise to protect a facility from future flooding has been economically justified for emergency relief funding, then a mitigation feature associated with the grade raise, such as possible wetland restoration or fish passage adjustment, would qualify for emergency relief funding. Conversely, if a “betterment” is not justified for emergency relief funding, then any added mitigation features related to the betterment would likewise not be eligible for emergency relief funding but instead, should be funded from regular apportioned Federal-aid highway funds. See [FHWA Emergency Relief Manual, Chapter 2](#) for additional information.

7. What Happens after the Immediate Emergency Repair (Emergency Opening) Work is Complete?

Once the immediate emergency work is complete, all environmental processes and approvals revert to the standard requirements. Permanent repairs, especially betterments or work in new locations, must go through the standard environmental processes in compliance with all the applicable laws, regulations, and executive orders.

For additional guidance, see [FHWA Emergency Relief Manual](#).