

**ABANDONED VESSEL AUTHORITIES AND BEST PRACTICES GUIDANCE- A
REVIEW OF NRT WORK**

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ABSTRACT 292749:

Abandoned and derelict vessels are a problem in almost every U.S. port and waterway, and these vessels can have significant impacts on the coastal environment and economy, including oil pollution, marine debris, and wildlife entrapment. They become hazards to navigation, illegal dumping of waste oils and hazardous materials and general public health hazards. Pollution response, including removal and disposal of these vessels can be complex and costly. As a result, many abandoned vessels are left in place unless they are obstructing or threatening to obstruct navigation, or threatening a pollution discharge.

Faced with a growing number of abandoned vessels and costly interventions, the National Response Team (NRT) held a session on abandoned vessels during the 2011 Co-Chairs meeting in Dallas, TX. Representatives from the National Oceanic and Atmospheric Administration (NOAA) and the United States Coast Guard (USCG) gave presentations about the scope of the problem and the need for national guidance for Federal On-Scene Coordinators (FOSCs). Based on issues presented and discussed during the session, the NRT Executive Secretariat agreed an interagency best practices document was needed.

An Abandoned Vessel Response Workgroup was established, co-chaired by the USCG and NOAA, and was tasked with identifying: 1) best practices used for responding to abandoned vessels; 2) the regulatory and policy authority of each agency with a nexus to abandoned vessels; and 3) the roles and responsibilities of each agency pursuant to those authorities. This paper summarizes the report on authorities and best practices.

INTRODUCTION:

At the March 2011 National Response Team (NRT) and Regional Response Team (RRT) Co-Chairs conference, National Oceanic and Atmospheric Administration (NOAA) and the U.S. Coast Guard (USCG) gave presentations on the challenges associated with abandoned vessels.¹ Based on issues presented and discussed during the session, the NRT Executive Secretariat agreed on the need for the NRT to identify interagency best practices when responding to

¹ <http://nrt.sraprod.com/nrtconf/index.cfm?fuseaction=conference.meeting2011>

abandoned vessels. A workgroup was convened under the NRT Preparedness Committee, co-chaired by USCG and NOAA and was tasked with developing an Abandoned Vessel Authorities and Best Practices Guidance document, designed to provide On-Scene Coordinators (OSC) with:

- Information about the regulatory and policy authority of each agency having a major nexus to abandoned vessels;
- Roles and responsibilities of each agency pursuant to those authorities;
- Best practices used for responding to abandoned vessels; and
- Options for removal and ultimate disposition of abandoned vessels.

Throughout the United States and its territories, thousands of vessels remain abandoned, either left to deteriorate by the owner or operator or as the product of a catastrophic event resulting in the loss of the vessel. Generally unsightly, some abandoned vessels pose a significant threat to the environment and human health, either through vessel deterioration, physical damage to the surrounding ecosystems, or through the proliferation of marine debris or the threat of discharge of oil and/or hazardous substances into the marine environment, including materials left on the vessel when abandoned and the potential use of the vessel as an illegal dumping site for oil and other hazardous substances. Currently, a variety of federal and state statutes address different aspects of the abandoned vessel problem, but current funding limitations and implementing guidance restrict federal agencies' ability to comprehensively address abandoned vessels. The Abandoned Vessel Authorities and Best Practices Guidance document summarizes the key laws and authorities relating to abandoned vessel mitigation, as well as special teams and best practices available to the OSC to mitigate these cases.

Abandoned and derelict vessels are problematic at many levels. There is no national database of these vessels, or a consistent statutory definition among states and agencies. Looking forward, one of the foremost challenges in addressing abandoned vessels will be identifying vessels throughout various regions of the United States, prioritizing the threat posed to public health and the environment, determining jurisdictional authority, and evaluating the potential for removal. (GAO, 1992) Additional challenges include the demanding nature of vessel removal and/or mitigation of the wrecks and abandoned vessels. In recognition of these multiple challenges, the NRT Best Practices Guidance document presents a four-step approach for abatement of abandoned vessels including: Assessments; Determination of Authorities; Response Funding Availability; and Application of Removal Options.

INITIAL ASSESSMENT OF ABANDONED VESSELS:

The initial assessment of an abandoned vessel is the first and arguably most critical element of the response. The information gathered during this phase will help determine which authorities are applicable, what funding can be used, and what methods of vessel removal or pollution mitigation are most appropriate under the circumstances.

Abandoned vessels may range considerably in size and type of service, with the complexity of the response generally increasing proportionately with the size of the vessel. Notwithstanding, there are common initial assessment questions that would help responders characterize the response complexity and resources at risk, regardless of the vessel's size.

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- Vessel location (moored, stranded, at anchor, or submerged)
- Is the vessel posing an obstruction to navigation?
- Owner/operator information (some vessels are well known, long-time derelicts)
- Physical construction and condition (wood, steel, fiberglass, or composite)
- Potential link to illegal activities
- Vessel type (fishing vessel, yacht, etc.)
- Size/vessel tonnage (over or under 100 displacement tons)
- Propulsion type (e.g., sail or motor)
- Vessel load and threat of pollution
- Sensitive habitat or protected resources
- Potential historic preservation and gravesite status

Once an assessment has been conducted and the scope of the response has been determined, the OSC then will have information necessary to select appropriate authorities to abate the threat.

RESPONSE AUTHORITIES:

When the initial assessment is complete, the OSC should have a better understanding of the threat posed to public health and the environment and can select the appropriate authorities under which the vessel can be mitigated and removed. Depending on the vessel type, size, location, and pollutants onboard, multiple federal statutes and regulations may govern the mitigation of pollution from and the removal of an abandoned vessel or wreck that poses a threat to the navigable waters, including the territorial seas of the United States. Although there are laws particular to the safety of the port, which make allowances for the U.S. Coast Guard Captain of the Port, the following explain how the relevant federal laws and regulations relate to the OSC's authority to mitigate pollution and remove abandoned vessels.

Principal Federal Statutes and Regulations:

The statutes and regulations listed below are the primary authorities relied on for federal action in addressing abandoned vessels. Depending on the circumstances at hand, other authorities may be relied on to mitigate damage from or otherwise address abandoned vessels. The synopses provided below offer a brief explanation of how the authorities relate to abandoned vessel response and should not be relied on as complete summaries of the listed authorities, nor relied upon to interpret these authorities. In any case where these authorities are relied on, legal counsel should be consulted.

Title	Statute	Lead Agencies					
		DOD	DOI	EPA	NOAA	USACE	USCG
Abandoned Barge Act	46 U.S.C. § 4701					√	√
Abandoned Shipwreck Act (ASA)	43 U.S.C. § 2101		√				
CERCLA	42 U.S.C. §			√			√

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	9601						
Clean Water Act (CWA)	33 U.S.C. § 1251			√			√
Intervention on the High Seas Act (IHSA)	33 U.S.C. § 1471						√
Marine Debris Act	33 U.S.C. § 1951			√	√		√
Marine Protection, Research and Sanctuaries Act (MPRSA)	33 U.S.C. § 1401			√	√		
National Marine Sanctuaries Act	16 U.S.C. § 1431				√		
Oil Pollution Act (OPA 90)	33 U.S.C. § 2710-2761			√	√		√
Rivers and Harbors Act	33 U.S.C. § 401					√	√
Salvage Facilities Act	10 U.S.C. § 7361	√					

Post-Disaster Response Authorities:

Most derelict and abandoned vessels are the result of chronic processes- rot and rust and deterioration from lack of maintenance, economic obsolescence, etc., with vessels slowly worsening until they sink or become too expensive to repair, and are abandoned. However, in a major disaster such as a hurricane, coastal storm, or tsunami, a large number of vessels of varying sizes, conditions, and types may require mitigation, and in many instances, removal. Assessments will need to be completed to accurately prioritize removal activities. To support these efforts, state programs will likely require federal assistance. In these instances, the President, at the request of the governor of the affected state and/or Chief Executive of a federally-recognized Indian tribe, can make a declaration enabling access to federal aid. Prompt attention to these “mass casualty” events may prevent a large number of damaged and stranded vessels from becoming abandoned at a future time.

The Robert T. Stafford Act as amended (Stafford Act), Title 42 U.S.C. § 5121-5207, provides a systematic and organized process for providing federal assistance in support of major disasters and emergencies. The Stafford Act gives the Federal Emergency Management Agency (FEMA) the responsibility for coordinating federal government-wide relief efforts and support under Mission Assignments. FEMA Mission Assignments will largely govern which responding agency will be responsible for the coordination of these efforts. Authorities under the Stafford Act and funding avenues relevant to abandoned and derelict vessels are detailed in this section.

When a Presidential Emergency or Major Disaster Declaration is made and the National and/or Regional Response Coordination Center is activated, FEMA may activate the Environmental Protection Agency (EPA) and USCG to coordinate activities under Emergency Support Function-10 (ESF-10) of the National Response Framework to address hazardous substance and oil incidents caused by or threatened to be caused as a result of a major disaster or emergency.

Damaged and wrecked vessel removal operations conducted under ESF-3, Public Works and Engineering, will be coordinated through U.S. Army Corps of Engineers (USACE) as the primary agency and the USCG as a supporting agency, if required to assist. The Mission Assignments issued by FEMA for the removal of these vessels prescribe specific areas of operation, which include navigable waterways and adjoining shorelines, as noted above in FEMA Recovery Policy 9523.5. During the recovery of debris and damaged vessels post-storm, thorough documentation of owner/operator and vessel identification information, as well as method of removal and disposal, if required, becomes vitally important.

FUNDING AUTHORITIES:

Funding available for abandoned vessels is directly related to the authorities that may apply to mitigating pollution and removing abandoned vessels. However, funding expressly for the removal of abandoned vessels is minimal among both federal and state agencies. Although there are some provisions in current law that make allowances for the removal of abandoned vessels, particularly through the USACE in the Wreck Act, these provisions often have caveats that hinder the funding and thus delay prompt removal, or in some cases prevent removal at all. Below is information on contracting and funding authorities and limitations for the key federal agencies involved in responding to abandoned vessels.

CERCLA Funding:

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) funding, which is generally limited to \$2 million and 12 months per removal action unless certain statutory criteria are met, is managed by EPA and may be used to respond to a vessel if there is a release or substantial threat of a release of a hazardous substance into the environment or if there is a release or substantial threat of a release of a pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. There are petroleum exclusions under CERCLA, but oil is covered under CWA/OPA 90 (see CWA/OPA 90 and Oil Spill Liability Trust Fund (OSTLF) section below). Subject to EPA's CERCLA response delegations, once EPA determines that a removal action is appropriate, EPA OSCs have no specific delegated or internal guidance restrictions limiting their ability to remove and destroy a vessel.² USCG OSCs cannot make the final decision, absent further approval, to use CERCLA funding to remove a contaminated vessel from the coastal environment or destroy it.^{3,4} The USCG OSC must have Commandant's approval before using CERCLA funding to remove or destroy a contaminated vessel. However, USCG OSCs can take other types of response actions under CERCLA to address releases or potential releases of hazardous substances as well as contaminated debris that threatens the environment. In any case, the use of CERCLA funding for the purpose of removal should be carefully documented to clearly justify the use of CERCLA funds.

² EPA Delegations Manual, *Delegation 14-2 (CERCLA Response)*, 7 November 2001

³ 33 C.F.R. §1.01-70

⁴ COMDTINST 16465.29, *CERCLA Response Authorities and Associated USCG Policies*. May 1983.

Section 104 of CERCLA authorizes a federal removal action for a pollution incident in the following instances:

- Whenever any hazardous substance is released or there is a substantial threat of a release into the environment; or
- Whenever there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare.

CWA/OPA 90 and OSLTF:

Similar to CERCLA, the Oil Spill Liability Trust Fund (OSLTF), also known simply as the Fund, is available to OSCs pursuant to NPFC policies and procedures, when there is a discharge or substantial threat of discharge of oil to waters and shorelines as described under the Clean Water Act (CWA)311(c).

When using CWA 311(c) authority in respect to oil discharges or substantial threats, OSCs should coordinate planned activities, including any planned assessment activities, closely with NPFC case managers to ensure appropriate funding of activities to remove a discharge or prevent or mitigate a substantial threat of discharge. This is especially important where mixed purposes are being achieved in removing or destroying a vessel, e.g., CERCLA, CWA, navigation safety, disaster, or vessel debris threats to the environment.

The decision by an OSC to remove a discharge of oil or prevent or mitigate a substantial threat of discharge is based on several factors including proximity to environmentally sensitive areas, risk versus gain and economic impacts, whether adequate response actions are being taken by the polluter or other responder, and whether the oil is deemed a substantial threat to the public health or welfare. The OSC's authority and substantial threat determination are further defined below. For USCG OSCs, if deemed to be the most practical or cost effective method for pollution removal activities, a vessel may be removed or destroyed when approved by the Commandant.⁵ Similar to the differences under CERCLA, EPA OSCs do not have any special limitations on their ability to remove or destroy a vessel under Section 311(c) of the CWA as amended by OPA—in fact that authority may be directly delegated to the OSC.⁶

Congressional Supplemental Appropriations:

After extreme storm events, Congress has passed supplemental appropriations to federal agencies for abandoned vessels and vessel debris. For example, after Hurricane Katrina in the Gulf, and Hurricane Sandy in the mid-Atlantic, NOAA's Marine Debris Program and the NOAA Office of Coast Survey were directed to survey nearshore waters, map items found, and disseminate survey information to assist with removal, and inform the public.

Federal Protected Area Management:

Under the National Marine Sanctuaries Act, funding may be made available for removal activities within sanctuaries for removal of derelict and abandoned, depending on the fiscal health of the fund and whether there is significant injury to sanctuary resources. Similar funds

⁵ COMDTINST 16465.5, *Vessel Removal and Destruction Under CWA and CERCLA*, 2011

⁶ EPA Delegations Manual, *Delegation 2-89 (Removal of Discharge or Threat of Discharge)*, 19 January 1993.

may be available through Department of the Interior (DOI) Bureaus, including National Parks Service (NPS) and U.S. Fish and Wildlife Service (USFWS)⁷. All funding is through litigation recoveries and are not appropriations.

State Funding:

There are a variety of state programs for abandoned and derelict vessels. The NRT Guidance describes these state programs, provides citations, and indicates whether funding is available. In summary, many states may have programs for the removal of abandoned vessels but lack adequate or continuing funding. In many cases, the vessel can be claimed by the state after a requisite period, removed, and the costs may be partially recouped by public auction. However, auctioned vessels in poor condition may be abandoned again later.

GENERAL PROCESS FOR ABANDONED VESSEL MANAGEMENT:

Based on a combination of federal and state requirements as well as USCG policy, the following are benchmark activities that should be conducted when pursuing removal and disposition of abandoned vessels. Several management options may be available for abandoned vessels, including vessel turn-in programs, donation of vessels, recycling, dismantling, artificial reefing, and ocean disposal.

1. Identify vessel owner or establish abandonment.

Can the owner be identified through state registration, insurance, or other means to determine title?

2. Notify vessel owner in writing of intent to remove/destroy.

Once a vessel is determined to be abandoned, a best effort should be made to notify the last known owner of the intent to remove the vessel, and the possible disposition of the vessel post-removal.

3. Provide public notification if owner cannot be contacted/identified.

If the owner cannot be identified, the proposed vessel removal and disposition should be advertised.

4. Determine state jurisdiction/state programs available for removal.

Some state programs are funded and can assist with the removal of abandoned vessels, providing removal funding where federal funds may not be viable.

5. Obtain State Historical Preservation Officer (SHPO) approval if vessel is over 50 years old and has potential “historical significance.”

Once removal authority has been determined, reference should be made to the National Historic Preservation Act. Contact the State Historical Preservation Office to implement Sec. 106 consultation under the NHPA and to determine whether any restrictions exist regarding removal.

⁷19jj, Park Service Resource Protection Act (PSRPA)

6. Initiate other federal consultations under Endangered Species Act (ESA), Essential Fish Habitat (EFH), Marine Mammal Protection Act (MMPA), National Marine Sanctuaries Act (NMSA) and Park Service Resource Protection Act (PSRPA) as necessary.

Additionally, the National Environmental Policy Act (NEPA) may also have consultation requirements that may need to be met.

7. Determine appropriate federal and/or state response authority and funding source, as discussed in earlier sections.

Determine whether a discharge or release, or substantial threat of discharge or release exists, in accordance with the National Contingency Plan (NCP). The ability to obtain OSLTF or CERCLA funding is directly contingent on the previous items respectively. NPFC should be consulted and engaged in the removal process where OSLTF funds will be used to fund the response.

8. Obtain Statement of No Objection (SNO) from flag state if foreign flagged.

If the vessel is foreign flagged and in U.S. territorial waters, a SNO should be obtained from the flag state prior to commencing removal.

9. Identify management options. Includes options for ultimate disposition of vessels.

10. Complete a Vessel Removal/Destruction Request Memorandum package (USCG Only).⁸

This package must be completed by USCG OSCs pursuing the removal and destruction of any abandoned vessel (except under the post-disaster conditions).

OPTIONS FOR ULTIMATE DISPOSITION OF ABANDONED VESSELS:

Once the authority for the OSC to assume custody of the vessel has been established, disposition options for managing these vessels include dismantling for recycling or scrapping (as well as land disposal), creating artificial reefs, vessel turn-in programs, donation of vessels, and disposal at sea. Each disposition management option is unique to the abandoned vessel, the locality in which the vessel is grounded or moored, the construction and size of the vessel, and the physical state of the vessel. There are statutory requirements and associated regulations, as well as permit processes applicable to the disposition management options mentioned above. These requirements and regulations, as well as the amount and types of materials of environmental concern that may be present on an abandoned vessel, the amount of economically salvageable parts of the vessel, and the condition of the vessel should be considered before choosing a disposition management option for an abandoned vessel. The following are primary options for disposition:

- Vessel Turn-In Programs
- Donation of Vessels
- Dismantling for recycling or scrapping (as well as land disposal)
- Artificial Reefing
- Ocean Disposal

When selecting the appropriate disposition management option for an abandoned vessel, the OSC should consider the efficiency, expedience, and stewardship of the method proposed. Is

⁸ The requirement for USCG Commandant approval is an internal USCG requirement under COMDTINST 16465.5, Vessel Removal and Destruction Under CWA and CERCLA.

time of the essence? If not, more time may be available to seek alternative methods of mitigation that provide the greatest benefit to public health and the environment. Vessel disposition management options that provide the least impact on public health and the environment from operations are preferred—assuming they are good options when considering the following factors as well. Is the proposed method expedient or will the operation be labor intensive and slow due to limited logistics availability and infrastructure support? The OSC should also decide whether the abandoned vessel disposition management action demonstrates best use of the funding source. Although this is not the determining factor, it is one that should be taken into account when reviewing options in their totality. Other factors include, when appropriate:

- Threat of Pollution
- Hazard to navigation/potential hazard to navigation
- Impact to the environment and human health
- Proximity to environmentally sensitive areas
- Cost of management option
- Availability of needed resources or facilities (programs, dismantling yards, etc.)

Finally, state and local programs may be able to assist in the removal of a vessel as discussed earlier, sometimes making it far easier to respond to abandoned vessels.⁹

STATE ABANDONED VESSEL PROGRAMS:

Appendix C of the Abandoned Vessel Authorities and Best Practice Guidance contains applicable state statutes that relate to abandoned and derelict vessels. 29 states have laws that discuss abandoned and derelict vessels. Of these states, only half actually have funding to execute removal of abandoned vessels. This section describes the statute as well as whether the program is funded. In some cases, such as Georgia, programs were funded for a time before funding was reallocated to other internal state programs. These state programs will provide the OSC with a broader awareness of possible partnership opportunities in their state for the removal of abandoned vessels. Many states are addressing the problem of abandoned vessels in their waters and many are considering new laws and regulations. This summary is only a starting point for understanding state programs and capabilities.

CONCLUSIONS:

The foremost challenges in addressing abandoned vessels will be identifying vessels throughout various regions of the United States, prioritizing the threat posed to public health and the environment, determining jurisdictional authority, and evaluating the potential for removal. However, the issue of abandoned vessels is not without solutions. The NRT Abandoned Vessel Authorities and Best Practice Guidance offers a compendium of resources and procedural interpretations provided by the NRT for OSC decision making. The case studies; synopses of statutory authorities and funding availability; and proposed vessel disposal management options; demonstrate a high degree of potential for future development and growth of abandoned vessel

⁹ For example, the State of California Department of Boating and Waterways offers a robust program for the mitigation of abandoned vessels, including the Abandoned Watercraft Abatement Fund and the Vessel Turn-In Program. Washington State recently passed legislation authorizing a similar program.

programs nationwide. This growth is as timely as it is vital. Without the development of more robust local programs and partnerships to address the endemic issue of abandoned vessels will very quickly become insurmountable. There is an underlying theme when comparing model abandoned vessel responses - collaborative efforts between federal, state, and local governments for the mitigation and removal of threats posed by abandoned vessels. There is clearly no one agency, trustee, stakeholder or resource able to fully address this problem; therefore the collaboration in response is borne of necessity.

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