

SECTION 106: THE CHALLENGES, INCONSISTENCIES, AND RESULTS

IN FEMA DISASTER RECOVERY WITHIN TEXAS AND LOUISIANA

A THESIS

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## INTRODUCTION

Since its implementation in 1966, Section 106 of the National Historic Preservation Act's (NHPA) sole purpose is for Federal agencies, like the Federal Emergency Management Agency (FEMA), to take into account its undertakings on historic properties. But the Section 106 process does not require outcomes to preserve historic properties, but rather creates a type of checklist to ensure historic properties are taken into account. The Advisory Council on Historic Preservation's (ACHP) implementing regulations, codified in 36 CFR 800 Protection of Historic Properties, are subjective in interpretation within Federal agencies, and FEMA disaster recovery in particular. The problem with subjective interpretation of the implementing regulations is that it allows for many challenges, and the implementation of the Section 106 process is inconsistent. Some challenges include early consultation or lack thereof, many interpretations of the implementing regulations, when to include consulting parties, interpretations of how to consult, what parties consult, and defining an undertaking to name a few. Some of the key questions include how do the various FEMA offices in Texas and Louisiana conduct the Section 106 review process? How are FEMA programs structured to comply with the Section 106 review process? What various legal documents exist that dictate how Section 106 is conducted or how these legal documents are used to mitigate effects to historic properties for specific programs? What type of case studies exist that exhibit challenges and inconsistencies and support the results of the Section 106 process? Current research does not address these questions. The goal is to identify and therefore eliminate challenges and inconsistencies in FEMA disaster recovery in Texas



and Louisiana. Through this research, FEMA will have better processes for handling Section 106 projects.

There are three primary FEMA offices that will be the focus of this thesis. The first office is the Louisiana Integrated Recovery Office (LIRO) based in New Orleans and Baton Rouge. This office was created after Hurricane Katrina and Rita and originally reviewed projects specific to these disasters. Since its creation, the LIRO has evolved to review all disasters declared in the State of Louisiana. The second FEMA office is the Texas Integrated Recovery Office (TIRO) and is based in Austin and Houston. This office was created after Hurricane Harvey. The TIRO primarily focuses on reviewing projects specific to this disaster but it assists Region 6 in other disasters declared in the State of Texas. The third office is the Region 6 office in Denton, TX. The Region 6 office oversees both Texas and Louisiana in addition to 3 other States. The Region 6 office primarily reviews what is called legacy disasters. According to the Region 6 Supervisory Historic Preservation Specialist, these are disasters that have had their offices closed and have migrated back to Region 6 for continued review. Usually the disaster hits a threshold of 75% completed projects to warrant the migration back to Region 6.<sup>1</sup>

FEMA offers financial assistance to State, Tribal, local governments, and certain types of private non-profits, under various Programs. There are two primary FEMA Programs that will be the focus in this thesis. The first funding Program is the Public Assistance (PA) program. PA provides financial assistance to communities so they can quickly respond to and recover from major disasters or emergencies. After a declared

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<sup>1</sup> Dooley, Chris. Interview with Sarah McGovern. Personal interview. Denton, December 5, 2022.

event PA helps cover the cost for debris removal, life-saving emergency protective measures, and restoring public infrastructure.<sup>2</sup> The second funding Program is the Hazard Mitigation Assistance (HMA) Program. HMA provides financial assistance for mitigation measures to reduce future disaster losses. This program is implemented once there is a disaster declared and makes funding eligible to the entire State.<sup>3</sup>

In my research I will be identifying various FEMA legal documents that are in place such as Abbreviated Consultation Process (ACP) documents, Memorandum of Agreements (MOA), and Programmatic Agreements, with the primary focus will be on FEMA Programmatic Agreements. Programmatic Agreements are the most used program alternative. They allow federal agencies to govern the implementation of a particular agency program or the resolution of adverse effects from complex projects or multiple undertakings similar in nature through the negotiation of an agreement between the federal agency, appropriate State Historic Preservation Offices (SHPO), Tribal Historic Preservation Offices(s) THPO, and the ACHP. In certain circumstances, the ACHP may also designate a specific agency agreement as a prototype agreement that can be used for the same type of program or undertaking in more than one program or area.<sup>4</sup> FEMA has developed a Prototype Programmatic Agreement, in coordination with the ACHP and the

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<sup>2</sup> “Assistance for Governments and Private Non-Profits after a Disaster.” FEMA.gov. Accessed November 11, 2022. <https://www.fema.gov/assistance/public>.

<sup>3</sup> “Hazard Mitigation Grant Program (HMGP).” FEMA.gov. Accessed November 11, 2022. <https://www.fema.gov/grants/mitigation/hazard-mitigation>.

<sup>4</sup> “Programmatic Agreements.” ACHP. Accessed November 11, 2022. [https://www.achp.gov/program\\_alternatives/pa](https://www.achp.gov/program_alternatives/pa).

National Conference of State Historic Preservation Offices, to create a framework for FEMA in developing agreements to improve and expedite Section 106 compliance for disaster recovery activities. FEMA Region 6 has executed State-specific Programmatic Agreements in all five States, including Texas and Louisiana. FEMA has also developed ACPs, MOAs, Programmatic Agreements over the years for Program specific activities or Project specific activities.

Introduction into FEMA case studies will better help understand these challenges and inconsistencies. One approach is to interview FEMA staff within the LIRO, the TIRO, and the Region 6 Office. Case studies and interviews will hopefully discern the differences in each office's approach to Section 106 and maybe together the offices can work through the differences and align goals to conduct more consistent Section 106 review and produce results in an otherwise very subjective interpretation of the implementing regulations.

## LITERATURE REVIEW

In the historic preservation community, Thomas F. King is one of the leading authorities on the Section 106 process and Cultural Resources. Thomas F. King's book, "Cultural Resource Laws & Practice. This book covers not only Section 106, but other environmental laws., This literature review focuses on King's section of the Section 106 process.

King points out that Section 106 is deceptively simple. The primary two components of the Section state :

1. “Take into account” the effects of their actions on historic properties – that is, places included in or eligible for inclusion in the National Register; and
2. “Afford the Advisory Council... a reasonable opportunity to comment” on their actions.<sup>5</sup>

A summary of King’s introduction discusses the confusion of what Section 106 meant upon its enactment. How were agencies supposed to “take effects into account?” And what did it mean to give the Council a “reasonable” opportunity to comment. In addition, the only requirements agencies had to give the Council were properties *already* listed in the National Register of Historic Places (National Register). Since the register was about as new as the ACHP, there weren’t many listings, so Section 106 business was limited in this early stage. However, a National Register was assembled by the National Park Service (NPS) using its existing list of National Historic landmarks and its inventory of buildings documented by the Historic American Buildings Survey. Agencies began finding that they did have to engage Section 106 occasionally. But what did this mean?<sup>6</sup>

Based on what seemed to work in the first few cases the ACHP took part in, practitioners decided the definition of “taking into account” was figuring out what effects one’s action was likely to have and considering what might be done to reduce or mitigate any effects that were adverse. Moreover, since agencies at the time almost universally didn’t know a thing about historic preservation, this consideration of effects and mitigation ought to be done in consultation with people who *did* know something about it

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<sup>5</sup> Thomas F. King, “Cultural Resource Laws & Practice: An Introductory Guide,” (AltaMira Press, 2004), 81

<sup>6</sup> Ibid, 82

– that is, the ACHP, small park service staff, and the newly created SHPOs. Finally, because the rationale for even *having* a Section 106 process was that preservation was construed to be in the public interest, the consultation process should be public.<sup>7</sup>

The ACHP first put out nonbinding procedures for Section 106 review, which were promptly the basis for litigation that gave them additional authority. President Nixon’s Executive Order (EO) 11593 added clarity to the ACHP’s role and brought eligible but unlisted historic properties under the Section 106 umbrella. President Carter gave the ACHP rule-making authority through the backdoor mechanism of a presidential memorandum on water resource management, of all things. Congress eventually made this authority, and the inclusion of eligible properties, official. It also separated the ACHP from NPS, giving it independent status. The Section 106 procedures were issued as formal regulation in 1979, and revised in 1986, and 1999/2000. They’re codified at 36 CFR 800.<sup>8</sup>

King discusses the purpose of Section 106 compliance. He goes on to say, first, what’s the Section 106 process *for* – what’s its purpose? Despite what some whose projects are reviewed think, its purpose is not to complicate their lives or deplete their bank accounts. Despite what some consultants think, its purpose is not to keep them employed. Despite what some archeologists think, its purpose is not to require archeological surveys. And despite what some architectural preservationists think, its purpose is not to keep old buildings standing.<sup>9</sup> Instead:

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<sup>7</sup> Ibid, 82-83

<sup>8</sup> Ibid, 83

<sup>9</sup> Ibid, 85

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.

Many of the problems that arise in Section 106 review result from neglecting one of these elements of the process's purpose. It is forgotten that Section 106 practitioners are trying to accommodate and try to succeed. Section 106 practitioners consult too narrowly or not at all; they start too late. And unfortunately, there are aspects to the process, and the way it's usually practiced, that encourage some of these mistakes.<sup>10</sup>

Although agencies should consult broadly under Section 106, the regulations give special attention to some parties. The party one has to consult in every case is the SHPO and/or the THPO. Other consulting parties called out in the regulations are:

- Indian tribes whose lands may be affected by the action (that is, lands within the external boundaries of their reservations);
- Indian tribes and Native Hawaiian organizations who may attach religious and cultural significance to affected properties, regardless of where they occur;
- Local governments with jurisdiction over areas affected;
- Applicants for federal assistance;
- Applicants for federal permits, licenses, or other approvals<sup>11</sup>

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<sup>10</sup> Ibid, 86

<sup>11</sup> Ibid, 87

Agencies are supposed to consult with other “individuals and organization with a demonstrated interest in the undertaking... due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” That embraces pretty much everybody, but the agency can, if it wishes, decline to consult with those not explicitly named as having consulting parties rights.<sup>12</sup>

The Section 106 regulations – or the core of the regulations, at least – comprise a series of steps, and the ACHP often talks about the process as one that proceeds “step by step.” This stepwise process should not be a rigid one; on the other hand, it’s not supposed to be so flexible that it becomes spineless. As interpreted by its various participants, however, it can be either – or even both at the same time. In general, King thinks flexibility is vital, if it advances, rather than detract from, the purpose of the process.<sup>13</sup>

King proposes the question of does the action require review? Is it an undertaking” Per 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.*

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<sup>12</sup> Ibid, 88

<sup>13</sup> Ibid, 88-89

King's next question, "Is it the "type of activity that has the potential to cause effects." King notes that it's not necessary to know that they'll be an effect, or there are any historic properties lurking in the neighborhood. Knowing that an action is the *kind* of action that has the *potential* to affect something doesn't mean that one has to know that something is there to be affected. Checking to see if something *is* indeed there, and *will* indeed be affected, is what one does after, and because, one recognizes the *potential* for effect.<sup>14</sup>

King asks the question, "So who decides." The regulations leave it entirely up to the federal agency responsible for an action to decide whether it requires review – that is, to determine whether it's an undertaking and whether it's the kind of thing that has the potential for effects. This leaves agencies a lot of latitude for discretion, and there's no question that some agencies abuse it – intentionally or otherwise. Most often, King thinks, the abuses are unintentional; common examples include figuring that an action doesn't require review if it's categorically excluded from detailed review under NEPA and assuming that there's no need for review if there isn't an obvious historic property out there shrinking in fear from the project's potential effects. The only way to alleviate these problems is by education inside the agencies and vigilance outside them.<sup>15</sup>

King goes on to discuss initiating review. Let's say FEMA is thinking about funding something, and it is decided that yes, indeed, it does require review under Section 106. What then? One very useful thing the ACHP did in the 1999/2000 regulation – it had been a soft spot in the 1986 regulations – was to discuss in detail how

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<sup>14</sup> Ibid, 91

<sup>15</sup> Ibid, 91



to initiate the process. Unfortunately, lots of agencies, such as SHPOs, consultants, and others haven't really tumbled to the "new" requirements. This is too bad, because one of the most common ways agencies fail to comply with Section 106 is by just forgetting to start the process, or by failing to initiate early consultation, or simply doing it wrong. Besides deciding whether review is required, the regulations say there are four things an agency has to do in initiating review:

- Coordinate with other reviews – like NEPA
- Identify which SHPO(s) and/or THPO(s) they need to consult;
- Plan to involve the public; and
- Identify other consulting parties

King can't overemphasize how important all these things are and how much it messes things up when agencies fail to do them. It's very common for agencies to recognize the need only to do the second item in the above list – they figure out what SHPO or THPO to consult and send them a letter – often asking just for their comments or even their "clearance." Or they'll take a cultural resource contractor to do an archeological survey of the project site and submitting the resulting report to the SHPO/THPO for approval – and think this is what Section 106 review is about. King wants to be clearer than the regulations (which are unusually clear on this point): *that's not Section 106 review*. Even if the SHPO/THPO tells one it is.<sup>16</sup>

King continues to describe how to involve the public. Failure to figure out how to involve the public results in a "black box" review carried out only by the agency and SHPO/THPO still think this is what they're *supposed* to do. That's not the way the

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<sup>16</sup> Ibid, 93

regulations say to do it; the regulation demands transparency. The interested public must know what's going on and to have the opportunity to participate. And if they really want to participate, then they can become "consulting parties" – which means that they participate in back-and-forth discussions about how to identify properties, consider effects, and resolve effects that are adverse. While King notes that anybody can be a consulting party, the regulations at 36 CFR 800(2)(c)(5) state that certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. King states that the wise agency, he thinks, will not only allow but encourage them to participate. It's a whole lot smarter to get somebody's concerns on the table early in planning than to find out what they are when the bulldozers are ready to roll, and one finds themselves served with a subpoena or blasted on the front page of the newspaper.<sup>17</sup>

Once initiated, the process moves into its first technical phase: identifying historic properties. What one is about in identification is not simply identifying historic properties, though that's how the regulations present it. One is trying to determine effects; identification of properties is just one step along the way.<sup>18</sup> So, much time, trouble, and angst get expended on doing identification work that doesn't bear any relationship to the project's likely effects. Identification needs to be done *only to the extent necessary to address effects*; addressing effects is what Section 106 is all about.

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<sup>17</sup> Ibid, 94

<sup>18</sup> Ibid, 94

Basing identification on seeking to understand effects introduces a good deal of productive flexibility into the system.<sup>19</sup>

There is not a one-size-fits-all approach to identification. Survey standards exist within SHPO offices, but if one strictly complies with these standards what might be missing in further review about the scope efforts? Unfortunately, lots of Section 106 practitioners, and SHPOs, prefer simple, universally applicable standards. It's understandable – they have limited staff and limited funds to carry out Section 106 review and universal standards make life predictable. But the attitude is unfortunate, nonetheless; it leads to doing work that's not necessary to address a project's impacts and to failing to do work that *is* necessary.<sup>20</sup>

Identification of historic properties involves looking at the likely effects of the project and thinking about what needs to be done to identify historic properties that may be subject to effects. Bringing in consulting parties early in the process helps identification as one initiates the process. Because those parties may have important ideas about how to best to do identification; they may know something about the area, and in any event, it's wiser to involve them in designing the identification effort that leave them carping on the sidelines.<sup>21</sup>

The regulations call for doing three things as parts of the identification of historic properties: establishing the area of potential effects (APE), reviewing existing information on that area, and consulting parties and the public.<sup>22</sup> To identify historic

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<sup>19</sup> Ibid, 95

<sup>20</sup> Ibid, 95

<sup>21</sup> Ibid, 95

<sup>22</sup> Ibid, 95

properties, historic preservationists need to know where to look, hence the APE. The size and shape need to be figured out within the proposed undertaking which may affect historic properties. The regulations define the undertaking as:

*The geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.*

One of the most common mistakes agencies make is to equate the APE with the actual “footprint” of the undertaking. A lot of things can affect the size and shape of the APE. The place where the undertaking will have direct physical effects is part of the APE, but it’s only part. So, the effects of an undertaking are shaped by the character of the undertaking, the local environment, and other factors. Typically, in defining the APE, one will need to consider not only direct physical effects but at least the potential for.<sup>23</sup> Some examples include secondary physical effects, visual effects, auditory effects, sociocultural effects, and effects on culturally significant natural resources. All these kinds of effects need to be considered, regardless of whether they’re the direct, obvious outcomes of the action or less obvious – foreseeable but likely to happen later than the action itself, or at a greater distance. Cumulative effects also must be considered – that is, the effects of the action under review added to the effects of everything else that may be messing up historic properties in the area. Defining the APE based on multiple variables will usually result in several differently bounded areas – an APE for physical effects, and APE for visual effects, and so on.. In fact, a troop of APEs is perfectly expectable.<sup>24</sup>

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<sup>23</sup> Ibid, 96

<sup>24</sup> Ibid, 97

The remainder of the identification of historic properties is essentially a matter of doing background research and consulting with people. Of course, one should consult about establishing the APE, too; consultation is the main thing to remember to do throughout the Section 106 process. Exactly what kind of consultation and what kind of background research needed to do depends on the circumstances – the nature of the project, the area, and so on. One needs to find out what’s already known about the APE. What surveys have already been done, what historic properties have already been identified? What areas have been studied and found to be devoid of historic properties, or of this, that, or the other kind of historic property.<sup>25</sup>

Before the identification of historic properties, there are some erroneous considerations to take place.<sup>26</sup> There’s a widespread belief that Section 106, or the regulations, require agencies to do some level of survey to identify historic properties. This is a myth. A related misconception is that the regulations require agencies to identify all historic properties in the APE. To accomplish this complete identification, it’s often assumed that some specified kind of “complete” survey is required. This, too, is a misconception. In fact, the regulations don’t require any kind of identification program. They simply require that the agency make a “reasonable and good faith effort” to “identify historic properties.” And that’s “historic properties,” not “all historic properties.” The regulations don’t require the identification of all historic properties for two reasons. First, it’s an impossibility; one can never be sure they have identified everything. Second, it’s unnecessary. The rule of thumb is that one should do enough

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<sup>25</sup> Ibid, 98-99

<sup>26</sup> Ibid, 99

identification to provide a basis for reasonable decisions about effects and what to do about them. How much and what kind of identification is required depends on the nature of the likely effects, the nature of the area, and the likely historic properties, among other things. Bottom line: there's no specific kind of survey that has to be done to satisfy Section 106; the kind of identification work one does depends on the character of the project and its likely effects and on the character of properties likely to be present – which can only be determined through background research and consultation. It is not necessary to identify every single historic property subject to effect. Still, it is necessary to identify every single historic property subject to effect, but the need to consider all kinds of historic properties, not just those one happens to be trained to identify and appreciate; The basic rule is to make a reasonable and good faith effort.<sup>27</sup>

The ACHP has provided guidelines for a “reasonable and good faith effort.” They call for the agency official to “take into account past planning, research and studies; the magnitude and nature of the undertaking and the degree of federal involvement; the nature and extent of potential effects on historic properties; and the likely nature and location of historic properties within the APE. The Secretary of the Interior’s standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, state, tribal, and local laws, standards, and guidelines. The regulations note that a reasonable and good faith effort may include “background research, consultation, oral history interviews, sample field investigation, and field survey.” When asked to provide its advisory opinion, pursuant to 36 CFR §

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<sup>27</sup> Ibid, 100-101

800.2(b)(2), on the adequacy of a specific identification effort, the ACHP will evaluate the agency's efforts in light of these factors and the following criteria.

1. The identification effort is reasonable when it is logically designed to identify eligible properties that may be affected by the undertaking, without being excessive or inadequate. A reasonable identification plan is one that includes the following:
  - Documentation of the horizontal and vertical extent of the APE that accounts for direct and indirect effects;
  - An explanation of how the factors cited above inform the content and intensity of the identification plan. This could include information on past work in the area, scope of federal involvement in the undertaking, and the undertaking's magnitude and anticipated effects on any historic properties that might exist in the APE;
  - A review of existing information on historic properties within the APE, including information about possible historic properties not yet identified;
  - A cognizance of applicable professional, state, tribal, and local laws, standards, and guidelines;
  - A familiarity with methodologies used in other historic property surveys in the area that have been effective in terms of time and cost;
  - A clear description of the steps that will be taken during field investigations, during the analysis of field results, and in the

subsequent reporting and consultation, to determine the presence or absence of historic properties within the APE.

2. The identification effort is carried out in good faith when it is fully implemented by or on behalf of the federal agency. An identification plan that is appropriate to the nature and scale of the undertaking is carried out in good faith when it meets the following criteria:
  - The plan is carried out in consultation with, as appropriate, the SHPO, THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties within the APE;
  - Is initiated in a timely manner that allows for appropriate analysis and reporting, with adequate time for review by the consulting parties;
  - Is carried out by a qualified individual or individuals who meet the Secretary of the Interior's qualification standards and have a demonstrated familiarity with the range of potentially historic properties that may be encountered, and their characteristics;
  - Acknowledges the special expertise possessed by Indian tribes and Native Hawaiian organizations in assessing the eligibility of historic properties that may possess religious and cultural significance to them (regardless of whether or not such tribes and organizations meet the Secretary's qualification standards);
  - Is fully supported by adequate funding and other necessary resources, and



- Is not compromised by lack of integrity or omission, such as manipulating or ignoring evidence.

It is also important to keep in mind what a reasonable and good faith identification effort does not require:

- The “approval” of a SHPO/THPO or other consulting party. The ACHP, SHPO/THPO and other consulting parties advise and assist the federal agency official in developing its identification efforts, but do not dictate its scope or intensity.
- Identification of every historic property within the APE. One of the reasons the ACHP’s regulations contain a post-review discovery provision (36 CFR § 800.13) is that a reasonable and good faith effort to identify historic properties may well not be exhaustive and, therefore, some properties might be identified as the project is implemented.
- Investigations outside of, or below, a properly documented APE. The Section 106 process does not require that the agency search for all historic properties in a given area. Because the APE defines the geographic limits of federal agency responsibility for purposes of Section 106 review, identification efforts are carried out within its boundaries.
- Ground verification of the entire APE. In many cases, areas can be considered to have a certain probability of containing historic properties based on current knowledge. This or similar

characterizations can be used to justify where within the APE most identification efforts will or should be targeted. Predictive models that have been tested and found to be reasonably efficient can also assist federal agencies to meet the “reasonable and good faith” identification standard.

In sum, the Section 106 regulations require federal agencies to make a “reasonable and good faith effort” to identify historic properties that may be affected by their undertakings. The regulations set out several factors that need to be considered in making the effort both reasonable in terms of intensity and scale, and carried out in good faith through its development and execution.<sup>28</sup>

What are the next steps after identification? One of the most common and least useful responses is that it means to do what the SHPO tells one to do. This is not meant to insult SHPOs; it’s just that in this case, as often happens, the SHPO’s staff person has been busy with other things and has given one an off-the-cuff recommendation that isn’t very useful.<sup>29</sup> Depending on the identification, it may seem one needs to deploy an Army of historians, architectural historians, archeologists, landscape historians, and cultural anthropologists to figure out what’s in the project’s APE. In some cases, this is true, particularly if the project is large with lots of far-reaching, complex potential effects. But, in most cases, it doesn’t have to be true; one needs to look at what kinds of impacts the

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<sup>28</sup> “Meeting the ‘Reasonable and Good Faith’ Identification ... - ACHP.” Accessed November 11, 2022. [https://www.achp.gov/sites/default/files/guidance/2018-05/reasonable\\_good\\_faith\\_identification.pdf](https://www.achp.gov/sites/default/files/guidance/2018-05/reasonable_good_faith_identification.pdf).

<sup>29</sup> King, “Cultural Resource,” 102

project is likely to have and adjust the identification accordingly.<sup>30</sup> A final point. It's during identification – notably during the first step, assessing information needs – that one can most effectively identify not only historic properties but also people who may be concerned about the project's effects. The regulations encourage consultation with people who may have knowledge of or concerns about historic properties in the area. One should treat this as an opportunity, not an onerous requirement. Far better to identify concerned people, ascertain their concerns, and begin to consult with them at this early stage than to wait for them to pop up in court when one is ready to go into construction.<sup>31</sup>

Once the identification effort is completed and it is found something that *might* be eligible for the National Register of Historic Places (National Register), but one doesn't know whether it *is*. What does one do in order to decide? In deciding that this thing might be eligible, and this other thing surely is not, the practitioner is making some value judgments that they ought to be careful about. It's generally good practice to err on the side of caution and assume something might be eligible unless it clearly, demonstrably isn't.<sup>32</sup> So, coming out of an effort to identify historic properties in the APE with a list of places that is thought might be eligible for the National Register, as well as perhaps, a probably shorter list of places that are known to be eligible, perhaps because they've already been nominated and accepted for placement. How is it decided whether something that hasn't been formally evaluated is eligible? Naturally, the application of

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<sup>30</sup> Ibid, 105

<sup>31</sup> Ibid, 106

<sup>32</sup> Ibid, 109

“Criteria of Eligibility,” which are found in NPS’ National Register regulations at 36 CFR 60.4.<sup>33</sup>

There are four National Register criteria, labeled “A” through “D” that establish significance. “A” is associated with events that have made a significant contribution to the broad patterns of history. “B” is associated with the lives of a person significant in the past. “C” is that embody the distinctive characteristics of a type, period, or method of construction, or represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction. “D” is that have yielded, or may be likely to yield, information important in prehistory or history. If significance is established then the criteria of integrity must be applied. The regulations refer to “integrity of location, design, setting, materials, workmanship, feeling, and association.”<sup>34</sup>

It’s not enough for a place to meet one of the National Register criteria and have integrity. It also must *not* reflect one of a series of “criteria considerations” – except that often a property can exhibit such a “consideration” and still be eligible. This can cause confusion. It’s clearer to explain the considerations one at a time and discuss why a place that reflects each one normally isn’t eligible but sometimes is.<sup>35</sup> The criteria considerations, ordinarily; cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings,

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<sup>33</sup> Ibid, 111

<sup>34</sup> “Nps.gov Homepage (U.S. National Park Service).” Accessed November 11, 2022.  
[https://www.nps.gov/subjects/nationalregister/upload/NRB-15\\_web508.pdf](https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf).

<sup>35</sup> King, “Cultural Resource,” 118

properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria of if they fall within the following categories: (a) A religious property deriving primary significance from architectural or artistic distinction or historical importance, (b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event, (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life, (d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design feature, or from association with historic events, (e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived, (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance, (g) A property achieving significance within the past 50 years if it is of exceptional importance.<sup>36 37</sup>

So now something is found that might be eligible, but one doesn't know whether it is eligible. What now? The Section 106 regulations are flexible on this point. They

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<sup>36</sup> Ibid, 118

<sup>37</sup> "Nps.gov Homepage (U.S. National Park Service)." Accessed November 11, 2022. [https://www.nps.gov/subjects/nationalregister/upload/NRB-15\\_web508.pdf](https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf).

provide that the SHPO/THPO and responsible agency can agree to regard a property as eligible for the National Register. When they do, they treat the property as eligible for purposes of Section 106. The regulations don't spell out any documentation requirements for a consensus determination; it can be made based on whatever documentation the agency and SHPO/THPO agree on.<sup>38</sup> The fact that the Federal agency, the SHPO/THPO decide that something is eligible does not mean that one must, or even should, nominate it for inclusion in the National Register. Eligibility determination and nomination are completely different things. Since one determine eligibility as part of the Section 106 process, it often would make no sense whatsoever to nominate the property to become a permanent part of the National Register, as the action subjected to Section 106 review may very well destroy it. In other cases, there's just no particular point in nominating the property; preparing a nomination may not be where one wants to put their limited financial and personnel resources.<sup>39</sup>

Once one has determined eligibility, determining the effect comes next. However, it's only one step in the process. The fact that a property is eligible for the National Register does not mean one can't blow it away or muck it up. It merely means that ways of managing it and mitigating effects on it must be considered. To figure out how to mitigate effects, one naturally needs to have some idea of what those effects are. For this reason, the regulations prescribe that once something is identified as eligible, one next seeks to determine what kind of effect, or adverse effect, the proposed action may have

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<sup>38</sup> King, "Cultural Resource," 129-130

<sup>39</sup> Ibid, 132

on it.<sup>40</sup> One may, of course, come out of the identification process having found nothing that's eligible for the National Register. In this case, one can determine that no historic properties will be affected, give the SHPO/THPO and other consulting parties thirty days to comment, and if the SHPO/THPO doesn't object within that time, you're through with Section 106 review.<sup>41</sup>

So, what if one finds a property eligible for the National Register? Deciding whether the effects of the action on historic properties will be adverse involves applying something call the "criteria of adverse effects." There is only one criterion:

*An adverse effect is found when an undertaking may alter directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.*

In order to know what to do with this criterion, consider what one has to know in order to apply this criterion. First, one must know what aspects of the property make it eligible for the Register. This is not necessarily a simple matter.<sup>42</sup> The regulations go on to say:

*Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register*

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<sup>40</sup> Ibid, 138

<sup>41</sup> Ibid, 139

<sup>42</sup> Ibid, 139

Even if the historic preservationist is not dealing with some antique nomination or eligibility determination – even if the practitioners are looking at the historicity of a property for the first time – reasonable people can disagree, and there’s a world of potential for disagreement about what does and doesn’t contribute to a property’s eligibility.

In applying the criteria of adverse effect, there are several examples in 36 CFR 800.5(a)(2). These include

- i. Physical destruction of or damage to all or part of the property
- ii. Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary’s Standards for the Treatment of Historic Properties (36 CFR Part 68) and applicable guidelines
- iii. Removal of the property from its historic location
- iv. Change of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance
- v. Introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features
- vi. Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization



- vii. Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or condition to ensure long-term preservation of the property's historic significance.

Having applied the criteria of adverse effect, one clearly must make one of two determinations. Either the project *will* have an adverse effect, or it won't. If it is determined that it will, one moves on to the next step. If one determines that it *won't*, then one makes a finding of "no adverse effect". Then notification to whomever has been consulted with – at minimum the SHPO or THPO and any Indian tribe that "has made it known... that it attaches religious or cultural significance to a historic property subject to the finding" – and provide them with specified documentation. Section 800.5(c) of the regulations says only that the SHPO or THPO has thirty days to review the finding, but Section 800.5(c)(2)(i) gives any consulting party the opportunity to object within thirty days. King doubts if this is intended to confuse; it's probably just sloppy drafting – which isn't uncommon in the regulations.<sup>43</sup>

Like the eligibility determination process, the process of determining effect is one that can generate a tremendous amount of argument over abstractions, fine points, and procedural issues. King's recommendation to clients about such arguments almost invariably is, don't get into them. If someone thinks there's an adverse effect, there's almost always a way to show that there is given the twists and turns of the criterion and its examples. If one doesn't think there's an adverse effect, but somebody else does, it's probably not worth arguing with him or her about it. And if one can find some lawyerly way to split a procedural hair, somebody else can probably find a similar way to splice it

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<sup>43</sup> Ibid, 145

back together or find a hair that's less ratty under some other law. Don't play games; accept the argument that there is an adverse effects (even if one doesn't agree) and get on with the process.<sup>44</sup>

If there is going to be an adverse effect, naturally the next thing to do is see if there's a way to keep it from happening, or reduce its severity. Mitigate it, or as the regulations put it, "resolve" the adverse effect. What will be done to resolve the adverse effect is arrived at through more consultation. But the regulations at this point don't provide much guidance about how to consult, and even less about what the agency itself might do to seek resolution – think about the matter, do studies, and most critically, consider alternatives.<sup>45</sup>

What the regulations at this point *do* talk a lot about is whether the ACHP participates in consultation. Prior to this point in the process, the ACHP has not been formally involved; now it is, but its involvement is kept on a tight leash. In a nutshell, the agency must notify the ACHP that it's found adverse effect and is continuing consultation, providing supporting documentation. The ACHP then decides whether it wants to participate. If the ACHP comes into the consultation, everybody consults; if it doesn't, everybody but the ACHP consults, and the resulting Agreement Document is filed with the ACHP. The regulations are quite explicit about providing documentation. The agency must provide the consulting parties with the documentation necessary for

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<sup>44</sup> Ibid, 147

<sup>45</sup> Ibid, 148

them to participate in the process. And the agency must inform the public of what's going on, provide the public with specified documentation, and consider the public's views.<sup>46</sup>

The regulations call for continuing consultation with those already at the table (those consulted during identification, evaluation, and effect determination) and for welcoming new parties to the process. But the agency calls the shots as to whom it will consult, other than the ubiquitous SHPO/THPO and affected tribe.<sup>47</sup> The regulations say to consult about ways to avoid, minimize, or mitigate the adverse effects. These three terms are not defined in the regulations. There's a tendency among Section 106 practitioners to think of the three terms in a hierarchical sense. The first is to seek ways to avoid the impact altogether; if this doesn't work, the practitioner looks for a way to minimize it, and if it can't be found, then agreement on mitigation measures is sought. "Mitigation" in this formulation tends to be equated with things like archeological data recovery and architectural recordation. Let the property go, but make a record of it.<sup>48</sup>

Consultation under Section 106 results in one of three things: agreement, termination, or project abandonment. The last option is never mentioned in the regulations, but it's always a possibility, and probably happens more often than people think. Some projects aren't feasible and when problems arise the Applicant/Sub-Recipient may withdraw their project. But assuming the project is not abandoned, adverse effects end up being "resolved" either under a MOA or after termination and issuance of ACHP comment.<sup>49</sup>

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<sup>46</sup> Ibid, 148-149

<sup>47</sup> Ibid, 149

<sup>48</sup> Ibid, 150

<sup>49</sup> Ibid, 159-160

In most cases, consultation about adverse effects results in an MOA. There's no particular magic to the format, but there is a logic to it.<sup>50</sup>

*The Title.* The title should be designed to give the “cold reader” an immediate fix on what the agreement's about. It needs to contain the name of the action and the key players

*The “Whereas” Clauses.* These clauses spell out the rationale for the agreement and outline relevant actions that have led up to it, data supporting it, and so forth.

*The Stipulations.* These detail what will actually be done to resolve the adverse effect, who will do each thing, when, what standards will be employed, and so forth.

*The Signature Blocks.* Signatures in these blocks represent agreement by the signatories and concurring parties.

*Appendixes.* Appendixes are often attached, providing things like detailed plans, standards to be followed, exceptions to standard practices, and systems for monitoring performance.

Is it legal to destroy a historic property? As far as federal law is concerned. It's not legal to destroy it without considering the matter – that's what Section 106 requires, and, of course, the way one considers it is by following the process set forth in 36 CFR 800. But once that has been done, one can destroy the property, subject to whatever

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<sup>50</sup> Ibid, 160

agreement is reached under Section 106 – and subject to any other legal authorities that apply.<sup>51</sup>

If you're an agency likely to have to deal with emergencies, the regulations (and good sense – but see below) encourage one to develop procedures for dealing with their historic preservation implications. This is done in consultation with all the usual suspects, and the procedures have to be approved by the Advisory Council. Once approved, one can follow the procedures in lieu of regular Section 106 review. Alternatively, one can cover emergency situations in a Programmatic Agreement and then follow that. If one doesn't have procedures in place and don't have a Programmatic Agreement, and one is confronted with the need for an immediate response to a disaster or emergency, then one is supposed to contact all the usual consulting parties and give them seven days to comment if it is determined that this is feasible; if not, comment is to be invited during whatever time is available. Interestingly, the regulations don't provide for the agency to do anything substantive at all. There's probably the assumption that the agency is going to do what it can to take care of historic properties, but there's no explicit requirement to this effect. So, the "emergency" section seems to create a pretty big loophole in the process. Declare an emergency, give folks fifteen minutes to comment, and go ahead. The saving grace in this section, however, is that its provisions apply only to actions taken within thirty days after the disaster or emergency has been declared. So, one can't say "Well, there was an earthquake last year and now they have to demolish these

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<sup>51</sup> Ibid, 164

damaged houses, so lets call up the SHPO and give them half an hour to provide his advice.” This is not advised.<sup>52</sup>

King goes on to discuss some conclusions on Section 106. He’s spent a lot of writing discussing the Section 106 process. If it seems to one that it’s complicated, perhaps confusing, likely time-consuming, King thinks that is right. One problem is that because Section 106 review is too complicated to be easily done early in planning, agencies tend to disconnect Section 106 review. They put off the former until the latter is well advanced or even completed. The effect of deferral is to increase greatly the chances of conflict between development and preservation, and greatly decrease the chances of successful resolution, because by the time Section 106 is done, many alternatives have been eliminated and the agency is pretty well set on its preferred course of action. The complexity of the process also generates high costs in money and time. These are often associated with activities that are of marginal relevance to the real issues of impact identification and resolution. Massive amounts of time can be spent arguing over the details of eligibility, or over precisely which examples of the Criterion of Adverse Effect apply. The heavy focus of the regulations on the role of the SHPO has two unfortunate results at least. One is that agencies – assuming that the process is all about simply satisfying the SHPO – often feel no need to develop or use expertise of their own. Why pay for pricey experts if the federal agency is going to do whatever the SHPO’s experts tell us to do? Thus, the responsible agency, which has the best chance of doing something intelligent about historic preservation early on and through the planning process, doesn’t. Instead, Section 106 review becomes a rote matter for the agency – jumping through the

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<sup>52</sup> Ibid, 173-174

hoop of “SHPO clearance.” The other result is that the SHPO is given great opportunity to act in arbitrary and dictatorial ways, and to sweat the small procedural stuff rather than dealing with the large policy and substantive issues. Even if the SHPO doesn’t do this sort of thing intentionally, it’s easy for an agency or project proponent – particularly if they lack the expertise of their own – to conclude that they’re being jerked around by the SHPO, and respond accordingly. The SHPO then develops quite pragmatic reasons for thinking that the agency or proponent is antagonistic and not to be trusted and so ratchets up the pressure, and the vicious cycle continues. And while the agency and SHPO dance their intricate dance, everyone else who may be interested in the project and its effects can get shut out – because what is forgotten in the process of all this is that it’s not just the SHPO who has to be consulted; other interested parties have roles to play, too.<sup>53</sup> So, what is needed? A thorough rethinking of the process going back to the basic requirements of the law and seeing how they could best be met given contemporary conditions. But this didn’t happen during the late 1990s revisions of the regulations, and there’s no sign that it’s going to happen anytime soon. So, historic preservationists are stuck with the complexities King has outlined in such mind-boggling detail above.<sup>54</sup>

King further expands on the Section 106 law in his book “Federal Planning and Historic Places: The Section 106 Process”. King provides facts and details on the Section 106 process. He also provides a critical analysis and complaints of the Section 106 process. Early in the book,<sup>55</sup> goes on to say that part of what doesn’t work well is the

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<sup>53</sup> Ibid, 182-183

<sup>54</sup> Ibid, 184

<sup>55</sup> Thomas F. King, “Federal Planning,” (AltaMira Press, 2000.), 15

Federal is the Agency Official, FEMA, in this case, does not pay enough money, and misallocates resources leading to buildings and structures to be destroyed. King also identifies complaints that Section 106 is not protective enough, too protective, too bureaucratic, too complicated, and intellectually indefensible.<sup>56</sup> Per the Section 106 of the National Preservation Act, now codified at 54 U.S. Code § 306108 - Effect of undertaking on historic property says:

*The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.*

King asks what the effects are? He suggests that for establishing the model of Section 106 review as a process of negotiation.<sup>57</sup> He also identifies that one doesn't exactly tell agencies to plan, that one tells them to "take effects of their actions into account".<sup>58</sup> As noted by King, the Reagan Administration tried to set out in destroying the Section 106 process by replacing the step process with a simpler, conveniently ineffective one in which agencies would submit project descriptions to the ACHP, which

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<sup>56</sup> Ibid, 15

<sup>57</sup> Ibid, 19

<sup>58</sup> Ibid, 17



would write comment letters back to the agencies.<sup>59</sup> Ultimately this approach did not make any headway as it got in the way of efforts with Section 110(a)(2)(E) a 1992 amendment to NHPA that put the core elements of the 106 process into law.<sup>60</sup> King also notes that one of the weaknesses is putting undue weight and stress on the SHPO.<sup>61</sup> King goes on to discuss more weaknesses of Section 106. That it has come to be interpreted that almost guarantees late identification of preservation-development projects, which greatly limits opportunities for resolution.<sup>62</sup> According to King, another problem is over-reliance on the SHPO. Too often, agencies view the 106 process as being one of getting “clearance” from the SHPO.<sup>63</sup> SHPO’s prefer this while others find it to be inevitable. King goes on to note that many decisions are made in black boxes between agencies and SHPO’s without involving other parties, and often agencies expect the SHPO to represent all preservation interests, even though SHPO can have a political agenda with a lot of conflicting interests to juggle. King’s final problem is that the 106 process has become too complicated, too procedure-bound, and too lawyerly.<sup>64</sup>

Section 800.1(a) states the purpose of Section 106 review to be:

...to accommodate historic preservation concerns with the needs of

Federal undertaking through consultation among the Agency Official and

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<sup>59</sup> Ibid, 21

<sup>60</sup> Ibid, 21

<sup>61</sup> Ibid, 21

<sup>62</sup> Ibid, 25

<sup>63</sup> Ibid, 25

<sup>64</sup> Ibid, 26

other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.

King supposes that this statement places a little too much emphasis on consultation, without even a bow toward the agency's own responsibility to apply its own brainpower to the effects of its actions. A continuing problem in Section 106 review is a tendency among agencies to equate "taking effects into account" with "asking the SHPO what to do." Emphasizing consultation without mention of giving independent thought to one's effects may support the tendency. But this is something of a quibble. If in elegantly, this subsection expresses the notion of balance that is at the heart of the process.<sup>65</sup> King has heard it argued by attorneys that Section 106 does not actually require an agency to consider alternatives.

King notes Applicants/Sub-Recipients may be charged by the Agency Official with doing the legwork of 106 review, but the agency must retain responsibility for compliance.<sup>66</sup> Pages 30-31 discuss consulting parties. King goes on to say that clearly, this definition of parties embraces just about everyone as King, for one, thinks it should. However, the fact that it doesn't just come out and say so – doesn't say "consult with everybody" but rather coyly minces around deciding the work up into parties – is about whether Fred, Sally, or the Southeast Armchair Historical Society is an X, a Y, or a Z, and therefore is or is not entitled to be a consulting party.<sup>67</sup>

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<sup>65</sup> Ibid, 27

<sup>66</sup> Ibid, 31

<sup>67</sup> Ibid, 32

King addresses public participation that both the Section 106 regulation and those governing compliance with other cultural resource laws make much of public participation, but none of them say much about how it's to be arranged. In the case of Section 106, public participation is actively constrained by the language of the regulations. Providing responsibly for public participation is one of the big challenges of Section 106 practice. Although there are people and agencies who just don't want the public to know what's going on, in most cases poor public participation results simply from failure to understand what kind of participation is appropriate to a given case. This in turn often results from an inability to distinguish projects that require a lot of public participation from those that don't. When greater public participation is argued for, the counterargument often raises the specter of gridlock. "If a public meeting is needed every time a ditch is dug or the street is paved, then the work will never get done." Well, of course. All projects don't require the same level and kind of public involvement. The problem, though, is how to sort out those that do need a lot of public involvement from those that don't. And how to decide what kinds of involvement are needed. And how to document the fact that it's been decided about public involvement in a non-arbitrary, non-capricious way.<sup>68</sup>

King defines public participation into five types based on the amount and kind of public participation they require:

1. *Autonomous decision*. The official makes the decision alone, without public involvement

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<sup>68</sup> Ibid, 103

2. *Semi-autonomous decision.* The official seeks input from the public but then makes the decision alone in a way that may or may not reflect the input received.
3. *Segmented public consultation.* The official discusses the potential decision, its impacts, and options for resolving impacts separately with different segments, gets their ideas, and then makes a decision that reflects (among other things) the influence of the various groups and the official's best effort to balance their interests.
4. *Unitary public consultation.* The official discusses the potential decision, its impacts, and options for resolving impacts with the public as a single, assembled group. The decision is then crafted, as best it can be, to reflect both the needs that require the action being decided on and the influence of the public.
5. *Public decision.* The official shares the need for a decision with the public and attempts to reach an agreement on what decision to make.<sup>69</sup>

Deciding what kind of decision – and therefore what kind of public participation – is appropriate involves answering seven questions.

1. Does the action involve requirements that could make one alternative way of carrying out the action better than another? For example, are there engineering requirements, architectural requirements, legal review requirements, or environmental, public health, or other

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<sup>69</sup> Ibid, 104

standards that could make one way of doing the project better than another?

2. Does one have enough information – before beginning the process of decision-making – to make the decision and make it right?
3. Is the subject of the decision such that there are multiple potentially feasible alternatives, or is the choice of approaches basically predetermined?
4. Is public acceptance important to the implementation of the decision?
5. Is public acceptance reasonably certain, even if the decision is made without public involvement?
6. Does the public that is relevant to the decision share the agency's goals regarding the decision?
7. Is conflict within the public, or between the public and the agency, likely to result from one or more potential alternative decisions? Is the public likely to be split over the project or its alternatives? Is there likely to be significant opposition from all or some of the public to what the plans are.<sup>70</sup>

King talks about how not to conduct Section 106. The 1979 regulation allowed the Agency Official to coordinate with SHPO and ask them what to do. As one can imagine, this created problems. People figured that this was all they had to do, so that's

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<sup>70</sup> Ibid, 104-105

all they did do. If the SHPO failed to respond, they figured they didn't need to do anything at all.<sup>71</sup>

The definition of undertaking in 36 CFR 800.16(y) 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; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. According to King, this section is ripe for deliberate misuse or inadvertent misconstruction, sidetracking Section 106 review before that an action doesn't have the potential to affect historic properties, and that's the end of it. Once the determination is made, the agency has no Section 106 responsibilities.<sup>72</sup>

However, the relationship with Section 106 is not always very thoughtfully worked out in agency procedures. As a result, the assignment of projects to CATEX categories under NEPA tends to chug along in happy ignorance of Section 106 review and vice versa.<sup>73</sup>

Section 800.3(c)(3) states:

*Consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.*

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<sup>71</sup> Ibid, 33

<sup>72</sup> Ibid, 35

<sup>73</sup> Ibid, 35

This may seem arbitrary, but in fact consultation overkill and underkill are real problems. Much time can be wasted consulting – the SHPO/THPO and others – about things that don’t really deserve the effort. This results from the assumption that there is a single, monolithic way to consult. The same misperception causes agencies to consult too little, or too late, about things that really need considerable attention.<sup>74</sup>

Section 800.3(c)(4) clarifies a point that was rather vague in the old regulation. When one writes to the SHPO or THPO and 30 days slide by without a response, what is done? This section makes it clear that an agency in such a case can do either of two things: It can assume the SHPO/THPO’s concurrence and move on to the next step in the process, or it can consult with the ACHP in lieu of the SHPO or THPO.<sup>75</sup> Recall that Section 800.2 identifies a whole list of entities as consulting parties – the SHPO/THPO, tribes, local governments, applicants, etc., plus other “individuals and organizations with demonstrated interest in the undertaking” (Section 800.2(c)(6)). So, it seems that under Section 800.3(f) it’s the agency’s obligation to get out at the beginning of the process and find folks with “demonstrated interests.”<sup>76</sup> Everybody else who wants to be a consulting party must request this status in writing, and it’s up to the agency to “consider” such requests and “determine which should be consulting parties.” The agency is to do this in consultation with the SHPO/THPO and any tribe whose lands are affected. So, if an agency doesn’t want someone at the consultation table – unless that someone is an SHPO, THPO, local government with jurisdiction, tribe with affected lands, or

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<sup>74</sup> Ibid, 37

<sup>75</sup> Ibid, 37

<sup>76</sup> Ibid, 38

tribe/Native Hawaiian group that asks to participate and, if the agency insists, demonstrates that it attaches religious or cultural significance to historic properties in the area – then the agency can pretty much close the door in that someone’s face.<sup>77</sup>

Poor identification work can result in costly last-minute discoveries. On the other hand, poor identification can cause unnecessary loss of historic properties and unnecessary conflict between project proponents and preservation interests. Finally, poor coordination between historic property identification and the identification of other cultural resource may cause an impact on cultural resource other than historic properties to be ignored all together.<sup>78</sup> Generally speaking, standard survey systems are geared to the identification of archeological sites and historic standing structures subject to demolition or other direct project impacts. They’re not designed to identify traditional cultural properties or cultural landscapes, and they’re not usually very good for historic districts and linear properties like roads.<sup>79</sup>

Section 800.4(a) introduces the useful NEPA notion of “scoping” into Section 106. Sometimes the assessment step was skipped altogether or taken to mean simply asking the SHPO what to do and then doing it. Even worse, in some cases, it was even reduced to asking the SHPO what’s out there, and if the SHPO didn’t know or didn’t say, assuming there was nothing there and “clearing the project to proceed.”<sup>80</sup> The requirement to “document” the APE is interesting, but its intent is never explained. It is in the definition at Section 800.16, though, that the ACHP provides some useful direction:

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<sup>77</sup> Ibid, 39

<sup>78</sup> Ibid, 41

<sup>79</sup> Ibid, 43

<sup>80</sup> Ibid, 45



*“Area of potential affect” means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influence by the scale nature of an undertaking and may be different for different kinds of effect caused by the undertaking.”*

Poor APE definition is another way that agencies often mess up in Section 106 review.<sup>81</sup>

So, the APE must include both direct and indirect effect areas, and the way practitioners define the APE should reflect the scale and nature of the undertaking. It’s perfectly all right to have an APE for direct effect and an APE for indirect, or an APE for physical and an APE for visual.<sup>82</sup>

Having addressed the APE definition, Section 800.4(a) goes on to direct that existing background data be reviewed, and that information be sought from consulting parties and other “likely to have knowledge of, or concerns with, historic properties in the area.” Agencies are also to “identify issues relating to the undertaking’s potential effects.” They are to give specific attention to properties and effects of concern to Indian tribes and Native Hawaiian organizations, understanding that such groups may be reluctant to divulge specific information. So scoping the identification effort involves figuring out the area(s) where effects may take place, reviewing background information, and (rather implicitly) consulting with tribes and others who may ascribe cultural value to properties in the area. One unfortunate turn of phrase in Section 800.4(a) is in the

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<sup>81</sup> Ibid, 46

<sup>82</sup> Ibid, 48

introductory clause when the Agency Official is directed to “consult with the SHPO/THPO to” determine the APE, review background data, and so on. The “to” is the problem; its use implies that one goes to the SHPO or THPO to do everything that’s needed to scope the identification effort. The subsections that follow, of course, describe actions that can’t be done with the SHPO or THPO alone, but this probably won’t keep some agencies from jumping to the conclusion that scoping involves just asking the SHPO or THPO what to do – in other words, to continue to avoid doing their own thinking.<sup>83</sup>

Second, the regulation does not say the agency must identify all historic properties within the APE. It just says the agency is required to identify historic properties. How many? What percentage of the total? In how much detail? It depends on several factors, as the following subsection makes clear. Subsection 800.4(b)(1) is about “level of effort.” It prescribes as its basic standard that the agency makes a “reasonable and good faith effort,” but it goes on to provide some ideas about what this effort might entail. “Background research, consultation, oral history interview, sample field investigation, and field survey” are the activities listed. Let’s hope that nobody takes this list to be inclusive; conversely, let’s hope that the individual terms are understood to be broadly encompassing.<sup>84</sup> The ACHP’s definition of a “reasonable and good faith effort” closely comports with that established by the Tenth Circuit Court of Appeals in *Pueblo of Sandia v. United States* (50 F.3<sup>rd</sup> 856 [10<sup>th</sup> Cir.1995]). The agency’s decision about how to identify historic properties needs to be based on the totality of available background data

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<sup>83</sup> Ibid, 49

<sup>84</sup> Ibid, 50

and must be informed by pertinent guideline. The Court also noted that consultation about decision needs to be informed and honest. The regulation doesn't say that, but I imagine the ACHP would say it's a given.<sup>85</sup>

After identification efforts come the evaluation efforts. King proceeds to discuss the issues of how not to evaluate. The first is to ignore it unless forced. The agency assumes that nothing's eligible unless somebody else proves that something is, usually by nominating it. Though common a while back, this isn't a very common problem. Most agencies understand that it's their responsibility to determine whether properties are eligible for the Register, or at least that it's their responsibility to find out whether the SHPO thinks they're eligible. Some agencies are still resistant to recognizing properties as eligible, though, and some project opponents fall into the trap of spending their own scarce resources to nominate properties, rather than insisting that the agencies do their jobs.<sup>86</sup>

Then there is the idea of let the SHPO do it. The agency sends a survey report or some other documentation to the SHPO and asks the SHPO to decide whether the properties described therein are eligible. While determinations are the responsibility of the Federal agency, many SHPOs take it on because they see no alternative and view the agencies as detached in the review. They thus accept unreasonable workloads and expose themselves to undue political pressure (pressure, usually, to determine properties ineligible). The agency that "asks the SHPO" puts itself in a box, because if the SHPO doesn't get back to the agency with a determination within the 30-day window prescribed

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<sup>85</sup> Ibid, 52

<sup>86</sup> Ibid, 57

by the regulation for most transactions, the agency has nothing. If the agency advises the SHPO of what it, the agency, thinks is eligible and ineligible, and the SHPO doesn't respond within 30 days, the agency can assume concurrence.<sup>87</sup>

Sometimes the approach is to keep the public out. Many agencies, and not a few SHPOs, try to make eligibility findings in a black box without public involvement. However irresponsible a way this may be for a public agency to behave, the 1986 regulation didn't forbid or even particularly discourage it, being silent on the subject of "outside" participation in eligibility findings. The 1999 regulation isn't much better.<sup>88</sup> Then there is the idea that it can't be eligible; the federal agency wants to demolish it. Agencies who haven't quite gotten a grip on how Section 106 is supposed to work sometimes try to avoid regarding as eligible any property that they want to demolish or otherwise destroy. This attitude is usually based on the assumption that if a property is regarded as eligible, this makes it inviolable.<sup>89</sup>

Then there is the approach to evaluate it to death. Evaluation can become a tremendous void into which to pour money, often because – with the best of intentions – SHPOs and others want to make sure the agencies aren't spending money unnecessarily on insignificant properties. There's a system of interlocking vicious circles that causes overly expensive evaluations to happen. The National Register likes lots of documentation (preferably on its own nomination forms). The Register is in NPS. NPS provides grants to the SHPOs and conducts a periodic program audit. NPS naturally

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<sup>87</sup> Ibid, 57

<sup>88</sup> Ibid, 58

<sup>89</sup> Ibid, 58

encourages SHPOs to insist on detailed evaluation. SHPOs do this to please NPS, to build their own historic property inventories, and often because they think it's a good idea. Consultants make money doing evaluation; some firms do little else. So, it's in the best economic interest of many consulting firms to call for a lot of evaluation, and it's equally in the best economic and political interest of the SHPO to do the same. It may or may not be in the best interest of agencies, project proponents, Native Americans and others who don't want a lot of information broadcast about their historic properties or of the properties themselves. But the widespread perception is that lots of evaluative study is an automatic necessity. In some cases – particularly regarding archeological sites – such study is carried to such an extreme that by the time the work is done, the property no longer is eligible. It's been “test-excavated” out of existence, or otherwise had its integrity completely compromised by “study.”<sup>90</sup>

Then, let's play nomination. The same economic-political forces that cause evaluative overkill cause some agencies and SHPOs to assume that – as the National Register prefers – an eligibility finding must be made based on a completed National Register form. The standard nomination form doesn't elicit very much information that's useful in Section 106 review, and it requires much attention to information whether a property's a site or a district, of State or local significance, and what historical themes it represents – none of which matters at all in Section 106 review. They can fret endlessly about boundaries, which are usually irrelevant if anything beyond the grossest direct generate substantial tomes of evaluative research, without ever identifying the element that give a property its integrity, and who disturbance may constitute adverse effect.

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<sup>90</sup> Ibid, 58

There is nothing in either the 1986 or 1999 regulation to require nomination forms or the equivalent, but as with other forms of over-documentation, it can be in economic interests of some to insist on their preparation, and a lot of people assume that forms are required.<sup>91</sup>

The next tactic is to ask the Keeper. Finally, some agencies follow 36 CFR 63 and request the Keeper's opinion on every eligibility determination. The Keeper, naturally, requires extensive documentation, automatically using nomination as its reference standard, and takes a lot of time to boot. Of course, 36 CFR 63 does require going to the Keeper, but 36 CFR 800 does not. So, what's an agency to do? Most ignore Part 63 in their day-to-day work, and then use it for procedural and documentary guidance when they do have to seek a Keeper's determination under Part 800. But others, mostly those with more money than good sense, ask the Keeper routinely. It's a waste of time.<sup>92</sup>

Subject to a few oddities, and unfortunately without explicitly correcting a lot of contradictory myths, the 1999 regulation provides for a flexible process of historic property identification and evaluation. There are no hard-and-fast requirements for particular kinds and levels of survey, no requirement that all historic properties be identified, no requirement for documentation as a basis for the decision to regard a property or class or group of properties as eligible or ineligible. The bottom line is that the agency must make a reasonable and good faith effort, knowledgeably considering pertinent guideline and based on a reasonable scoping effort.<sup>93</sup>

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<sup>91</sup> Ibid, 58-59

<sup>92</sup> Ibid, 59

<sup>93</sup> Ibid, 62

Identification findings result in either no historic properties present or historic properties present. Within the identification findings and with the application of effects, there are a few different determinations an agency can make. In the case of a “no historic properties affected” finding, under Section 800.4(d) the agency notifies all the consulting parties and makes documentation available for public inspection. The required documentation according to Section 800.11(d), is a description of the project and the APE, a description of what the agency did to identify historic properties, and an explanation of why the agency has reached the conclusion it has. If the SHPO or THPO, or the ACHP if it “has entered the Section 106 process,” doesn’t object within 30 days, the agency is finished with Section 106 review and can proceed with its project.<sup>94</sup>

If historic properties are identified, the agency applies the Criteria of Adverse Effect found at Section 800.5(a)(1). The agency is also to “*consider any views... which have been provided by consulting parties and the public.*” The “have been” language is a bit curious: Does this mean that in order to have its views considered, a stakeholder needs to have filed them before the agency applies the Criteria, without even being told that the agency is applying them? An agency can arrive at a “no adverse effect” determination if the Criterion of Adverse Effect is not met, or the agency and SHPO/THPO agree to conditions that will keep adverse effects from happening – then the agency provides documentation of this finding to all consulting parties, providing the SHPO/THPO (and presumably the other) with 30 days to comment.<sup>95</sup>

An undertaking has an adverse effect when it:

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<sup>94</sup> Ibid, 63

<sup>95</sup> Ibid, 72

*... may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association.*

The “examples” of adverse effects” listed in Section 800.5(a)(2) are as follows:

- *“Physical destruction of or damage to all or part of the property”*
- *“Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary’s Standards for the Treatment of Historic Properties (36 CFR Part 68) and applicable guidelines”*
- *“Removal of the property from its historic location”*
- *“Change of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance”*
- *“Introduction of visual, atmospheric, or audible elements that diminish the integrity of the property’s significant historic features”*
- *“Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization”*



- *“Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance”*<sup>96</sup>

If the agency determines that there will or may be an adverse effect on historic properties, then under Section 800.6 the parties all consult to “resolve the adverse effect,” that is to “develop and evaluate alternatives or modifications that could avoid, minimize or mitigate adverse effects...” The parties continue “consultation” per Section 800.6(a); they don’t initiate it upon finding an adverse effect. Besides the SHPO/THPO and other consulting parties identified earlier in the process, the agency and SHPO/THPO (and the ACHP when it takes part) may invite others to participate, and the agency is required to invite anyone who is going to assume a role in implementing whatever comes out of the consultation.<sup>97</sup> Usually, a MOA is the go-to preferred method of resolving adverse effect. However, FEMA under the Statewide Programmatic Agreement, has developed an alternative to an MOA called the ACP. The ACP allows the agency, SHPO/THPO, and other consulting parties to develop a streamlined approach to resolving adverse effects utilizing Appendix C: Treatment Measures. The consulting parties meet to discuss the options between an MOA, which require a longer agreement document, a procedure for involving the legal department, and a signature from Senior Leadership. The ACP is far more streamlined and results in a letter to all consulting parties for review and a 15-day objection period. The ACP requires no legal counsel review, or any additional signatures.

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<sup>96</sup> Ibid, 67-71

<sup>97</sup> Ibid, 75

If there are no objections to the ACP, then FEMA can move forward on the undertaking and no further Section 106 review is required.

If an adverse effect cannot be resolved through an ACP and Standard Treatment Measures, then an MOA will be required. Assuming an MOA is arrived at, who signs it? The regulation is pretty convoluted about this. First, there are “signatories” per Section 800.6(c)(1). These are the agency, the SHPO or THPO, and the ACHP in those cases in which it gets involved. Next, there are “invited signatories” per Section 800.6(c)(2). These are parties that the agency “may” invite or “should” invite. Rather oddly, the regulation says that Indian tribes and Native Hawaiian organizations that attach religious or cultural significance to affected properties on *may* be invited, even though Section 101(d)(6)(B) of the NHPA makes *consultation* with such tribes and groups mandatory. Agencies are advised that they should invite “any party that assumes a responsibility” under the MOA to sign. If an invited signatory doesn’t sign, then the MOA can still go into effect. It’s not very clear how this would work if the non-signing party was someone assigned a responsibility. Then there is “concurrence.” The agency *may* invite “all consulting parties” to concur in the MOA. The signatories as a group may agree to invite other consulting parties to concur, as well as people and groups that have *not* been consulted to date. Like an invited signatory, a concurring party’s failure to sign on doesn’t keep the MOA from going into effect. As a result, it’s hard to see what the difference is between an invited signatory and a concurring party. Anyhow, the bottom line seems to be that in most cases if the agency and SHPO agree on something, that’s what’s going to be done, no matter how much other consulting parties may complain.<sup>98</sup> If

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<sup>98</sup> Ibid, 76-77

an agency proposes to document a perfectly usable old building and then nuke it, there's no reason for an SHPO or the ACHP to hold their noses and sign an MOA on the assumption that if they don't, the agency will nuke the building *without* even documenting it.<sup>99</sup>

Emergency situations are the subject of Section 800.12. In the event of a flood, a fire, a hurricane, an earthquake, or an invasion from outer space, an agency is given lots of flexibility in how it complies with Section 106. Section 800.12(a) encourages agencies to establish their own procedures for dealing with the kinds of emergencies they routinely face. If now procedures are in place, however, the agency still doesn't have to go through the standard Section 106 review process in case of a disaster or other emergency. The emergency must either be declared by the President, a tribal government, the governor of a State, or (where the local government serves as the Federal agency as a result of lawful delegation), the head of a local government or in the agency's eyes present "another immediate threat to life or property." In such a case, the agency notifies the usual parties (SHPO, etc.) and gives them seven days, or whatever time is available, to comment.<sup>100</sup>

The emergency provisions can be invoked only "within 30 days after the disaster or emergency has been formally declared." In an emergency that's not "formally declared," presumably, one would count from the date the responsible agency official decided that life or property was endangered. The bottom line is that if you've got more than 30 days to plan something, one ought to be able to go through the standard 106

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<sup>99</sup> Ibid, 78

<sup>100</sup> Ibid, 90

process. Recognizing that this may not always be the case, Section 800.12(d) permits agencies to apply for extensions.<sup>101</sup>

Section 800.14 outlines several ways to deal with Section 106 responsibilities other than through the standard 106 process. An agency can:

- Adopt its own procedures for Section 106 compliance, after consultation with SHPOs, THPOs and other interested parties, and subject to ACHP approval;
- Execute a Programmatic Agreement;
- Establish exempted categories of action, after consultation and subject to ACHP approval; or
- Request ACHP comment on a category of undertakings, rather than on individual actions

In the past, Programmatic Agreements have been the most used “program alternative,” though the other options haven’t been available (except for the option of “counterpart regulations,” which are pretty much like alternate procedures). If PAs will continue to be the program alternatives of choice, let’s consider them in a little more detail.<sup>102</sup>

A Programmatic Agreement can be used whenever “circumstances warrant a departure from the normal section 106 process stipulated in 36 CFR 800.14(b)(1)(v). The regulation gives examples of such circumstances: when potential effects are similar and repetitive, or multi-state scope; when they can’t be fully determined before the Federal

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<sup>101</sup> Ibid, 90-91

<sup>102</sup> Ibid, 92

action is taken; when there's delegation to non-federal parties; when the action involved is routine management on a federal facility, to name a few.<sup>103</sup>

First there's one that covers an agency *program*. Once the Programmatic Agreement is in place, it's followed in lieu of the standard 106 process unless and until it expires or is terminated. If and when that happens then the agency has to comply with the standard process on each action covered by the Programmatic Agreement. The other kind of Programmatic Agreement is the "complex project Programmatic Agreement". A Programmatic Agreement can be executed on a large and complex project. Under Section 800.14(b)(3) such a Programmatic Agreement is negotiated in the same manner as a regular MOA, so if there's failure to agree, the agency can seek final ACHP comment. If the Programmatic Agreement covers several projects, though (whereupon it becomes indistinguishable from a agency program Programmatic Agreement), then failure to agree or termination leaves the agency to carry out the standard process with respect to each such project.<sup>104</sup>

King summarizes the Section 106 review process with critical analysis of the regulations. He goes on to say that however, the regulation contains many soft spots where multiple interpretations are possible, a couple of scary escape routes for agencies that just don't want to comply, a lot of room for honest mistakes, and a veritable orchestra of bells and whistles. It puts serious constraints on public participation and will greatly increase the political difficulties that SHPOs face in carrying out their roles in the

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<sup>103</sup> Ibid, 92

<sup>104</sup> Ibid, 92-93

process.<sup>105</sup> King also surmises on what is the purpose of Section 106 review? It is surely *not* to affect the in-place preservation of the nation's patrimony. If that were its purpose it would exert much more control over agency behavior, forbidding the destruction of things rather than merely calling for effects to be considered. The purpose of Section 106 is not preservation, it's planning.<sup>106</sup>

## METHODOLOGY

To better understand the FEMA Section 106 review process, necessity was met to reach out to various key FEMA staff members to provide insight into key questions that drive challenges, inconsistencies, with the hopes of producing results. The key questions are as follows:

- What are some differences between site inspections related to legacy disasters vs. active disasters?
- To what extent does FEMA engage in public participation?
  - When does your office bring in consulting parties?
  - Should consulting parties be brought in earlier in Section 106 consultation, or is that warranted?
- Did Tribes participate in the Statewide Programmatic Agreement consultation?
  - Did Tribes participate in the Louisiana Elevations Programmatic Agreement consultation?
  - If they didn't, why was this decision made?

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<sup>105</sup> Ibid, 97

<sup>106</sup> Ibid, 176

- If they didn't, what is being done to rectify this decision?
- What are some of the nuances of the Prototype Programmatic Agreement?
- How are the Public Assistance and Hazard Mitigation Assistance Programs structured to comply with the Section 106 review process in your office?
  - How is Section 106 consultation conducted in your office?
  - What are the differences in how the LIRO and TIRO conduct Section 106 consultation compared to Region 6?
- When was the decision made to have the EHP Public Assistance team consult with SHPO/Tribes while Hazard Mitigation Assistance decided to have Applicants consult directly with SHPO?
- Hazard Mitigation Assistance is conducted in the LIRO but is not conducted in the TIRO. Why was this decision made?
- How does your office interpret Stipulation II.A.4 of the Statewide Programmatic Agreement? (Any portion of an undertaking that does not meet Programmatic Allowances, the entire project should be consulted on...)
- Who pays for EHP compliance?
  - How does cost share come into play?
- What parameters should be met to warrant an RFI?
  - When would an RFI not be sent?
  - When should one be sent?
- What is FEMA's definition of an undertaking?

- What warrants a non-compliant project?
  - How does the FEMA process proceed if a project is determined non-compliant?
- What can be done to homogenize the Section 106 process?

In evaluating differences between site inspections related to legacy disasters vs. active disasters, FEMA Region 6 Supervisory Historic Preservation Specialist indicated that the PA Team does not have the same ability to travel to site inspections on legacy disasters, while the active disasters do have the ability to travel to site inspections. One caveat to this was when the FEMA Supervisory Historic Preservation Specialist noted that a project was elevated to the Regional Administrator, the head of the FEMA Region 6 office, and special provisions were made to allow him to travel to a site to conduct a field investigation. The other caveat for legacy disaster work to go on site inspections is when an employee is deployed to an active disaster in close proximity to the legacy disaster. Otherwise, site inspections do not occur on legacy disasters in Region 6.<sup>107</sup>

When FEMA staff were interviewed on what extent FEMA engages public participation, it was almost unanimous that FEMA brings in consulting parties and the public when an adverse effect is on the table. FEMA Region 6 Supervisory Historic Preservation Specialist did notate that in Houston after Hurricane Harvey there was an early effort, before any projects and scope of works were written, to go out in the field with interested consulting parties.<sup>108</sup> This field inspection primarily focused on the mid-

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<sup>107</sup> Dooley, Chris. Interview with Sarah McGovern. Personal interview. Denton, December 5, 2022.

<sup>108</sup> Ibid



century modern neighborhoods and attempting to make preliminary determinations on any potential National Register Historic Districts. The problem with these areas were the immense amount of demo/rebuild houses causing inappropriate infill and dominating the mid-century landscape. Additionally schools built circa 1965 in Houston after Hurricane Harvey warranted other consulting parties to come in earlier in the process.<sup>109</sup>

FEMA LIRO Senior Historic Preservation Specialist stated that FEMA sends initial Disaster Notifications to SHPO/Tribes. Experience has shown that there is usually no feedback from SHPO/Tribes and the FEMA LIRO Senior Historic Preservation Specialist noted that they weren't really sure how useful that notice is. The FEMA LIRO Senior Historic Preservation Specialist provided details on individual project consultation or public participation for individual projects and engaged the public by issuing newspaper advertisements, and also asking Applicants/Sub-Recipients to post notices on their websites or even put up hard copy notifications in public places. The FEMA LIRO Senior Historic Preservation Specialist described that the LIRO was much more successful with public participation where public notices were posted publicly rather than through newspaper notifications. The FEMA LIRO Senior Historic Preservation Specialist explained that Louisiana has a website specific to FEMA public notices where all public notices are posted and various preservation organizations, consulting parties, and the public have access to these notices. The FEMA LIRO Senior Historic Preservation Specialist said that in their experience with public participation is usually limited unless the project is highly visible or controversial, such as schools, infrastructure, and projects like that. When the LIRO invites public participation it

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<sup>109</sup> Ibid

usually is looking at websites like neighborhood groups in the community where the project is occurring and then send them a copy of the consultation letter that is being sent to SHPO/Tribes. But again, this is usually triggered by an adverse effect. The FEMA LIRO Senior Historic Preservation Specialist stated that sometimes they would send no adverse effects to the State and sometimes would copy consulting parties on those if they demonstrated interest in the past and the type of project that is occurring. However, if the LIRO thinks that consulting parties may bring some perspective to the project that FEMA is missing, if its going to be controversial or very public it is usually done after FEMA assesses the damages, identified historic properties, and assessed effects. So it is still pretty late in the four step process. The FEMA LIRO Senior Historic Preservation Specialist noted that an example of a demolition project may be a case where they bring in consulting parties to help FEMA identify historic properties and it may be part of a bigger agreement, such as a Programmatic Agreement where identification isn't complete.<sup>110</sup>

The Region 6 FEMA Supervisory Environmental Specialist admittedly stated that FEMA may not be doing a great job with public participation. Again, explaining that it is when an adverse effect occurs, consulting parties are invited in to consult. They go on to explain that there are no projects in Region 6 where FEMA has gone out and done public meetings. That FEMA relies on Applicants/Sub-Recipients being the front lines with the public.<sup>111</sup> Most often the funding Programs are the direct line to the public or the

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<sup>110</sup> Martinez, Amber. Interview with Sarah McGovern. Personal interview. Denton, December 5, 2022.

<sup>111</sup> Cook, Dorothy. Interview with Sarah McGovern. Personal interview. Denton, December 5, 2022.

Applicant/Sub-Recipient and EHP does not have the direct correspondence with the public.

The FEMA LIRO Program Lead states that it varies from project to project and is typically when historic properties are present and a potential for adverse effects that the level of engagement rises. They add that obviously depends on the historic property, the level of significance, whether local, state, or nationally within that community and the level of controversy surrounding it. What type of proposal so often drives the type of public participation.<sup>112</sup> Traditionally adverse effects public notices are posted to a SHPO website created specifically for FEMA public notices, which goes to certain interested groups to get information and engage.

The TIRO Deputy Environmental Liaison Officer stated that it depends on which Program one is working on and that different Programs have different levels of public participation. Again, the experience with public participation was in the form of adverse effect consultation. The TIRO Deputy Environmental Liaison Officer explained that they resolved their adverse effects via the ACP per the Texas Statewide Programmatic Agreement. They kept the consulting parties engaged by frequent contact such as meetings ahead of time to discuss matters related to the adverse effect, that way there were no surprises when the ACP letter was distributed.<sup>113</sup>

When asked should consulting parties be brought in earlier in Section 106 consultation, or is that warranted, FEMA Region 6 Supervisory Historic Preservation

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<sup>112</sup> Cramer, Jerame. Interview with Sarah McGovern. Personal interview. Denton, December 5, 2022.

<sup>113</sup> Mehok, Rebecca. Interview with Sarah McGovern. Personal interview. Denton, December 5, 2022.

Specialist believed it wasn't warranted since approximately 90% of work is roads and culverts and the majority of those projects can be cleared with Programmatic Allowances when replaced or repaired in-kind. One caveat the FEMA Region 6 Supervisory Historic Preservation Specialist gave was an example, like Houston after Hurricane Harvey, if a natural disaster, such as a tornado, hit a historic district and if there is a local historic association with interest in that neighborhood, FEMA would seek to work with them earlier in the process.<sup>114</sup>

The FEMA LIRO Senior Historic Preservation Specialist stated that bringing consulting parties in earlier in the Section 106 consultation process is usually not going to be warranted, and that it is a judgement call on an experience practitioner to gauge that. High profile projects seem to be the exception where consulting parties might be interested with schools and infrastructure. The FEMA LIRO Senior Historic Preservation Specialist stated that a lot of projects where earlier consultation may have been warranted are really large scale, such as multiple undertaking type projects that really required a programmatic approach. The FEMA LIRO Senior Historic Preservation Specialist believes that earlier consultation with consulting parties could be warranted to help identify historic properties, and help assess effects. In finalizing the thesis interview, the FEMA LIRO Senior Historic Preservation Specialist stated that 90% of people will accept, including the Applicant or Sub-Recipient, and that the consulting parties used to FEMA undertakings are not really worried about it.<sup>115</sup>

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<sup>114</sup> Dooley Interview

<sup>115</sup> Martinez Interview

The FEMA LIRO Program Lead explains that FEMA shows both lessons learned from bringing them in too late or too early. One example was a project where there were adverse effects and consulting parties were brought in only for the project not to be FEMA eligible and funded through another agency and it took a while to unravel what FEMA had begun. The FEMA LIRO Program Lead states that to get early involvement on adverse effects to see if there are ideas to avoid, minimize, both by the Applicant/Sub-Recipient and the funding Program, but also the public to gauge the sort of level, controversy, or significance. So while they do think there is value in bringing consulting parties and the public in early there are a lot of caveats that FEMA funding can change. Therefore changes to projects and scopes of work often happen and consulting parties and the public don't realize the flexibility and movement in FEMA grants where there may no longer be funding or FEMA is funding something different than what FEMA started in the beginning. So, the FEMA LIRO Program Lead emphasizes managing expectations around changes that may occur, or the consultation itself could end and be terminated because the FEMA undertaking is no longer there.<sup>116</sup>

When asked the Region 6 FEMA Supervisory Environmental Specialist, they admitted this was a tough question because FEMA's mission has a volume of projects and communities expecting the delivery of funding. Which, guides FEMA's ability in engaging the project in a meaningful way. Programmatic Allowances have no return in investment. However, determinations of eligibility could be a chance to bring in consulting parties.<sup>117</sup> The TIRO Deputy Environmental Liaison Officer believed that it

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<sup>116</sup> Cramer Interview

<sup>117</sup> Cook Interview

could go either way depending on the nature of the project and the nature of the work. One example given was if a large historic district was going to be demolished then one would have a bigger project and a larger amount of interested consulting parties and of course one would need to bring in consulting parties sooner. The TIRO Deputy Environmental Liaison Officer added that if it was an individual building they didn't know if it was necessary to bring in more people sooner and not because FEMA is negating their interest, but because overall the work and the project and the fact that it might be an adverse effect might not be as damaging to the integrity and fabric of the community as it would be for something much more large scale.<sup>118</sup>

According to FEMA Region 6 Supervisory Historic Preservation Specialist, Tribes were not part of the original negotiations on the Statewide Programmatic Agreement consultations, except in Louisiana. However, that decision was made by Senior leadership before his time as a Supervisory Historic Preservation Specialist and he was unaware of why that decision was made. However, to rectify this decision, all Tribes are being invited to the re-negotiations of the Statewide Programmatic Agreements as the original Statewide Programmatic Agreements expire. Additionally, Tribes also have the option of doing a standalone Programmatic Agreement document.<sup>119</sup> Tribes were invited to participate in the negotiations of the Louisiana Elevations Programmatic Agreement. However, because the archeology was addressed in the Statewide Programmatic

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<sup>118</sup> Mehok Interview

<sup>119</sup> Dooley Interview

Agreement and not in the Louisiana Elevations Programmatic Agreement, Tribes largely chose not to participate in the negotiations.<sup>120</sup>

Nuances of the Prototype Programmatic Agreement exist. According to FEMA Region 6 Supervisory Historic Preservation Specialist one main concern arose regarding what did previously disturbed ground mean.<sup>121</sup> According to the FEMA LIRO Senior Historic Preservation Specialist expedited review stipulation for review procedures doesn't speak for no adverse effects, just adverse effects. Therefore, each office is left to make up their own. The FEMA LIRO Senior Historic Preservation Specialist suggested that a policy should be created on how to deal and document them. The FEMA LIRO Senior Historic Preservation Specialist also brought up that one has to read the preambles, the introductory to the Programmatic Allowances.<sup>122</sup> Some states are concise, but in Louisiana there is a site check required for archeological resources which is not necessarily included in Texas. The FEMA LIRO Program Lead states that the Prototype Programmatic Agreement builds upon some of the earlier Statewide Programmatic Agreements that Louisiana had enacted, but builds upon it by adding some streamlining measures that were present in the Secondary Programmatic Agreement for the school districts, such as standard treatment measures. So, the FEMA LIRO Program Lead thinks one of the caveats is the treatment measures with SHPO and consulting parties. So, early on, a lot of prototype Programmatic Agreement didn't have archeological mitigation as a standard treatment measure. That was something started down in the Louisiana

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<sup>120</sup> Martinez Interview

<sup>121</sup> Dooley Interview

<sup>122</sup> Martinez Interview

Programmatic Agreement that pre-dates the Prototype. The FEMA LIRO Program Lead sees other nuances in the emergency expedited process that allows FEMA a good deal of flexibility in decision making as regards to time periods of three days and the potential of adverse effects in some of that decision making within the expedited emergency period. The FEMA LIRO Program Lead notates other nuances of the Tier 1 and Tier 2 approach, which the Prototype added for Programmatic Allowances. So, the FEMA LIRO Program Lead has seen variations in some Programmatic Allowances being in Tier 1 while others are in Tier 2. So they add that if SHPO/Tribes are not comfortable with a Tier 1 Programmatic Allowance it doesn't necessarily mean one gets rid of it, but can move it to a Tier 2 Programmatic Allowance. This allows for a higher review.<sup>123</sup>

When getting down to the facts of how the Section 106 process is conducted in each office, FEMA Region 6 Supervisory Historic Preservation Specialist oversees PA and noted that the process is written in paper and that the Environmental and Historic Preservation (EHP) staff is included in the beginning with the Sub-Recipient. Then a desktop review is conducted to identify any Section 106 concerns. One of the problems identified is that EHP gets information when FEMA gets it from PA and that meetings don't occur for months which can create after-the-fact reviews, so FEMA EHP starts to react rather than having a formal scope of work to review. FEMA Region 6 Supervisory Historic Preservation Specialist stated that this is the nature of disaster work.<sup>124</sup> The FEMA Region 6 Supervisory Historic Preservation Specialist is unfamiliar with how the LIRO conducts Section 106 review, but believes that the TIRO has better aligned with

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<sup>123</sup> Cramer Interview

<sup>124</sup> Dooley Interview



Region 6 practices than they did at the beginning. It was noted that there were issues initially with how Tribal consultation was conducted, but that has since been rectified.<sup>125</sup>

The FEMA LIRO Senior Historic Preservation Specialist summarized how Section 106 is conducted in the LIRO. There was a division of labor. Eventually environmental protection specialists were able to review Tier I projects, while historic preservation specialists reviewed the Section 106 projects. The LIRO conducted pre-work leading up to project development. The historic preservation specialist attended site inspections. Projects requiring consultation the historic preservation structures/buildings staff and archeological staff teamed up to go on site inspections if needed and wrote consultation letters together. In contrast, the Region 6 staff often do not have the resources for a buildings/structure historic preservationist to coordinate with an archeologist historic preservationist to write consultation letters. The LIRO has a lot of procedures in place for letter writing templates. The FEMA LIRO Senior Historic Preservation Specialist compared Section 106 consultation coordination earlier in the process by stating that the LIRO did some pretty intensive identification of historic properties in comparison to the Region 6 office. However, in recent years, experience shows that templates and the Section 106 process have aligned better because the LIRO started basing their templates on Region 6 consultation procedures based off the Region 6 protocols after several meetings with Senior leadership staff. However, there was some resistance from the LIRO historic preservation staff since they were used to doing Section 106 consultation their way.<sup>126</sup>

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<sup>125</sup> Ibid

<sup>126</sup> Martinez Interview

The FEMA LIRO Program Lead also summarized how Section 106 is conducted in the LIRO. They explained that the review process should follow the Statewide Programmatic Agreement and the Region 6 process, such as standard comments as well as any guidance that Region 6 has distributed. The FEMA LIRO Program Lead discusses receiving a scope of work in the form of a project worksheet (PW), determining if it's a type of activity with potential to affect historic properties, if it meets an allowance, if it doesn't meet an allowance, is it an after-the-fact or has the work not occurred and then going through the consultation with SHPO and determining if there is Tribes with interest. They continue from there that one does your basic identification and evaluation, establish an Area of Potential Effect (APE), consult the Louisiana Cultural Resources Database, any background historic maps that may exist, Google street view, assess effects of the project on that information, determine if you're in a historic district or potential district. Then after all that is done, make an effect determination based on the background information. The FEMA LIRO Program Lead goes on to say that newer technical specialists will usually have their letters reviewed by management, but some of the more experienced technical specialists have 10-15 years of experience and don't usually have their letters reviewed by management. From there, the FEMA LIRO Program Lead does a final review and signs the letters which are then submitted to SHPO and appropriate Tribes.<sup>127</sup>

To summarize how Section 106 is conducted in the TIRO, the TIRO Deputy Environmental Liaison Officer was tasked to create a grand plan with consistency and pragmatism. They also met with SHPO fairly early, partially because there is a long time

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<sup>127</sup> Cramer Interview

between the beginning of a disaster and when projects come into the formal review queue. This allowed SHPO to know what might be coming. The TIRO Deputy Environmental Liaison Officer also constantly was in touch with Region when something was complicated. They also mentioned that Section 106 starts with a technical specialist having a good working knowledge of the Statewide Programmatic Agreement, what it allows for and what it doesn't. Additionally, technical specialists need to understand scope of works and be able to make a critical analysis. The TIRO Deputy Environmental Liaison Officer spoke of work being heavy on identification and evaluation, to understand the APE. They went on to say that in house training was crucial and it is ongoing. In discussing differences in how the TIRO conducts Section 106 compared to Region 6, the TIRO Deputy Environmental Liaison Officer said it was hard to tell since the TIRO has limited visibility on Region 6 Section 106 processes. However, they mentioned that they slightly deviated from the Region 6 consultation template by adding tables and subheadings, which helped technical specialists better understand where to put the right information in the right place. They went on to say that they probably put in more detail in consultation compared to Region 6 which is an effort to help build relationships with the SHPO. Additionally, the TIRO Deputy Environmental Liaison Officer mentioned that they often times made decisions when survey work was needed rather than relying on SHPO/Tribe recommendations.<sup>128</sup>

Currently the EHP PA team consults directly with SHPO/Tribes while HMA has made the decision to have Applicants, or Sub-Recipients, consult directly with SHPO in most cases. The FEMA Region 6 Supervisory Historic Preservation Specialist who

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<sup>128</sup> Mehok Interview

oversees the PA Team started in 2012 and is unsure when this decision was made, but felt that this is not how the process should work.<sup>129</sup> In speaking with the FEMA LIRO Senior Historic Preservation Specialist they never had the Applicants/Sub-Recipients coordinate directly with SHPO. The LIRO had an in-house HMA contracting team in place that handled all HMA projects.<sup>130</sup> However, because Region 6 had Applicants/Sub-Recipients coordinate directly with SHPO and not all Louisiana projects went through the LIRO and there was a lot of confusion amongst the Applicant/Sub-Recipient on when to coordinate directly with SHPO. Eventually the Louisiana SHPO office required that all FEMA Section 106 correspondence should come to the Louisiana SHPO directly from FEMA. In 2009 when the Region 6 FEMA Supervisory Environmental Specialist arrived, the Region 6 office had already decided on to Applicants/Sub-Recipients consult directly with SHPO for the HMA Program. If a determination wasn't made, SHPO makes the determination. When FEMA gets the grant application the SHPO consultation is already in there and there is a range of timelines that vary. Sometimes the Applicant/Sub-Recipient consults on things that they don't need them, specifically because it could meet a Programmatic Allowance. At the time the decision was made, there were not enough historic preservation staff dedicated to HMA. However, when a historic property is identified and there could be adverse effects, FEMA steps in to take control of the Section 106 consultation process. The Region 6 FEMA Supervisory Environmental Specialist admits that it is not a perfect system by any means.<sup>131</sup>

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<sup>129</sup> Dooley Interview

<sup>130</sup> Martinez Interview

<sup>131</sup> Cook Interview

Hazard Mitigation is conducted in the LIRO but is not conducted in the TIRO. Why was this decision made? Region 6 FEMA Supervisory Environmental Protection Specialist explained that the LIRO has a longer history managing Katrina and Rita and they answered to Headquarters instead of Region 6. Then the LIRO recently moved to Regional control.<sup>132</sup> The responsibility to handle HMA in LIRO vs. Region 6 has undergone several iterations of decisions. It was originally conducted in the LIRO by a contracting staff. It is now handled in the LIRO by FEMA staff. Part of this decision came from the State vocalizing their desire to have staff physically present in the office. According to the FEMA LIRO Program Lead it was the decision of the Regional Administrator to finally settle on the LIRO handling the HMA Program.<sup>133</sup> TIRO was stood up as regular Joint Field Office (JFO) and transitioned to a TIRO. The Region 6 FEMA Supervisory Environmental Specialist explained that the TIRO simply does not know the HMA language or how the Program works. HMA comes a year later or 18 months later after a declared disaster. Usually HMA comes back to Region by that point. The Region 6 FEMA Supervisory Environmental Specialist goes on to explain that traditionally HMA is handled by the Region because the cadre staff don't speak the HMA language like they understand PA. Then there is the issue that most staff were hired as local hires who didn't know FEMA or the processes and Region 6 had the staff capacity to continue working HMA with the skill set that know how to do HMA.<sup>134</sup>

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<sup>132</sup> Ibid

<sup>133</sup> Cramer Interview

<sup>134</sup> Cook Interview

Stipulation II.A.4 of the Statewide Programmatic Agreement states that any portion of an undertaking that does not meet Programmatic Allowances, the entire project should be consulted on. It was asked amongst the three offices how this Stipulation was interpreted. The FEMA Region 6 Supervisory Historic Preservation Specialist provided an example of roads and culverts where a plethora of roads and culverts may be a part of the project, but are considered independent undertakings. Therefore, the FEMA Region 6 Supervisory Historic Preservation Specialist noted that EHP would have PA slice those out of the project and make them stand alone projects.<sup>135</sup> This is done so a project number is not held up in consultation for a few undertakings, while the rest of the project can easily be cleared. The FEMA LIRO Senior Historic Preservation Specialist explained that they handle these projects similar to Region 6 and there can be segmentation.<sup>136</sup> For example if a project number has 100 roads and two do not meet Programmatic Allowances, FEMA would view each road as an independent project because Road A doesn't crossover Road B and they aren't intertwined. Similarly, elevations or demolition/acquisitions are independent buildings that are not linked and are considered separate undertakings. The FEMA LIRO Program Lead also offers an example regarding pump stations. In their experience the pump stations were bundled under one PW so the argument became whether the pump stations were one undertaking under one PW or were the pump stations considered individual projects. After consultation with Senior leadership, it was decided that the pump stations constituted individual projects and only the ones that did not meet Programmatic Allowances were to be consulted on. The

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<sup>135</sup> Dooley Interview

<sup>136</sup> Martinez Interview

FEMA LIRO Program Lead went on to say that these differ from a building renovation where some actions meet Programmatic Allowances and some do not, therefore it would be viewed as a single undertaking and the entire project should be consulted on.<sup>137</sup> The TIRO Deputy Environmental Liaison Officer noted that per Region 6 the language used to call out what meets allowances was removed from consultation letters.<sup>138</sup>

It is often questioned, who pays for EHP compliance? In the case of PA and the FEMA Region 6 Supervisory Historic Preservation Specialist, archeological and architectural surveys fall under the cost share, which depends on what the cost share of the disaster is decided.<sup>139</sup> The standard used to be a 75% FEMA Cost Share and a 25% Applicant/Sub-Recipient Cost Share. It is now a 90% and 10% Cost Share. The FEMA LIRO Senior Historic Preservation Specialist stated that it depends on the type of grant and the funding source. For example with the PA Program the Katrina grants were extremely complicated and EHP would involve the FEMA Program staff because they were the ones funding it and they need to determine if its going to be part of the grant. Or is the Applicant/Sub-Recipient going to have to pay for it on their own? Then the question comes into play that if they pay for it on their own can they use it as their cost share portion? With Katrina there was a 100% cost share, so there was not really a cost share. But, in other disasters it comes up because if one adds that adverse effect mitigation the cost of the overall grant does increase the cost share.<sup>140</sup> The Region 6 FEMA Supervisory Environmental Specialist stated that the applicant typically pays for

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<sup>137</sup> Cramer Interview

<sup>138</sup> Mehok Interview

<sup>139</sup> Dooley Interview

<sup>140</sup> Martinez Interview

historic preservation compliance when deliverables are needed for compliance, because while PA may be a 100% cost share in some instances, Hazard Mitigation is not a 100% cost share and it is usually a 75% FEMA cost share and 25% Applicant/Sub-Recipient cost share. The Region 6 FEMA Supervisory Environmental Specialist goes on to say that if FEMA is producing the deliverables there is often a blame game that FEMA is taking too slow, rather than when the work is contracted out and the Applicant/Sub-Recipient is less inclined to say FEMA is slowing down the process.<sup>141</sup> The FEMA LIRO Program Lead says that it varies, whether FEMA is speaking on identification and evaluation vs. mitigation. They note that if its an in-kind repair or replacement typically FEMA would be responsible, but if the project is causing an adverse effect the Applicant/Sub-Recipient would be responsible. The FEMA LIRO Program Lead goes on to say that for Katrina there was a 100% cost share and EHP handled a lot of the contracting because PA was nervous to hand over all that money to Applicants/Sub-Recipient. They also noted that the cost share is 90% FEMA and 10% Applicant/Sub-Recipient now, but it may be different in HMA.<sup>142</sup>

Requests for Information (RFI) are common amongst FEMA projects. However, there is sometimes pushback on when an RFI is sent, so setting the parameters on when an RFI is warranted is important. In the case of PA, the FEMA Region 6 Supervisory Historic Preservation Specialist an RFI would be warranted when FEMA needs a piece of information to review a project.<sup>143</sup> PA specifically has to work with the Consolidated

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<sup>141</sup> Cook Interview

<sup>142</sup> Cramer Interview

<sup>143</sup> Dooley Interview



Resource Center (CRC) which is a separate FEMA entity that assists in writing the initial scope of works for formal project review. Often times the FEMA Region 6 Supervisory Historic Preservation Specialist will get pushback from the CRC because it messes with their productivity metrics when anything is sent back. Therefore, to circumvent pushback from the CRC, the FEMA Region 6 Supervisory Historic Preservation Specialist has an informal RFI process where they reach out to PA directly for a 48 hour RFI window. If the information is not available within 48 hours that is when the FEMA Region 6 Supervisory Historic Preservation Specialist will send a formal RFI and will rework the project in the official project review system.<sup>144</sup> The FEMA LIRO Senior Historic Preservation Specialist described the RFI process asking if a project met a Programmatic Allowance? If it didn't then the project was reviewed further for missing information and then an RFI would need to be sent. However, the LIRO attempts to utilize site inspection photos and notes to try and extract the information needed. The next question the FEMA LIRO Senior Historic Preservation Specialist has is if the building is eligible for the National Register then they have to ask if they have enough information to make that decision. Following that question is when a property is eligible for the National Register is there enough information to assess effects. However, the FEMA LIRO Senior Historic Preservation Specialist emphasized that there has to be a judgement call.<sup>145</sup> The Region 6 FEMA Supervisory Environmental Specialist is of the opinion that FEMA only RFIs when absolutely necessary, such as getting the information needed to do compliance right, not just because it's wanted or it would be nice to have. They go on to say that they

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<sup>144</sup> Ibid

<sup>145</sup> Martinez Interview

err on the side of the Applicant/Sub-Recipient because not only are they having to do EHP compliance, they are doing all kinds of other HMA compliance and the amount of information they have to provide is almost impractical; so, the Region 6 FEMA Supervisory Environmental Specialist tries not to bug the Applicant/Sub-Recipient unless there is an absolute need for information.<sup>146</sup> The FEMA LIRO Program Lead explains that RFIs are not black or white and that technical specialists may disagree on when one is needed or not. However, they go on to further explain that when missing information that is needed to complete a review the staff would use the CRC checklist as a guide for information to ask for. Some explanations include elevations of buildings, needing a date of construction, what is around it, are the photos good enough. Additionally, for ground disturbance does it have the length, width, and depth of below ground disturbance. The FEMA LIRO Program Lead gives another example of a historic church where one may have an adverse effect there is more leeway for the amount of information one asks for such as profiles or an engineering study if it's going to be elevated. But if it is not a historic church and there is no archeology FEMA pretty much knows SHPO won't care and FEMA doesn't care. However, they go on to note that one has to be mindful of time, especially if it's an expedited priority project.<sup>147</sup> The TIRO Deputy Environmental Liaison Officer stated when there is an impediment to the project review, meaning when there is no date of construction or if there is an item that is missing from the CRC

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<sup>146</sup> Cook Interview

<sup>147</sup> Cramer Interview

checklist. They go on to say that it is usually not the Applicant/Sub-Recipient putting pressure on not sending RFIs but rather the CRC.<sup>148</sup>

Per the ACHP implementing regulations, there is an official definition of what an undertaking is. However, FEMA does refine the legal definition of an undertaking. According to the FEMA Region 6 Supervisory Historic Preservation Specialist the definition of an undertaking is the official federal money spent on a project. When PA is doing a formal project review they look at what is called a PW. No longer does the PW accurately tell what FEMA is paying for, the official scope of work comes from the CRC.<sup>149</sup> According to the FEMA LIRO Senior Historic Preservation Specialist they simplified the answer by pointing out that the short answer is the Programmatic Agreement references the implementing regulations definition. However, they go on to say that sometimes there are situations on segmentation, that if FEMA is demolishing one property, but not the next, why would FEMA be responsible for both unless there is some sort of connection in the contract? The FEMA LIRO Senior Historic Preservation Specialist goes on to say that if FEMA is funding the roof of a building and one knows the Applicant/Sub-Recipient is funding the windows, it is all part of the same project, therefore all part of the same undertaking. They go on to say that they don't think segmenting pieces of a building as part of an undertaking would be appropriate.<sup>150</sup> The Region 6 FEMA Supervisory Environmental Specialist defined an undertaking as any physical action that FEMA is funding.<sup>151</sup> The FEMA LIRO Program Lead says that they

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<sup>148</sup> Mehok Interview

<sup>149</sup> Dooley Interview

<sup>150</sup> Martinez Interview

<sup>151</sup> Cook Interview

would lean on the Statewide Programmatic Agreement and the implementing regulations, but that it's a FEMA grant funded action. The problem identified by the FEMA LIRO Program Lead is when projects are not formally in the legal system to review so there is not technically a FEMA funded project. They go on to explain that it can be further complicated if there are multiple agencies funding projects and then FEMA doesn't have a clear undertaking.<sup>152</sup> In interpreting what FEMA's definition of an undertaking is, the TIRO Deputy Environmental Liaison Officer simply put it as any project where there are federal dollars involved.<sup>153</sup>

Sometimes, in rare cases, EHP determines a project is non-compliant with environmental and historic preservation laws. According to the FEMA Region 6 Supervisory Historic Preservation Specialist most non-compliant projects are not centered around Section 106. Instead it could be a lack of permitting with the United States Army Corp of Engineers (USACE) or various other reasons; and that often projects are withdrawn or deobligated (funding withdrawn) because they have been reviewed as non-compliant. However, the funding program such as PA or HMA, or the Regional Administrator, still have the option to fund the project. But, according to the FEMA Region 6 Supervisory Historic Preservation Specialist, PA usually uses non-compliance to deobligate a project.<sup>154</sup> In speaking with the FEMA LIRO Senior Historic Preservation Specialist they describe that the Programmatic Agreement goes through this pretty well and that a project isn't non-compliant until its done and there is no

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<sup>152</sup> Cramer Interview

<sup>153</sup> Mehok Interview

<sup>154</sup> Dooley Interview

opportunity to resolve it, such as in the cases of after-the-fact reviews.<sup>155</sup> According to the Programmatic Agreement if a project meets a Programmatic Allowance then a project can be cleared. However, if the project would have required Section 106 review than it is up to the SHPO/Tribes to determine if they will consult on the project. But the FEMA LIRO Senior Historic Preservation Specialist goes on to say that one would need to discuss with the funding Program, and Senior leadership who make the ultimate decision.<sup>156</sup> A problem with non-compliant projects is that once it leaves the EHP queue, EHP is often times left out of the loop on what the final funding decision was. The FEMA LIRO Program Lead states that for Section 106 it's usually one where FEMA is not able to complete the Section 106 process for adverse effects or for after-the-fact reviews. How does FEMA proceed if a project is determined non-compliant? The FEMA LIRO Program Lead states that EHP writes a memo to the funding Program and at that point the funding Program has the option to fund it without EHP approval, usually with the RA's approval. They go on to say that most often it does not get the funding Program's approval, but then there is a process for the Applicant/Sub-Recipient to appeal that decision to Region and Headquarters.<sup>157</sup> The TIRO Deputy Environmental Liaison Officer replied that usually in their case its where a scope of work is not defined. However, there was an example where large berms were being built and the Applicant/Sub-Recipient didn't comply with floodplains, wetlands, did not talk to USACE or SHPO and just did the work. Therefore, the EHP TIRO team determined it

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<sup>155</sup> Martinez Interview

<sup>156</sup> Ibid

<sup>157</sup> Cramer Interview

was non-compliant. Similar to other offices, if PA really wants to do the project, or if there is political pressure, or financial reasons why the project needs to happen, then the Program can still move forward and fund the project.<sup>158</sup>

What can be done to homogenize the Section 106 process? The FEMA Region 6 Supervisory Historic Preservation Specialist states that the three offices need to work together. That the LIRO has operated as its own office for 17 years with no interaction with Region 6 and its only been the last 2 or 3 years that their office has become a direct report to the Region 6 office. The FEMA Region 6 Supervisory Historic Preservation Specialist notes that the TIRO is different because most of the Region 6 staff was deployed to Hurricane Harvey and helped establish the office and manage the disaster. According to the FEMA Region 6 Supervisory Historic Preservation Specialist there was a time when there was a directive that Region 6 staff would circulate between the LIRO and TIRO offices to help integrate staff into their operations, then the COVID pandemic hit and the directive ceased. FEMA Headquarters is working on a national set of standard comments for review comments for all EHP laws, since the Headquarters cadre supports all disasters. However, according to the FEMA Region 6 Supervisory Historic Preservation Specialist this is problematic because each State is different and there are too many nuances, and Regions have a far better understanding of what they need from their States. The closest thing to a standardized document is the CRC checklist and the CRC State checklists.<sup>159</sup> In asking the FEMA LIRO Senior Historic Preservation Specialist they emphasized training, Regionally specific training, with the idea of

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<sup>158</sup> Mehok Interview

<sup>159</sup> Dooley Interview

possible rotations to the Regional office to gauge how Section 106 is conducted.<sup>160</sup> In an interesting opposing view, the Region 6 FEMA Supervisory Environmental Specialist believes that an argument can be made that homogenizing the process might not be a good thing. They go on to state that every case is its own unique situation, there may be a similar activity type but completely different sort of context, political environment, and engagement. The Region 6 FEMA Supervisory Environmental Specialist noted that they believed Section 106 in general is homogenized since there are regulatory steps in place, such as identifying historic resources and effects; so, the framework is kind of standardized and the Statewide Programmatic Agreements are similar. They go on to say that the Statewide Programmatic Agreements each has their prerogatives, but that they have been tweaked in a sense so those Programmatic Agreements better meet the needs and that they think its ok. The Region 6 FEMA Supervisory Environmental Specialist continues that they don't know if it needs to be the exact same everywhere, and that it is different between PA and HMA meaning it comes down to volume and project type. PA has many cost adjustments and generally speaking has a lot of in-kind repairs that meet the Programmatic Allowances. Where HMA is a lot of letter writing, which is nice to have that lift done by the Applicant/Sub-Recipient and knowing the early initial consultation. In the Region 6 FEMA Supervisory Environmental Specialist's final thoughts FEMA does what works the fastest and hopefully the most efficient with the least amount of repercussions and that FEMA gets to a place where they are comfortable with their compliance and FEMA is not hearing any flack from advocacy groups, or being sued. They go on to say that FEMA is not getting that negative feedback on the

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<sup>160</sup> Martinez Interview

Section 106 process, so it must be working and therefore will continue with this pattern until something breaks. The path of least resistance under each Program.<sup>161</sup> The FEMA LIRO Program Lead says that it's probably good to allow some variation and flexibility because things are different in different states within Region 6. The FEMA LIRO Program Lead goes on to say that exchanging staff across disasters is one thing they've worked toward in consistency, such as having TIRO employees deploy to the LIRO so they can see how things are done in Louisiana, ask questions, and get feedback. They also note that maybe there should be more historic preservation meetings with senior staff to talk through issues or processes.<sup>162</sup> The TIRO Deputy Environmental Liaison Officer noted that in some ways it shouldn't be, because if one does it the same way every single time then one isn't paying attention to what the resource is. However, the TIRO Deputy Environmental Liaison Officer stated that it is important to make sure all the technical specialists are educated on what are appropriate levels of effort. They went on to say in order to get consistency one has to review projects a lot of times and go through that decision making process every time one does it and think critically about what is being done, what the effect will be and what will the outcome be, and that's setting aside any particulars of a state or region that is being worked on.<sup>163</sup>

## INTERPRETATIONS/OUTCOMES

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<sup>161</sup> Cook Interview

<sup>162</sup> Cramer Interview

<sup>163</sup> Mehok Interview



Several times Agreement Documents have been alluded to. FEMA's primary Agreement Documents include the ACP, MOAs, and Programmatic Agreements as a result of the Statewide Programmatic Agreements. While there are several alternatives to the standard process of Section 106, the most common is a Programmatic Agreement which will be the primary focus of this thesis for Agreement Documents. The responsible agency, the ACHP if it elects to play, some representative of SHPO and (in theory) other interested parties, including Indian tribes and Native Hawaiian organizations sit down and try to work out an alternative way of meeting the basic requirements of Section 106 and other pertinent authorities. This alternative is embodied in a Programmatic Agreement, which is signed by all the parties and then governs how things are done. A representative of SHPO must be involved. That representative will be the SHPO if the action takes place in a particular state, a group of SHPOs if several states are involved, or the National Conference of SHPOs if the PA will have a national effect. Some SHPOs claim not to be represented by the national conference and therefore argue that a PA executed by the conference is not applicable in their states. This is a misconception. SHPO participation in Programmatic Agreement development, execution, and implementation is an artifact of the regulations, not a matter of right. The regulations say that the national conference is the SHPO representative in nationwide PA matters, and that's simply the way it is, however little an individual SHPO may like it.<sup>164</sup>

FEMA has developed a Prototype Programmatic Agreement (PPA), in coordination with the ACHP, to create a framework for FEMA in developing agreements

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<sup>164</sup> King, "Cultural Resource," 176

to improve and expedite Section 106 compliance for disaster recovery activities. The ACHP's Chairman designated the PPA on December 17, 2013 in accordance with 36 CFR Part 800.14(b)(4). In developing the PPA, FEMA conducted outreach to stakeholders, including holding listening sessions with the National Association of Tribal Historic Preservation Officers (NATHPO), select tribal representatives, and State Historic Preservation Officers (SHPOs). These outreach efforts were further augmented by the ACHP, which reached out to preservation organizations. FEMA also convened an internal working group of environmental, historic preservation and program staff who had disaster experience assessing disaster activities and could share their knowledge of efficiencies and best management practices.

The PPA is designed to promote consistency across states, ensure flexibility and responsiveness to state and tribal concerns, and allow an appropriate level of consideration of historic properties. The PPA provides for exemptions and expedited reviews for many activities demonstrated to cause either predictable or little or no effects on historic properties. It also allows other federal agencies to utilize the PA to satisfy their Section 106 responsibilities for response and recovery activities when appropriate. The PPA recognizes the important role Indian tribes and Native Hawaiian organizations (NHOs) have in the Section 106 process, and allows them to either utilize the traditional statewide PA, or to develop separate agreements to outline tribal protocols. In either case, FEMA will continue to be responsible for conducting consultation with Indian tribes and NHOs.<sup>165</sup>

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<sup>165</sup> "FEMA Prototype Programmatic Agreement Synopsis." ACHP. Accessed November 11, 2022. <https://www.achp.gov/digital-library-section-106-landing/fema-prototype-programmatic-agreement>.

A few new items that were introduced into the PPA were the ACP to expedite adverse effect consultation. This led to the creation of Standard Treatment Measures. In addition, The Programmatic Allowances created a tiered review process. The Programmatic Allowances stipulated that Tier I allowances did not have to be applied by Secretary of Interior (SOI) Professional Qualification Standards, however Tier II allowances must be applied by SOI Professional Qualification Standards.

In 2020, FEMA executed a Programmatic Agreement among FEMA, the Louisiana SHPO, and the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) for the Elevation of Buildings and Structures in Louisiana in an effort to streamline the Elevations review and attempt to circumvent the requirement for architectural/engineering drawings which places an undue hardship on most Applicants/Sub-Recipients, especially those in low-income housing. Outlines in Stipulation II.A Project Review Programmatic Allowances can be determined if the scope of work meets the allowances outlined in Appendix B of the 2016 Statewide PA, specifically allowance II.B.11. The remaining Programmatic Allowances describe what happens if a project does not meet the II.B.11 Programmatic Allowance. Essentially the project moves on to determining an APE, and Identification of Historic Properties. What is new in the Elevations Programmatic Agreement is that SHPO stipulated a Louisiana Historic Resource Form that must be filled out for all properties over the age of 45. If there is an adverse effect to a historic property then another new stipulation in the Elevations Programmatic Agreement was created, an Elevations Considerations Checklist.

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1. FEMA will request the information necessary to determine if the proposed undertaking incorporates the elevation considerations from the Recipient. This information must be provided to FEMA for review prior to construction beginning. The information will include a completed Elevation Consideration checklist (attachment B) from the Subrecipient and any documentation they can provide to demonstrate the elevation will meet all of the considerations such as, but not limited to, a statement from an elevation contractor or other professional, or photographs to show adjacent buildings.
2. If FEMA determines the undertaking incorporates all of the elevation considerations, FEMA shall document a finding of no adverse effect in the file and conditionally approve the project with the condition the Subrecipient photographically record the structure or building post-elevation and submit a final LHRE Form in accordance with Stipulation II.E.2(e).
3. If FEMA determines the undertaking doesn't meet the elevation considerations outlined in Attachment B or the Subrecipient is unable to determine if the undertaking will meet the design considerations, FEMA will document that the undertaking may adversely affect historic properties and conditionally approve the project with the provisions outlined in Stipulations II.E.1 (Design Review) and 2 (Recordation) of this Elevations PA.

An example of a FEMA ACP was the Gretna City Hall wind retrofit project.

FEMA provided funds authorized under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288, as amended, through its Pre-Disaster Mitigation,

Competitive (PDMC) grant program to the City of Gretna (Applicant) for the wind retrofit of Gretna City Hall (Undertaking). FEMA completed Section 106 review for the above-referenced property in accordance with the Programmatic Agreement between FEMA, the Louisiana State Historic Preservation Officer (SHPO), the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP), and Participating Tribes dated December 21, 2016 (LA PA 2016).

In a letter to the SHPO office dated May 1, 2017, FEMA applied the criteria of adverse effect pursuant to 36 CFR §800.5(a)(1) and determined the removal of the original non-damaged windows will be an irreversible alteration that diminishes the building's design, materials, and workmanship. FEMA proposed to address the undertaking's adverse effects on Gretna City Hall through the development of Treatment Measures as provided in Stipulation II.C.6(a) of the LA PA 2016. In a response letter from the SHPO office dated May 3, 2017, the SHPO review staff concurred with these findings.

As provided in Stipulation II.C.6(a) of the LA PA 2016, if an undertaking may adversely affect a historic property, FEMA may propose to resolve the adverse effects through the application of one or more of the Treatment Measures set out in Appendix C of the LA PA 2016. FEMA developed these selected measures after discussions with GOHSEP, the City of Gretna, and SHPO in a conference call on July 5, 2017. This letter served as written documentation of the treatment measures that were selected and provides GOHSEP, the City of Gretna, and SHPO with the opportunity to object to these proposed Treatment Measures as set out in Stipulation II.C.6(a)(ii). The Treatment Measures agreed upon was Photographic Recordation, Salvage, and Design Review. It

was a successful application of the ACP process and streamlined the adverse effect resolution.

In December 2016, FEMA developed an MOA among FEMA, the Louisiana SHPO, GOHSEP, and the City of New Orleans (CNO), regarding the Elevation of Three (3) Residential Structures New Orleans, Orleans parish, LA. In the MOA it was Stipulated that CNO would conduct Photographic Recordation. Additionally, CNO was responsible to ensure that the elevation designs utilize the guidelines as best as possible that are set out in Elevation Design Guidelines for Historic Buildings in the Louisiana GO Zone (EDG) developed by the Louisiana Office of Cultural Development's Division of Historic Preservation. Finally, CNO was to ensure that the elevation adheres to the Ground-Disturbance Minimization Techniques.

From my professional experience, I have conducted some initial observations for challenges and inconsistencies in the Section 106 process. Some of these ties into King's observations and critical analysis of the Section 106 process. While others are professional observations. Included in these observations are things such as the inability for legacy disasters to travel to site inspections, early consultation or lack thereof, many interpretations of the implementing regulations, when to include consulting parties outside of adverse effects, interpretations of how to consult, what parties to consult with, who conducts consultations, how consultation is done across the Programs, deviations on consultation templates, funding non-compliant projects or not, and defining an undertaking to name a few.

King explains that one of the most common mistakes agencies make is to equate the APE with the actual "footprint" of the undertaking. Often times FEMA utilizes this

approach, defining the APE as just the footprint of the undertaking rather than taking into account the entire scope of the undertaking. FEMA could do better in establishing the APE to account for direct physical effects, for the secondary physical effects, and for visual effects. An example of this is on generator projects. In most circumstances, FEMA defines the generator APE as the footprint of the generator. Largely because these generators are in rural locations without other buildings and structures within a visual APE. However, recently FEMA had two generators that were taking place adjacent, but not attached to two historic properties. In this case, FEMA delineated the APE to include both the generator site and these property sites for visual effects. Fortunately, the generators were taking place in the rear of the historic properties, and there were limited effects, thereby resulting in a no adverse effect determination.

Often there is an inability to travel to physically see properties unless deployed to disasters. The Regional office has the most restrictions on travel and relies heavily on Internet resources to conduct Section 106. Deployed staff on disasters have more flexibility on travel due to the Disaster Relief Fund allotting more financial resources to send deployed staff to site visits. Therefore, the Louisiana and Texas offices have more ability to physically inspect historic properties as they are funded by the Disaster Relief Fund.

36 CFR 800.2(a)(3) stipulates that the use of contractors is allowed.

*Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendation under this part. The agency official remains legally*

*responsible for all required findings and determinations. If a document of study is prepared by a non-Federal party the agency official is responsible for ensuring that its content meet applicable standards and guidelines.*

An inconsistency seen amongst the LIRO, the TIRO, and the Region 6 office is who actually initiates the Section 106 review. Typically under the PA Program, FEMA initiates Section 106 with SHPO and Tribes. Contrary to the HMA Program, the PA program is responsible for initiating all SHPO consultations. This allows for more control over the consultation and ensures that the Section 106 steps and documentation are followed in accordance with 36 CFR 800. However, under the Hazard Mitigation Grant Program, the Applicant is responsible for initiating the Section 106 review with SHPO and it is usually prior to FEMA determining if the Applicant or their project is eligible for funding. The HMA Program is overseen by Region 6 and is not reviewed within the TIRO. It is part of the HMA Program's guidelines for Applicants to include the SHPO consultation and response as part of their application to FEMA. This can create complications if SHPO identifies historic preservation issues prior to FEMA historic preservation staff receiving the project for review. However, HMA is conducted within the LIRO, with support from the FEMA Region 6 office. Inconsistency continues in the fact that the Louisiana SHPO has recently determined that they will not review projects directly from the Applicant and that Section 106 initiation must come directly from FEMA. However, Texas SHPO still accepts initial Section 106 reviews from the Applicant. This inconsistency can create confusion mostly among the Applicants but also among FEMA historic preservation staff. Amongst this inconsistency is one consistent fact that FEMA always coordinates Section 106 review directly with Tribes as is required



for government-to-government consultation. However, the final determination(s) still resides with FEMA as the agency official. There are pros and cons to this delegation. One pro is that it saves FEMA time from drafting a consultation letter and awaiting a response. A con is that sometimes the consultation is unnecessary if the project ultimately meets a Programmatic Allowance, which streamlines the Section 106 review process. In the case of a project meeting an allowance, FEMA ultimately decides on what level of determination is applicable and will likely allowance a project rather than utilizing the SHPO review.

As Thomas F. King explains earlier, emergency situations are the subject of Section 800.12. In the event of a flood, a fire, a hurricane, or an earthquake, an agency is given lots of flexibility in how it complies with Section 106. Section 800.12(a) encourages agencies to establish their own procedures for dealing with the kinds of emergencies they routinely face. In the case of Region 6, the Texas and Louisiana Programmatic Agreements are in place and FEMA doesn't have to go through the standard Section 106 review process in case of a disaster or other emergency. FEMA notifies the usual parties (SHPO, etc.) and gives them seven days, or whatever time is available, to comment.<sup>166</sup>

The emergency provisions can be invoked only "within 30 days after the disaster or emergency has been formally declared." In an emergency that's not "formally declared," presumably, one would count from the date the responsible agency official decided that life or property was endangered. The bottom line is that if you've got more

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<sup>166</sup> King, "Federal Planning," 90

than 30 days to plan something, one ought to be able to go through the standard 106 process. Recognizing this may not always be the case, Section 800.12(d) permits agencies to apply for extensions.<sup>167</sup>

A challenge with emergency actions is when Applicants proceed with work prior to Section 106 being completed. In some circumstances, the Applicant can be exempt from Section 106 within the first 30 days of a declared disaster if there is an immediate threat to life or property. However, often times the Applicant will proceed with work after the 30-day grace period. This frequently causes issues when coordinating with SHPOs and Tribes. Another challenge is that FEMA often times interpret the 30 days for all undertakings that occur within 30 days of the disaster, regardless of if there is an immediate threat to life or property.

The Texas Programmatic, and similar in the Louisiana Programmatic Agreement, outline procedures for expedited review for emergency undertakings:

1. Determine Expedited Review

- a. As part of the Declaration process, FEMA shall define the time interval during which the disaster causing incident occurs (the incident period, as defined in 44 CFR § 206.32(f)). FEMA may approve Federal assistance and/or funding for emergency work (as defined in 44 CFR § 206.201(b)) that occurs during the incident period, including work already completed, in response to an immediate threat to human health and safety or property. Pursuant to 36 CFR § 800.12(d), FEMA may conduct

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<sup>167</sup> Ibid, 90-91

expedited review of emergency Undertakings for 30 days from the beginning of the incident period.

b. Should FEMA determine that it is necessary to extend the expedited review period beyond the initial 30 days, FEMA will, in 30-day increments, as needed, notify the ACHP, SHPO, TDEM, and participating Tribe(s).

## 2. Conduct Expedited Reviews

a. If the emergency undertaking is an immediate rescue and salvage operation conducted in response to an event to preserve life and property, FEMA has no Section 106 consultation responsibilities in accordance with 36 CFR § 800.12(d); or

b. If the emergency undertaking meets one or more of the Allowances in Appendix B of this Agreement, FEMA shall complete the Section 106 review process pursuant to Stipulation II.A., Programmatic Allowances.

c. If FEMA determines that the emergency undertaking may adversely affect a historic property during this expedited review period: i. To the extent practicable FEMA may propose treatment measures that would address adverse effects during implementation, and request the comments of the SHPO and participating Tribe(s) within 7 days of receipt of this information unless FEMA determines the nature of the emergency warrants a shorter time period.

ii. FEMA may provide this information through written requests, telephone conversations, meetings, or electronic media. In all cases, FEMA shall clarify that an “expedited undertaking review” is being requested.

iii. FEMA shall take into account any timely comments provided by SHPO and/or participating Tribe(s) in making a decision on how to proceed.

iv. Should the SHPO and participating (Tribe(s) not comment within 7 days, FEMA may fund the emergency undertaking based on the available information. This will complete the Section 106 consultation for the undertaking.

v. FEMA will notify the SHPO and participating Tribe(s) of the final decision, indicating how any comments received were considered in reaching that decision.

Another challenge observed is issues with Secretary of the Interior Professional Qualification Standards. Often times disaster offices have limited resources to staff their offices with qualified staff due to the urgency of getting boots on the ground. There are several avenues for staffing a disaster office. Whether through Headquarters staffing, Regional staffing, or local hires. Local hiring is most problematic because candidates often have minimal qualifications or experience. In addition to staffing issues, my observations in both the Regional office and disaster offices is having SOI buildings/structures staff conducting archeological review. And the converse, archeological staff conducting buildings/structures review.

King notes on several occasions where Federal agencies, or their delegates, rely on SHPO/Tribes to make determinations/recommendations rather than FEMA taking on their own regulatory responsibility. King goes on to say that one of the most common and least useful responses is that it means to do what the SHPO tells one to do. This is not meant to insult SHPOs; it's just that in this case, as often happens, the SHPO's staff person has been busy with other things and has given one an off-the-cuff recommendation that isn't very useful.<sup>168</sup> A continuing problem in Section 106 review is a tendency among agencies to equate "taking effects into account" with "asking the SHPO what to do."<sup>169</sup> King talks about how not to conduct Section 106. The 1979 regulation allowed the Agency Official to coordinate with SHPO and asking them what to do. As one can imagine, this created problems. People figured that this was all they had to do, so that's all they did do. If the SHPO failed to respond, they figured they didn't need to do anything at all.<sup>170</sup>

Another challenge observed in the Regional office is Section 106 review at the minimal level. Often times FEMA Region will resort to having the SHPO or Tribes make Section 106 recommendations, such as historic or archeological surveys. This is partially due to the perception of the Applicant. The Applicant usually does not want to go over and beyond what is required of the Section 106 review process, oftentimes due to the cost share, therefore Region 6 historic preservation staff rely heavily on the SHPO and Tribal recommendations to adequately conduct Section 106 review.

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<sup>168</sup> King, "Cultural Resource," 102

<sup>169</sup> King, "Federal Planning," 27

<sup>170</sup> Ibid, 33

One evident inconsistency on how staff members interpret legal documents, such as the Programmatic Agreement is the following example. Recently FEMA staff were in conflict on how to interpret a Programmatic Allowance on generators. The allowances reads, “In-kind repair or replacement, or minor upgrades, elevation, and/or installation of generators, HVAC systems, and similar equipment provided activities occur within previously disturbed soils and any roof mounted equipment is not visible from the ground level. *This includes any related trenching within previously disturbed soils, except when in close proximity to a known archaeological site*” The generator was being located at a water tower site and the scope of work read, “The City of Edna proposes to replace an aging generator with a new permanent generator and an automatic transfer switch at their Kleas Water Plant located at 404 North Kleas Street, Edna, Jackson County, TX (28.98267, -96.64580). The proposed generator will be placed on a new 5’ X 18’ concrete pad and other proposed work include conduit, electrical and wiring, and any other necessary equipment to be affixed next to the Kleas Water Plant. No underground conduit and wiring is anticipated. The installation of this generator will allow the City to maintain power supply in the event of a power outage at the water plant.” The historic preservation staff member who was reviewing the project determined that the concrete pad warranted a SHPO consultation. However, the supervisor flagged it as possibly meeting a Programmatic Allowance because previous staff members had similar projects and applied for the Programmatic Allowance. In my review of the project I had determined that the project met the Programmatic Allowance because it appeared evident there was an existing concrete pad, the concrete pad constituted a minor upgrade, and was within previous disturbed soils. The original project reviewer stated that at the TIRO they did

not interpret new concrete pads as minor upgrades. However, the majority of historic preservation staff members agreed it met a Programmatic Allowance and FEMA cleared the project without SHPO consultation.

Stipulation II.A.4 states if FEMA determines any portion of an undertaking's scope of work does not conform to one or more allowances listed in Appendix B, FEMA shall conduct Section 106 review for the entire undertaking in accordance with Stipulation II.B, Expedited Review for Emergency undertakings, or Stipulation II.C, Standard Project Review. There have been debates on how this Stipulation is applied. FEMA often batches individual projects such as roads or houses into one project number. So if there are 100 roads in one project and all but one meet allowances, does one consult on all 100 roads or does one consult on just the one road? Say there are 50 houses proposed for elevations. All but one meet allowances. Again, does one consult on all 50 properties or just the one property that doesn't meet the Programmatic Allowances. FEMA has determined that these types of projects constitute individual projects that just happen to be batched into one project number and one would consult on just the one individual property. However, let's say one building has multiple projects going on and the floors, walls, and ceilings, meet the Programmatic Allowance, but the windows do not meet an allowance. In this case, FEMA would consult on the entire property undertaking.

On March 18, 2022 FEMA Administrator Deanne Criswell announced that additional disaster funding is available to all states, tribal nations and territories with Presidential major disaster and emergency declarations occurring in 2020 and 2021. On March 15, President Joseph R. Biden, Jr. signed "H.R. 2471, Consolidated

Appropriations Act, 2022” into law, which granted a minimum 90% federal cost share for any emergency or major disaster declaration declared occurring or having an incident period beginning between, Jan.1, 2020 and Dec. 31, 2021. Specifically, the enacted law authorizes an increase to the standard 75% federal cost share to at least 90% for PA, the Hazard Mitigation Grant Program and specified Individual Assistance programs authorized under emergency and major disaster declarations. The assistance authorized as part of H.R. 2471 is in addition to the President’s announcement on March 1, which extended the full federal cost share to 100% to support all eligible work under COVID-19 emergency and major disaster declarations through July 1, 2022. From January 2020 through December 2021, FEMA responded to disasters that have impacted millions of Americans. This additional assistance will help communities across the country recover and build a stronger, more resilient nation.<sup>171</sup>

Stipulation C of the Texas Programmatic Agreement, and similar in the Louisiana Programmatic Agreement, details conditions for consulting parties:

1. Consulting Parties: FEMA shall consult as appropriate with the SHPO to identify any other parties that meet the criteria to be consulting parties and invite them to participate in the Section 106 consultation process. FEMA may invite others to participate as consulting parties as the Section 106 consultation proceeds. FEMA shall invite any individual or organization that will assume a

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<sup>171</sup> “FEMA Announces 90/10 Cost Share Adjustment.” FEMA.gov. Accessed November 11, 2022. <https://www.fema.gov/press-release/20220318/fema-announces-9010-cost-share-adjustment>.



specific role or responsibility outlined in an MOA or Programmatic Agreement to participate as an invited Signatory to the agreement.

Stipulation D of the Texas Programmatic Agreement, and similar in Louisiana, details public participation.

2. FEMA recognizes that the views of the public are essential to informed decision making throughout the Section 106 consultation process. FEMA shall notify the public of proposed undertakings in a manner that reflects the nature, complexity, and effect(s) of the undertaking, the likely public interest given FEMA's specific involvement, and any confidentiality concerns of affected Tribe(s) private individuals and businesses. FEMA may consult with TDEM, Subrecipient, and SHPO, to determine if there are individuals or organizations with a demonstrated interest in historic properties that should be made aware of an undertaking. If such parties are identified or identify themselves to FEMA, FEMA shall provide them with information regarding the undertaking and its effect on historic properties, consistent with the confidentiality provisions of 36 CFR § 800.11(c).

3. In accordance with the outreach strategy developed for an undertaking in consultation with the SHPO for involving the public, FEMA shall identify the appropriate stages for seeking public input during the Section 106 consultation process.

4. FEMA shall consider all views provided by the public regarding an undertaking and will consider all written requests of individuals and organizations to participate as consulting parties, and in consultation with the SHPO determine

which should be consulting parties. FEMA will invite any individual or organization that will assume a specific role or responsibility outlined in a Section 106 agreement document to participate as a signatory party.

5. FEMA may also provide public notices and the opportunity for public comment or participation in an undertaking through the public participation process of the National Environmental Policy Act (NEPA) and its implementing policies set forth in DHS Directive No. 023-01, *Implementation of the National Environmental Policy Act* (Oct. 31, 2014); DHS Instruction No. 023-01-001-01, *Implementation of the National Environmental Policy Act* (Nov. 6, 2014); FEMA Directive No. 108-1, Environmental Planning and Historic Preservation Responsibilities and Program Requirements (Oct. 10, 2018); FEMA Instruction No. 108-1-1, Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements (Oct. 10, 2018); and/or Executive Orders 11988 and 11990 relating to floodplains and wetlands as set out in 44 CFR Part 9, and Executive Order 12898, Environmental Justice, provided such notices specifically reference Section 106 as a basis for public involvement.

6. Should a member of the public object in writing to implementation of the Agreement's terms, FEMA will notify the other signatories in writing and take the objection into consideration. FEMA shall consult with the objecting party and, if that party so requests, the other Signatories, for not more than 30 days. In reaching its decision regarding the objection, FEMA shall take into consideration

all comments from these parties. Within 15 days after closure of this consultation period, FEMA shall provide the other parties with its final decision in writing.

The regulations are explicit about involving consulting parties throughout the Section 106 process. My experience is that consulting parties are not invited until an adverse effect is determined. Does this conflict with what the Section 106 regulations state? In theory it does. The regulations and the Statewide Programmatic Agreements emphasize that consulting parties and the public should be involved in the Section 106 process. So one of the inconsistencies FEMA faces is that it doesn't not properly invite consulting parties early on in the process. However, I would argue that simple projects that meet Programmatic Allowances and do not need consultation, would therefore not require consulting parties in the process.

Quite often there is pressure from FEMA EHP staff to not send Requests for Information (RFI) due to pressure from the Program and Applicant. One part of the resistance to send RFIs is that it may take the Applicant a substantial amount of time to respond to the RFI. Other times the Applicant may not understand an EHP RFI.

In 2017 and 2018 the definition of an undertaking came into question. FEMA maintains that the FEMA undertaking is limited to what FEMA is funding. A recent example is a project in the Central Arlington Heights area of Texas. The Applicant/Sub-Recipient consulted directly with SHPO and stated there was going to be 10 demolition and acquisition properties and a detention pond would be constructed. Once FEMA received the project, FEMA found two properties eligible for funding and the other 8 properties and detention pond were ineligible for funding and were removed from the project. SHPO initially recommended that FEMA evaluate the area as a potential historic

district. FEMA reviewed the area and determined it was a potential historic district and that the demolition and acquisition would be an adverse effect. SHPO concurred with this determination. FEMA then identified consulting parties to continue consultation and resolve the adverse effects. Meanwhile, SHPO commented that they believed the demolition and acquisition of the 8 properties and the creation of a detention pond is a “reasonably foreseeable” effect of the demolition and acquisition of the two FEMA funded properties and all 10 buildings should be included with the scope of work. FEMA disagreed with the SHPO comments and maintained that the undertaking was limited to the demolition and acquisition of the two FEMA funded properties. Per 36 CFR 800.6(a)(1) FEMA submitted a notification letter to the ACHP containing a description of the undertaking, the buildings to be adversely affected, as well as the SHPO comments regarding “reasonably foreseeable” effects. Several consulting parties commented that they agreed with the SHPO comments regarding the undertaking including all 10 properties and the detention pond. The ACHP also agreed with the SHPO comments. However, FEMA maintained that only the 2 properties were federally funded and the other 8 properties and detention pond were not part of the federally funded undertaking. Consultation continued and ultimately the consulting parties conceded to FEMA’s definition of the undertaking. In an interesting twist the Applicant/Sub-Recipient stated that they were open to removing the two properties from FEMA funding and would pay for it on their own, effectively terminating Section 106 consultation. However, the Applicant/Sub-Recipient decided not to do that and kept the FEMA undertaking of the

demolition and acquisition of 2 properties.<sup>172</sup> This is also a great example of how Applicant's/Sub-Recipient's consulting directly with SHPO can create a challenge.

King discusses earlier the process of identification and determining effect and arguments that can be made one way or the other. King suggests not to get into the arguments that there is always a way to show there is a way of identifying historic properties and determining effects. I agree with King on the point that if one doesn't think there's an adverse effect, but somebody else does, it's probably not worth arguing with them about it. Recently FEMA had a project in Arkansas that entailed acquisition demolition. The Applicant initiated consultation and the Arkansas SHPO identified no historic properties affected, historic properties, no adverse effects, and one adverse effect. Upon FEMA review, the property determined to be an adverse effect did not appear to be historic and the question arose whether or not to present an argument that it was not historic and there would be no adverse effects. However, like King suggests, FEMA determined that it was not worth the effort to argue for it's non-historic status. It was a minimal traditional building with no identifying historic features, but the historic district contained a variety of minimal traditional homes and the property fell into the significant dates of construction and likely met Criteria A, rather than Criteria C. FEMA proceeded to meet with consulting parties and decide to use the streamlined process of the ACP, utilizing Recordation and Historical Context Statements and Narratives as Treatment Measures.

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<sup>172</sup> Scoggin, Bob. Interview with Sarah McGovern. Personal interview. Denton, December 9, 2022.

Earlier King, notated that sometimes there is consultation overkill that are real problems. Much time can be wasted consulting – the SHPO/THPO and others – about things that don’t deserve the effort. This results from the assumption that there is a single, monolithic way to consult. The same misperception causes agencies to consult too little, or too late, about things that really need considerable attention.<sup>173</sup> This was evident in the aforementioned consultation. The Applicant had a phone conversation with the Arkansas SHPO where they agreed upon a full archeological and historic building survey. There was no written documentation of this request, and FEMA should have been part of the conversation as soon as an adverse effect was identified. The contractor even went so far as to determine that the survey would serve as mitigation to the adverse effects. FEMA found that the survey was unwarranted for the scope of the undertaking, and that the recommendation of the contractor was beyond the scope of their decision-making responsibilities. FEMA, as the federal agency is required to carry out adverse effects resolution and those adverse effect resolutions should be conducted with identified consulting parties. However, as the survey had already been completed, FEMA and identified consulting parties agreed to use the survey as part of the Treatment Measures under Historical Context Statements and Narratives.

Stipulation III.G of the Texas Programmatic Agreement addresses circumstances where an Applicant may have initiated an undertaking before Section 106 review was initiated or completed. Where FEMA determines that an Applicant has initiated an undertaking without willful intent to avoid the requirements of Section 106, FEMA proceeds to determine if an undertaking meets the definition of an allowance(s), emergency

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<sup>173</sup> King, “Federal Planning,” 37

action, or no potential to effect. In these circumstances FEMA documents this determination, considers the undertaking Section 106 compliant, and reports these numbers in their respective section(s) of the Annual Report. In 2016 FEMA determined that there was one project undertaking did not meet the aforementioned definitions and would have required Standard 106 Project review. FEMA determined that the project was non-compliant and documented this decision in the project file.

Overall one challenge of Section 106 compliance is a lack of training for Applicants, the State Emergency Management Offices (SEMO), other stakeholders, and internal EHP staff. FEMA does have opportunities to provide brief training to Applicants, SEMOs, and other stakeholders. However, these trainings are short 15-30 minutes of an overview of Section 106 that are part of a larger training opportunity related to Program activities, and does not provide an adequate overview of Section 106 of the National Historic Preservation Act. FEMA does offer an in-depth training, IS-235.A: Overview of FEMA's EHP Review. This interactive course provides an overview of FEMA's environmental and historic preservation compliance responsibilities and is an alternative to the 4-day E/L253 course held at the Emergency Management Institute or in the regional offices. The course is designed to: provide the user with the basic background and practical knowledge needed to participate in FEMA's environmental and historic preservation review process; help the user understand how the environmental/historic preservation review process applies to various job responsibilities within FEMA's

programs; and, provide the resources necessary for the user to accomplish environmental/historic preservation responsibilities.<sup>174</sup>

The course includes interactive knowledge checks, case studies, and resource materials.

Course Objectives:

- Describe the basic elements of Federal EHP laws, regulations, and Executive Orders.
- Describe key roles and responsibilities in the EHP process.
- Identify activities that trigger EHP review.
- Explain the consequences of non-compliance with EHP requirements.

However, this course is offered mainly to already seasoned historic preservation specialists and is a requirement for Position Task Books. Position Task Books identify the competencies, behaviors, and tasks that personnel should demonstrate to become qualified for a defined incident management and support position.<sup>175</sup> Within EHP the Position Task Book is for a Historic Preservation Specialist (HSSP).

As mentioned earlier, local hiring is most problematic because candidates often have minimal qualifications or experience. They are simply “thrown” into the PA disaster

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<sup>174</sup> “IS-253.A: Overview of FEMA’s Environmental and Historic Preservation Review.” Federal Emergency Management Agency | Emergency Management Institute. Accessed November 11, 2022. <https://training.fema.gov/is/courseoverview.aspx?code=is-253.a&lang=en>.

<sup>175</sup> “Position Task Books.” FEMA.gov. Accessed November 11, 2022. <https://www.fema.gov/emergency-managers/nims/components/position-task-books>.



recovery process with nominal knowledge or training. Upon being hired for a Declared disaster they are expected to attend Recovery Scoping Meetings (RSM) and give a brief out of the EHP process. Then they are assigned to Site Inspections (SI) where they are expected to point out potential EHP issues. Once RSMs or SIs are completed the staff are required to write up technical reports giving a summary of each meeting. Often times the staff has such limited experience they aren't capable of writing substantive reports.

Another issue with staff who have limited experience is that there are environmental specialists and historic preservation specialists. So an environmental specialist may go to a RSM or SI with historic preservation issues and not have the knowledge to address the historic preservation issues. On the converse, a historic preservation specialist may attend an RSM or SI where environmental issues are concerned and the historic preservation specialist is unable to point out what exactly the environmental concerns lie. This does not help the Applicant with expectations of what could arise during an official project review.

Once RSM and SIs are complete the PA program writes official project reviews. Lack of training becomes increasingly problematic because an official project review, recorded as a Record of Environmental (REC) considerations, becomes the legal document, recording FEMA's official EHP review. Often times the onus is placed on one or two specialists who have experience reviewing official projects. These staff usually come from the Region, or the Headquarters Cadre. Local hires often take a lot of time to train before they are capable of reviewing official projects. Again, the onus is placed on the one or two specialists who have experience to train the local hires, so these experienced specialists are trying to balance multiple jobs. Inconsistencies frequently

arise in how specialists review official projects. Region 6 has developed Standard Comments that are required for specialists to use in their reviews. However, there are several incidents where disaster specialists do not use the Standard comments and come up with their own comments. Additionally, reviewers don't always use the correct radio buttons in the online system FEMA uses to document official reviews. The inconsistencies in reviews come to light when Region 6 is preparing the Annual Reports to SHPO as required by the Statewide Programmatic Agreement.

During my time deployed to Hurricane Harvey in the TIRO between 2017 and 2018 I served as a Manager on the disaster, overseeing more than 25 staff members. My time was limited to help train the staff due to multiple responsibilities required of the Manager. One of my observations that I took back to Region 6 was advising Senior staff on hiring or utilizing a Regional staff member to be deployed to the disaster, specifically to train all staff from beginning to end to meet the Regional requirements. One tool Region 6 had during Hurricane Harvey was a 2017 Standard Operating Procedures (SOP) manual. However, the manual was so immense that it was lost on the staff. It also detailed how to conduct a disaster under the old PA procedures, and Hurricane Harvey was one of the first disasters to implement a new process for PA. Essentially, the SOP, while new, became obsolete immediately. Region 6 updated the SOP in 2020 to try and streamline the document, and aligning it with the new PA procedures, making it more accessible and readable to the EHP specialist.

## CONCLUSION

The Section 106 process does not require outcomes to preserve historic properties, but rather creates a type of checklist to ensure historic properties are taken into account. The implementing regulations, codified in 36 CFR 800 Protection of Historic Properties, are subjective in interpretation within Federal agencies, and FEMA disaster recovery in particular. The problem with subjective interpretation of the implementing regulations is that it allows for many challenges, and the implementation of the Section 106 process is inconsistent. While these are just a few challenges and inconsistencies I have observed in my experience, through this thesis process I have been challenged to produce new procedures and results from my research. Case studies and interviews hopefully discern the differences in each office's approach to Section 106 and maybe together the three offices can work through the differences and align goals to conduct more consistent Section 106 review and produce results in an otherwise subjective interpretation of the implementing regulations. Through this research, FEMA will have better processes for handling Section 106 projects. The goal is to identify and therefore eliminate challenges and inconsistencies in FEMA disaster recovery in Texas and Louisiana.

Some of these challenges and inconsistencies are evident throughout this thesis. Problems arise when staff on legacy disasters are unable to travel to physically see projects and rely on photographs and reports. In comparison those on active disasters do have the ability to travel for site inspections and are responsible for taking photographs and creating reports. These are limitations that EHP have no control over. To better assist legacy disaster staff there should be consistency with active disaster staff on how to properly take photographs and write reports. Additionally, there should be an emphasis

on uploading these photographs and reports properly to the disaster drive so it can be migrated back to Region 6 when they take over the disaster. These photographs and reports are crucial to legacy disaster staff when they are unable to travel because this can become the only source of information available as to what a project looked like at the time of the disaster.

Public participation appears to be engaged once an adverse effect is identified. Sometimes this causes problems because a consulting party or the public do not have a say in the undertaking and ways to avoid or minimize the adverse effect before it is decided upon. As what has been demonstrated, there are some examples when consulting parties and the public have been involved earlier than adverse effects are determined. This early engagement encourages trust between FEMA and the consulting parties and the public.

While Tribes did not initially participate in the Statewide Programmatic Agreements, the Region 6 office is rectifying this problem by inviting them to the re-negotiations of the Statewide Programmatic Agreements. Tribes also have the option of negotiating their own Programmatic Agreement. This is due to their sovereignty and government-to-government consultation. Additionally, Tribes were invited to participate in the Louisiana Elevations Programmatic Agreement but due to the nature of the Agreement being focused on above-ground buildings and having the archeology addressed by the Statewide Programmatic Agreement, the Tribes elected not to continue participation. Tribal consultation is vital and is required by the implementing regulations, so leaving them out of consultation is an unnecessary challenge.

Nuances of the Prototype Programmatic Agreement naturally exist. The primary concern is for expedited review. They don't speak for no adverse effect determinations, just adverse effects and therefore each office is left to make up their own. This can easily provide inconsistencies in how Section 106 is done for expedited reviews. Additionally, the preambles vary from Statewide Programmatic Agreements and provide various distinctions on how to apply the Programmatic Allowances. This can cause inconsistencies in how technical specialists review projects because they either don't read the preambles or it significantly changes how the technical specialists review a project. A solution for this would be ample training to staff on each Programmatic Agreement and to point out the differences. One solution I came up with was to create a spreadsheet that highlights in red the different languages present in each Programmatic Agreement. Tier I and Tier II Programmatic Allowances are new in the Prototype Programmatic Agreement. There is a lot of leeway in how and where these Allowances are placed based on negotiations with consulting parties. Most commonly a Tier I Allowance may be moved to Tier II. This can cause great discrepancies in how a technical specialist reviews projects. Again, training on the Statewide Programmatic Agreement differences would be beneficial.

When getting down to the facts of how the Section 106 process is conducted in each office, FEMA staff notated that the Statewide Programmatic Agreement is heavily relied on. Additionally, the LIRO specified that templates created for consultation and standard comments have since been aligned to be similar in nature and create consultations that are alike in nature. In contrast the TIRO noted that they have deviated slightly from the Region 6 templates. This deviation causes inconsistencies and it would

be suggested that their office returns to the original templates created by the Region 6 office. Another difference in the TIRO is that they make survey determinations where the Region 6 office rarely does. To better bring into line processes it would be recommended that the Region 6 office and the TIRO Senior Leadership should meet and discuss this variation to better align processes.

One main point of confusion remains with the fact that the Region 6 EHP PA Team consults with SHPO/Tribes directly. Whereas the Region 6 HMA team allows Applicants/Sub-Recipients to consult directly with SHPO while consulting with Tribes separately. Then you have the LIRO who consults directly with SHPO/Tribes for both PA and HMA. The TIRO PA Team consults directly with SHPO/Tribes, but does not conduct HMA, which is left to the Region 6 office to conduct. More inconsistencies such as these challenge the staff and consulting parties and creates confusion. It would solve the inconsistencies if FEMA took control of all SHPO/Tribes consultations.

More confusion exists with the HMA Program which is conducted in the LIRO but not in the TIRO. Region 6 handles the HMA Program for the TIRO. This inconsistency exists because the LIRO has been established since 2005 and originally had a contracting firm handle all HMA in house. Eventually the contracting firm transitioned to the LIRO staff. This was also a decision made because the LIRO was overseen by the FEMA headquarters office and was not part of Region 6 oversight. Therefore, the LIRO staff is well versed in how the HMA Program functions. There has been a plethora of decisions made whether or not HMA would remain at the LIRO or transition back to Region 6. The current decision is to keep it at the LIRO. However, Region 6 often assists the LIRO in HMA projects so there is some crossover that exists between each office.

Stipulation II.A.4 of the Statewide Programmatic Agreement essentially says that any portion of an undertaking that does not meet Programmatic Allowances then the entire project should be consulted on. Based on the examples and feedback the interpretation seems to be consistent. The three offices agree that projects such as roads, buildings for elevation or buildings for acquisition and demolition constitute individual projects whether or not they are under the same project number and would be consulted on separately despite this Programmatic Allowance. However if you have a single building with multiple components in the project then that would establish one undertaking and you would have to consult on the entire project regardless if components meet Programmatic Allowances.

There are various ways EHP compliance may be paid for. Generally, when a project requires an archeological or architectural survey the cost is part of the cost share, whether that is 75% FEMA and 25% Applicant/Sub-Recipient or 90% FEMA and 10% Applicant/Sub-Recipient. In some rare cases the cost share is 100% so you see FEMA as the responsible party for EHP compliance. In the case of HMA there is always a cost share regardless of the PA cost share on the disaster. Then when deliverables are required, the Applicant/Sub-Recipient is responsible for their part of the cost share. In addition to surveys, deliverables may also include architectural drawings. There are obvious inconsistencies in who pays for EHP compliance, but perhaps FEMA could move towards consistent cost shares in disasters so the compliance is equal in nature.

Requests for Information can be a source of contention amongst EHP staff. It was mostly agreed upon that RFIs are needed when there is a lack of information needed to review a project. However, pushback is common when an RFI is needed. As FEMA sees

in PA, this resistance often comes from the CRC. This is due to the CRC needing to meet metrics on getting projects written and to the disaster staff. Therefore, PA created a procedure for informal RFIs that necessitate a 48 hour informal RFI to receive the information needed. If the 48 hours isn't met then the RFI is written in an official template and the project is formally re-worked back to the Program. In contrast, HMA does not have a formal process for RFIs. EHP simply writes an email to the Program detailing what information is needed. This is a deviation from how PA handles RFIs. One way to make the process more uniform is utilizing the same template and re-work in the system across all Programs.

The definition of an undertaking was uniformly described as to what FEMA is paying for. However, there has been an example where FEMA's definition of an undertaking came in to question among consulting parties. Despite the comments from the consulting parties, FEMA took into account the comments, but remained unwavering in their definition of an undertaking. This has shown a proven consistency in FEMA.

Non-compliant projects are rare in FEMA. However, they do exist. Sometimes this has to do with other environmental laws and not necessarily to do with Section 106. In the case of Section 106 non-compliance a lot of times these are due to projects that wouldn't have met a Programmatic Allowance and would have required Section 106 consultation. Most common occasions where non-compliance may occur is in after-the-fact reviews where SHPO/Tribes opportunity to comment has been foreclosed on. Some SHPO/Tribes will still consult on after-the-fact reviews, but in cases where they won't, FEMA may choose to determine the project non-compliant. This does not mean the project won't be funded by the Program, or under the direction of the Regional



Administrator. It depends on many factors, for example political pressure. However, EHP has largely received support for non-compliant projects and is mostly consistent in its inability to be funded.

The most important question of this thesis to direct results in the Section 106 process is how to homogenize FEMA procedures. Varying responses include having the three offices that are focused on to work together. Whether that is sharing templates and guidance, or having staff rotate in to each office to see how the Section 106 process is conducted, or have Senior leadership meet on a regular basis to discuss what is going on with Section 106 projects and how to align the review process. Emphasis on training is also important because it allows the opportunity to show EHP staff how Section 106 is conducted. Another example on how FEMA is trying to align the Section 106 process is having FEMA headquarters create a national set of guidance and standard comments. However, this was not favorable to the three offices because there is a plethora of variations to how Section 106 is conducted in each State. Currently, the closest thing that standardizes Section 106 is the CRC checklists. The CRC maintains these checklists to know what questions need to be asked to formulate a project with all of the information a technical specialist would need to review a project. In an interesting twist to standardizing the Section 106 process, there was feedback that maybe Section 106 does not need to be homogenized. That the implementing regulations and Statewide Programmatic Agreements create a framework as is and that every project is different so it is complicated to try and apply the same mechanisms to each project.

In conclusion, there exists many challenges and inconsistencies in the Section 106 process. It has been shown that the Region 6 office, the LIRO, and the TIRO have made

efforts to align the Section 106 processes through the framework of the implementing regulations, Programmatic Agreements, templates, checklists, and guidance to name a few. Bringing the LIRO and TIRO under the direction of the Region 6 office has aided in the homogenization of the Section 106 process. However, because of the subjective nature of the Section 106 implementing regulations, the unique cases of each individual project, and the numerous amount of technical specialists who come from different backgrounds, it seems that it is difficult to completely standardize the Section 106 review process.

## APPENDICES

APPENDIX A

CRC EHP COMPLETENESS CHECKLIST

# Consolidated Resource Center (CRC)

## National EHP Completeness Checklist

FEMA Environmental and Historic Preservation (EHP) Specialists at the CRCs perform completeness reviews of all projects to ensure they include sufficient scopes of work (SOW) and adequate documentation to conduct EHP compliance review in the field. The following checklist supports CRC EHP Specialists in identifying required SOW elements and documentation for a project to be considered complete. In addition, State-specific guidance documents will be referred to when reviewing for completeness, as applicable.

**Note: This checklist does not substitute for comprehensive review of laws, regulations and guidance. Full analysis must be completed by Field EHP for compliance with federal laws and regulations.**

### All Projects – Permanent Work

All permanent work projects should be reviewed for a complete and detailed damage description and SOW to include the following elements:

☐ **Verification of “In-Kind” Work**

- SOW clearly describes whether work will be returned to pre-disaster condition, have codes and standards upgrades, include 406 mitigation, or will be using 428 funding. Any change in design, material, or footprint must clearly be explained.

☐ **Method of Repair**

- Description of materials used and method of repair, including cleaning methods.
- Description of equipment used for repair.

☐ **GPS Coordinates (For Each Site)**

- Coordinates are required for all damaged sites, staging areas, and facilities such as built structures, culverts, bridges, lift stations, docks, cemeteries, etc.
- Must be formatted in decimal degrees, and accurate to at least five decimal points.
- For sites more than 200 linear feet, coordinates for the site’s beginning and end are required (roadways, dunes, embankments, trenching, transmission lines, irrigation canals, etc.).

☐ **Dates of Construction**

- Required for all built structures, culverts, bridges, lift stations, water control facilities (i.e. earthen dams, irrigation canals, etc.), parks, etc. For multiple buildings/structures within the same facility (i.e. school campus), dates of construction are required for each individual building.

☐ **Ground Disturbance:**

- Description of the extent of ground disturbance (Area: length, width, and depth).
- SOW clearly indicates whether ground disturbance will be outside of existing footprint or right-of-way (ROW).
- SOW indicates if there will be vegetation removal.

☐ **Source of Fill/Material – Completed Work**

- Fill borrow source is required for all completed work projects and should include source type (private, commercial, etc.), name, GPS coordinates/address, and type of material.

☐ **Equipment Staging Areas/Access Roads**

- Location and description of ground disturbance (length, width, depth) associated with staging activity areas or the construction of temporary access roads.
- Description of vegetation clearing, if applicable.

☐ **Photos, plans, drawings, blueprints for projects, if available**

☐ **Description of Other Federal Funding, if applicable**

❖ **Please refer to State-specific guidance (if applicable) for the following regarding all permanent work projects:**

- **Work in Water**
- **H & H Study Requirements for projects occurring in water.**

## **Debris**

In addition to “All Projects” requirements, debris projects and those including debris should be reviewed for a complete and detailed damage description and SOW to include the following elements:

☐ **GPS Coordinates/Location**

- For Collection Location, Debris Staging Areas, and Final Disposal Sites.
- SOW clearly identifies whether debris is within a waterway.

☐ **Debris Type** (Vegetative, Construction & Demolition, White Goods, Hazardous Trees, Stumps, etc.)

- If vegetative, refer to State-specific guidance regarding Invasive Species.
- If stumps/rootballs, identify amount, method of removal, and source of fill, if used.

☐ **Total Amount of Debris (Cubic Yardage or Tonnage)**

☐ **Method of Final Debris Reduction and Disposal** (cut and toss, chipping & spreading, hauling to landfill, burning, etc.)

- Name of contractor used to haul debris and name of disposal location.
- Timeframe work was completed.

❖ **Please refer to State-specific guidance (if applicable) for the following regarding debris projects:**

- **Permits for Debris Staging Areas and Final Disposal Locations**
- **Burning of Debris**
- **Debris Removal from Water or Shoreline**
- **Hazardous Trees**

## Emergency Protective Measures

In addition to “All Projects” requirements, emergency protective measures projects should be reviewed for a complete and detailed damage description and SOW to include the following elements:

### ☐ Description of Repairs or Pre-disaster Protection Measures

- ☐ Must clearly identify whether actions are temporary or permanent.
- ☐ Description must include GPS coordinates, level of ground disturbance, and identification of staging areas and/or the construction of temporary access roads.
- ☐ Timeframe work was completed.

### **Mold Remediation and/or Power Washing of Buildings/Structures**

#### ☐ Age of building/structure. If over 45 years, then also include:

- ☐ Timeframe work was completed.
- ☐ Detailed description of remediation (removal of sheetrock, ceiling tiles, chemicals used, surfaces treated, etc.).
- ☐ For power washing, pounds per square inch (PSI) range.

#### ❖ Please refer to State-specific guidance (if applicable) for the following regarding emergency protective work projects:

- Demolitions
- Asbestos Remediation
- Vector Control
- Emergency Work in Water
- Installation of Temporary Facilities/Utilities, including beach berms
- Snow Removal
- Handling and Disposal of Sandbags

## Roads, Culverts, and Bridges

In addition to “All Projects” requirements, roads, culverts, and bridges projects should be reviewed for the following:

### **Culverts or Cross Drains**

- ☐ Size of damaged culvert and replacement culvert (diameter and length) and type of construction material (brick, pre-cast concrete, metal etc.)

### **Bridges**

- ☐ Bridge report, if available, or description of bridge that includes type, material, height, width,
- ☐ length, condition, date of construction, etc.
- ❖ Please refer to State-specific guidance (if applicable) for the following regarding roads, culverts, and bridges projects:
  - H & H Study Requirements
  - Permits

## Water Control Facilities

Water control facility work should be reviewed for “All Projects” requirements.

## Buildings and Equipment

In addition to “All Projects” requirements, buildings and equipment projects should be reviewed for the following:

**If the facility or structure is 45 years or older, ensure the SOW includes:**

- ☐ Thorough description of materials to be used and method of repair including cleaning methods. (If substitute materials will be used, please make sure it specifies whether they match the originals in color, texture, and design).
- ☐ Photos of the damage and all sides of the facility or structure.
- ☐ Date(s) of any previous major renovation(s) to exterior or interior, if known.

### **Mold Remediation/Power washing**

- ☐ See Requirements under Emergency Protective Measures.

### **Debris Removal**

- ☐ See Requirements under Debris.

## Utilities

In addition to “All Projects” requirements, utilities projects should be reviewed for the following:

### **Transformers**

- ☐ **Type of Transformers** (PCB [ $>500$  ppm], PCB-Contaminated [ $>50$  ppm and  $<500$  ppm] v. Non-PCB)
- ☐ **Final disposal location of transformers.**
- ☐ **SOW clearly indicates whether there was a spill. If there was a spill, describes type of material spilled, approx. quantity and extent of spill, remediation measures, and disposal site.**

### **Power Lines (Transmission and Distribution)**

- ☐ **Description of any upgrades, reduced spans, rerouting, or replacement of existing lines.**

### **Utility Poles**

- ☐ **Quantity and location of new poles** (placed back in same hole or in new location).
- ☐ **Final disposition location of damaged poles.**
- ☐ **Description of ground disturbance (location and dimensions) occurring) for staging areas, access areas, or utility relocations.**



## **Parks, Recreation, Other**

**In addition to “All Projects” requirements, parks, recreation and other projects should be reviewed for the following:**

### **Trails and Remote Park Facilities**

- ☐ Provides facility maps that identify the alignment of damaged locations in addition to start/stop GPS coordinates.
- ☐ Clearly identifies access and equipment requirements (i.e. foot traffic, small motorized/tracked equipment, hand tools).
- ❖ **Please refer to State-specific guidance (if applicable) for the following regarding parks, recreation and other projects:**
  - **Beach Projects**
  - **Cemeteries**
  - **Permits**

## APPENDIX B

## LOUISIANA SPECIFIC CRC CHECKLIST

# Consolidated Resource Center (CRC)

## Louisiana Specific EHP Completeness Checklist

The following checklist supports CRC EHP Specialists in identifying required SOW elements and documentation for a project to be considered complete and adequate for EHP Field review. Early, close and continual coordination between CRC EHP and EHP Field staff on projects will reduce and/or eliminate issues that cause delays, project re-works and ineligible work. Please note that for work to be completed projects, EHP Field will acknowledge that some information cannot be provided in advance. In these situations, documentation can be provided before project close-out.

### All Projects – Permanent Work

All permanent work projects should be reviewed for a complete and detailed damage description and SOW to include the following elements:

#### ☐ Work Completed

- Work Completed may require after the fact consultation with the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officers (THPOs). To facilitate those consultations the following information must be included as an attachment to the project documentation:
  - Date(s) for when work was initiated and completed
  - Justification for completing work prior to FEMA review and approval.
  - For work on structures over 45 years old, photographs of the completed work and all sides of the facility or structure.

#### ☐ FIRMettes

- FIRMettes are not required for:
  - Emergency actions under Category B (e.g. emergency protective measures, emergency response, temporary repairs, etc.)
  - In-kind repairs to electrical distribution systems that span multiple Parishes
  - In-kind repairs to park trails or roads only when the work does not include bridge(s), culvert(s), low water crossing(s), raised road elevation, or mitigation
  - Projects <\$5,000
    - This includes projects with multiple unique/independent site locations where the recovery costs for each location is <\$5,000
  - Permitted disposal facilities
  - Chop and drop activities that do not include staging

#### ☐ Work in or Near Water or Wetlands

- *Work Outside State Designated Critical Resource Waters (CRW) and/or Major Rivers*
  - **No proof** of coordination with USACE required for a project when:
    - Work consists of in-kind repair(s) and is 0% - 100% complete
    - Work consists of improvements, upsizing, or changes in design and is 0% - 99% complete
  - **Written approval** or other coordination with USACE is **required** when the work consists of improvements, upsizing, or changes in design and is 100% complete
- *Work Within CRW and/or Major Rivers*

- **No proof** of coordination with USACE required for a project when 0% of the work is complete
- **Written approval** or other coordination with USACE is **required** when:
  - Work consists of in-kind repair(s) and is 1% - 100% complete
  - Work consists of improvements, upsizing, or changes in design and footprint and is 1% - 100% complete

☐ **H&H (Hydrologic and Hydrology) Study Requirements for Projects in Water**

- Required for improvements or upsizing of culvert(s), major drainage improvements, bridge(s), or low water crossing(s) when they occur in the FEMA Regulatory or undesignated Floodways. A no-rise certification signed by a registered professional engineer and concurrence by the community must also be included.

## Debris

In addition to “All Projects” requirements, debris projects should be reviewed for a complete and detailed damage description and SOW to include the following elements:

☐ **GPS Coordinates/Location**

- Collection location from public right of way (ROW) not required

☐ **Debris Staging, Burning, and/or New Disposal Sites**

- Applicants are required to complete the “*Request for Approval of Temporary Debris Management Site*” form and submit to the Louisiana Department of Environmental Quality (LDEQ).
- Applicants are also required to complete the “Disposal Site Evaluation and Registry” form and submit to the State Historical Preservation Office (SHPO). SHPO will return the completed form to the Applicant.
- A copy of the approved form(s) must be submitted to the Program Delivery Manager (PDMG) to be included with the project documentation.
- A copy of permit or correspondence from LDEQ and/or the Parish related to any burning of debris for disposal. Open air burning is governed by LDEQ’s Air Permit Division. Additionally, Louisiana burn bans are determined by the Louisiana Department of Agriculture and Forestry (not LDEQ) and is dependent upon weather conditions.
- Any debris removal or stump removal from a State Park must include documentation demonstrating coordination with the Louisiana State Historic Preservation Office.

☐ **Debris to Landfill(s)**

- No contact, approval, or permits are needed to take any debris to a permitted landfill.
- Scope of work must include the location, operating name, and municipal solid waste permit number.

☐ **Debris Removal from Water or Shoreline**

- May require a US Army Corps of Engineers (USACE) permit, and/or a SHPO authorization if

debris removal involves dredging, the discharge of dredge or fill material, or involves structures or work impacting the navigability of a waterway.

☐ **Utility poles**

☐ **Identify the final disposition of the damaged poles and include the follow as it applies:**

- If poles were disposed of at a permitted landfill, provide the location, operating name, and municipal solid waste permit number
- If poles are being re-used by landowners, this must be indicated in the scope of work.
- If poles are being relocated, this must be indicated in the SOW along with GPS coordinates for the new location.

**FIRMette(s) for new location(s) are required.**

## **Parks, Recreation, Other**

**In addition to “All Projects” requirements, buildings and equipment projects should be reviewed for the following:**

☐ **Park**

- ☐ Date of park construction
- ☐ Construction dates for park infrastructure such as pavilions, cabins, bridges, culverts, etc.

## APPENDIX C

## TEXAS SPECIFIC CRC CHECKLIST

# Consolidated Resource Center (CRC)

## Texas Specific EHP Completeness Checklist

The following checklist supports CRC EHP Specialists in identifying required SOW elements and documentation for a project to be considered complete and adequate for EHP Field review. Early, close and continual coordination between CRC EHP and EHP Field staff on projects will reduce and/or eliminate issues that cause delays, project re-works and ineligible work. Please note that for work to be completed projects, EHP Field will acknowledge that some information cannot be provided in advance. In these situations, documentation can be provided before project close-out.

### All Projects – Permanent Work

All permanent work projects should be reviewed for a complete and detailed damage description and SOW to include the following elements:

#### ☐ Work Completed

- Work Completed may require after the fact consultation with the Texas Historical Commission (THC) and Tribal Historic Preservation Officers (THPOs). To facilitate those consultations the following information must be included as an attachment to the project documentation:
  - Date(s) for when work was initiated and completed
  - Justification for completing work prior to FEMA review and approval.

#### ☐ FIRMettes

- All FIRMettes must be issued by the Region 6 Flood Mapping Mailbox
- FIRMettes are not required for:
  - True emergency actions under Category B (e.g. emergency protective measures, emergency response, temporary repairs, etc.)
  - In-kind repairs to electrical distribution systems that span multiple counties
  - In-kind repairs to park trails or roads only when the work does not include bridge(s), culvert(s), low water crossing(s), raised road elevation, or mitigation
  - Projects <\$5,000
    - This includes projects with multiple unique/independent site locations where the recovery costs for each location is <\$5,000
  - Permitted disposal facilities
  - Chop and drop activities that do not include staging

#### ☐ Work in or Near Water or Wetlands

- *Work Outside State Designated Critical Resource Waters (CRW) and/or Major Rivers*
  - **No proof** of coordination with USACE required for a project when:
    - Work consists of in-kind repair(s) and is 0% - 100% complete
    - Work consists of improvements, upsizing, or changes in design and is 0% - 99% complete
  - **Written approval** or other coordination with USACE is **required** when the work consists of improvements, upsizing, or changes in design and is 100% complete
- *Work Within CRW and/or Major Rivers*
  - **No proof** of coordination with USACE required for a project when 0% of the work is complete

- **Written approval** or other coordination with USACE is **required** when:
  - Work consists of in-kind repair(s) and is 1% - 100% complete
  - Work consists of improvements, upsizing, or changes in design and is 1% - 100% complete

☐ **H&H (Hydrologic and Hydrology) Study Requirements for Projects in Water**

- Required for improvements or upsizing of culvert(s), bridge(s), or low water crossing(s) when they occur in the FEMA Regulatory Floodway. A no-rise certification signed by a registered professional engineer and issued by the community must also be included.

## Debris

In addition to “All Projects” requirements, debris projects should be reviewed for a **complete and detailed** damage description and SOW to include the following elements:

☐ **GPS Coordinates/Location**

- Collection location from public right of way (ROW) not required

☐ **Debris Staging, Burning, and/or New Disposal Sites**

- Applicants are required to complete the “Request for Approval of Temporary Debris Management Site” form and submit to the Texas Commission on Environmental Quality (TCEQ).
- Applicants are also required to complete the “Disposal Site Evaluation and Registry” form and submit to the THC. THC will return the completed form to the Applicant.
- A copy of the approved form(s) must be submitted to the Program Delivery Manager (PDMG) to be included with the project documentation.
- Debris burning is governed by TCEQ, as well as the local county. Debris burning requests must also be approved by the county judge.

☐ **Debris to Landfill(s)**

- No contact, approval, or permits are needed to take any debris to a permitted landfill
- Scope of work must include the location, operating name, and municipal solid waste permit number

☐ **Debris Removal from Water or Shoreline**

- May require a US Army Corps of Engineers (USACE) permit, a Texas General Land Office (GLO) authorization, and/or a THC authorization if debris removal involves dredging, the discharge of dredge or fill material, or involves structures or work impacting the navigability of a waterway.

☐ **Utility poles**

- **Identify the final disposition of the damaged poles and include the follow as it applies:**
  - If poles were disposed of at a permitted landfill, provide the location, operating name, and municipal solid waste permit number
  - If poles are being re-used by landowners, this must be indicated in the scope of work



- If poles are being relocated, this must be indicated in the SOW along with GPS coordinates for the new location.

**FIRMette(s) for new location(s) are required.**

## **Parks, Recreation, Other**

**In addition to “All Projects” requirements, buildings and equipment projects should be reviewed for the following:**

☐ **Park**

- Date of park construction
- Construction dates for park infrastructure such as pavilions, cabins, bridges, culverts, etc.

APPENDIX D

LOUISIANA STATEWIDE PROGRAMMATIC AGREEMENT

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND EMERGENCY  
PREPAREDNESS, AND PARTICIPATING TRIBES**

**WHEREAS**, the mission of the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security (DHS) is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards; and

**WHEREAS**, FEMA makes assistance available to States, Territories, Commonwealths, communities, Federally recognized Indian Tribes (Tribes), and other eligible entities through programs (Programs) set forth in Appendix A, pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296 (2002) (codified as amended at 6 U.S.C. § 101 *et seq.*); Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (1974) (codified as amended at 42 U.S.C. § 5121 *et seq.*, (Stafford Act); the National Flood Insurance Act of 1968, Pub. L. No. 90-448 (1968) (as amended); the National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325 (1994) (as amended); the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2006) (as amended); the Sandy Recovery Improvement Act, Pub. L. No. 113-2 (2013); implementing regulations contained in Title 44 of the Code of Federal Regulations (CFR), Executive Order 13407 (2006), and such other acts, executive orders, implementing regulations, or Congressionally authorized programs as are enacted from time to time; and

**WHEREAS**, FEMA has determined that implementing its Programs may result in Undertakings [as defined by 54 U.S.C. § 300320 and 36 CFR § 800.16(y)] that may affect properties listed in or eligible for listing in the National Register of Historic Places (National Register) pursuant to 36 CFR Part 60 (historic properties), and FEMA has consulted with the Louisiana State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act (NHPA), Pub. L. No. 89-665 (1966) (codified as amended at 54 U.S.C. § 306108), and the regulations implementing Section 106 of the NHPA (Section 106) at 36 CFR Part 800; and

**WHEREAS**, FEMA, the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) have determined that FEMA's Section 106 requirements can be more effectively and efficiently implemented and delays to the delivery of FEMA assistance minimized if a programmatic approach is used to stipulate roles and responsibilities, exempt certain Undertakings from Section 106 review, establish protocols for consultation, facilitate identification and evaluation of historic properties, and streamline the assessment and resolution of adverse effects; and

**WHEREAS**, FEMA has developed a Prototype Programmatic Agreement (FEMA Prototype Agreement) pursuant to 36 CFR § 800.14(b)(4) in consultation with ACHP and NCSHPO to serve as a basis for negotiation of a State/Tribal specific Programmatic Agreement (Agreement) with SHPO, State/Tribal Emergency Management Agency, and/or participating Tribe(s); and

**WHEREAS**, this Agreement conforms to the FEMA Prototype Agreement as designated by ACHP on December, 17, 2013, and therefore does not require the participation or signature of ACHP; and

**WHEREAS**, DHS; ACHP; the Department of Transportation; the U.S. Department of Housing and Urban Development (HUD); the U.S. Environmental Protection Agency; the Department of the Army (Civil Works); the Department of the Interior; the Department of Commerce; the Department of Agriculture; the Department of Energy; and the Council on Environmental Quality entered into an Memorandum of Understanding (MOU) on July 29, 2014 to establish the Unified Federal Review (UFR) process to expedite and unify the process for completing environmental and historic preservation reviews required for Disaster Recovery Projects as called for by the Sandy Recovery Improvement Act and this MOU specifically identifies the FEMA Prototype Agreement as a UFR mechanism; and

**WHEREAS**, in order to implement its Programs, FEMA will provide assistance to the State of Louisiana and/or Tribes (Recipient(s)) that may provide monies and other assistance to eligible subrecipients, and as such, the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) that is typically responsible for administering funds provided under these Programs, has participated in this consultation, and FEMA has invited GOHSEP to execute this Agreement as an Invited Signatory; and

**WHEREAS**, FEMA also may directly perform its own Undertakings pursuant to this Agreement; and

**WHEREAS**, in anticipation or in the immediate aftermath of an event, impacted communities and the State of Louisiana, and/or affected Tribes, may conduct critical preparedness, response and recovery activities to safeguard public health and safety and/or to restore vital community services and functions before, during, and/or following an event. Some of these activities may become Undertakings requiring Section 106 review subject to the terms of this Agreement, and FEMA shall coordinate the appropriate review as warranted; and

**WHEREAS**, FEMA has determined that its Programs may result in Undertakings with the potential to affect historic properties having religious and cultural significance to Tribes including sites that may contain human remains and/or associated cultural items; and

**WHEREAS**, FEMA recognizes that the Alabama-Coushatta Tribe of Texas (ACTT); Caddo Nation (CN); Chitimacha Tribe of Louisiana (CTL); Choctaw Nation of Oklahoma (CNO); Coushatta Tribe of Louisiana (CT); Jena Band of Choctaw Indians (JBCI); Mississippi Band of Choctaw Indians (MBCI); Muscogee (Creek) Nation (MCN); Poarch Band of Creek Indians (PBCI); Quapaw Tribe of Oklahoma (QTO); Seminole Nation of Oklahoma (SNO); Seminole Tribe of Florida (STF); and Tunica-Biloxi Tribe of Louisiana (TBTL), (Tribes) may have sites of religious and cultural significance on or off Tribal Lands [as defined in 36 CFR § 800.16(x)], and in meeting its Federal trust responsibility, FEMA has engaged in government-to-government consultation with Tribe(s), and pursuant to 36 CFR § 800.2 (c)(2)(ii)(E) has invited the Tribe(s) to enter into an agreement that specifies how FEMA and the Tribe(s) will carry out Section 106 responsibilities, including the confidentiality of information; and

**WHEREAS**, the CN, CTL, CNO, CT, JBCI, MCN, PBCI, QTO, STF, and TBTL have assumed the responsibilities of SHPO in its/their Tribal lands through appointment of a Tribal Historic

Preservation Officer (THPO) in accordance with Section 101 of NHPA, and FEMA shall consult with THPO in lieu of SHPO for Undertakings occurring on or affecting its/their Tribal lands; and

**WHEREAS**, notwithstanding the aforementioned invitation to enter into an agreement, FEMA has invited ACTT; CN; CTL; CNO; CT; JBCI; MBCI; MCN; PBCI; SNO; STF; QTO; and TBTL, to enter into this Agreement as a signatory party to fulfill the requirements of Section 106; and

**WHEREAS**, as of the date of this Agreement, no Tribe has agreed to enter into a separate Programmatic Agreement or other agreement with FEMA; and

**WHEREAS**, as of the date of this Agreement, no Tribes(s) have declined to enter into this Agreement as a signatory party; and

**WHEREAS**, FEMA may invite additional Tribes that have sites of religious and cultural significance to enter into the terms of this Agreement as invited signatories or concurring parties in accordance with 36 CFR § 800.14(f), and nothing in this Agreement prevents a Tribe from entering into a separate Programmatic Agreement or other agreement with FEMA for administration of FEMA Programs; and

**WHEREAS**, the terms of this Agreement shall not apply to Undertakings on or affecting Tribal lands without prior execution of the Agreement by the affected Tribe(s); and

**WHEREAS**, for the review of specific Undertakings under this Agreement, FEMA may invite other agencies, organizations, and individuals to participate as consulting parties; and

**NOW, THEREFORE**, FEMA, Recipient(s), SHPO, and participating Tribe(s) (Signatories) agree that FEMA Programs in the State of Louisiana and/or on Tribal lands shall be administered in accordance with the following Stipulations to satisfy FEMA's Section 106 and Section 110 of the NHPA responsibilities for all resulting Undertakings and effectively integrate historic preservation compliance considerations into the delivery of FEMA assistance. FEMA will not authorize implementation of an individual Undertaking until Section 106 review is completed pursuant to this Agreement.

## **STIPULATIONS**

To the extent of its legal authority, and in coordination with other Signatories, FEMA shall ensure that the following measures are implemented:

### **I. GENERAL**

#### **A. Applicability**

1. The execution of this Agreement supersedes the terms of the previous Programmatic Agreement in the State of Louisiana, dated August 17, 2009 and amended on July 22, 2011 and the *Louisiana State-Specific Programmatic Agreement among the Federal Emergency Management Agency; Louisiana Governor's Office of Homeland Security and Emergency Preparedness; Louisiana State Historic Preservation Officer of the*

*Department of Culture, Recreation & Tourism; Alabama-Coushatta Tribe of Texas; Chitimacha Tribe of Louisiana; Choctaw Nation of Oklahoma; Jena Band of Choctaw Indians; Mississippi Band of Choctaw Indians; Seminole Tribe of Florida; and the Advisory Council on Historic Preservation regarding FEMA's Hazard Mitigation Grant Program dated January 31, 2011 (LA HMGP PA). However, the execution of this Agreement does not supersede and/or invalidate the existing Secondary Programmatic Agreement Among Federal Emergency Management Agency, State Of Louisiana Division Of Administration Office Of Community Development, Louisiana State Historic Preservation Officer, Advisory Council On Historic Preservation, Louisiana Department Of Education, Through Its Recovery School District, And Orleans Parish School Board Regarding Implementation Of School Facilities Master Plan For Orleans Parish New Orleans, Louisiana or the Secondary Programmatic Agreement Among the Federal Emergency Management Agency; the Louisiana Historic Preservation Officer; the Advisory Council on Historic Preservation; the City of New Orleans; and the United States Army Corps of Engineers Regarding the Demolition of Privately Owned Residential Buildings within Orleans Parish Damaged as a Result of Hurricanes Katrina and Rita.*

2. For FEMA Undertakings that also are within the jurisdiction of the Federal Communications Commission (FCC) and within the scope of its Section 106 Programmatic Agreements for communication facilities, FEMA defers Section 106 review in accordance with the ACHP Program Comment, as amended on September 24, 2015. The approval of funding for the FEMA Undertaking shall be conditioned upon the compliance of the subrecipient with the FCC's applicable Section 106 review, including any required consultation with Tribes. FEMA shall notify SHPO/THPO when it applies the ACHP Program Comment to an Undertaking. FEMA remains responsible for any FEMA Undertakings it determines are outside the jurisdiction of FCC.
3. In the event of a Stafford Act major disaster or emergency declaration (Declaration), State, Tribal, and local governments may lack the capability to perform or to contract for emergency work, and instead request that the work be accomplished by a Federal agency. Through a mission assignment (MA), FEMA may direct appropriate Federal agencies to perform the work. This Agreement shall apply to such Federal assistance undertaken by or funded by FEMA pursuant to Titles IV and V of the Stafford Act and 44 CFR Part 206.
4. FEMA may utilize this Agreement to fulfill its Section 106 responsibilities and those of other Federal agencies that designate FEMA as the lead Federal agency pursuant to 36 CFR § 800.2(a)(2) with appropriate notification to the other Signatories and ACHP regarding Undertakings that fall within the scope of this Agreement. When FEMA is not designated as the lead Federal agency, all Federal agencies, including FEMA, remain individually responsible for their compliance with Section 106. This provision does not prevent FEMA from recognizing another Federal agency as lead Federal agency for specific Undertakings, as appropriate.
5. If another Federal program or Federal agency has concluded Section 106 consultation review and approved an Undertaking within the past five (5)-years, and no new

substantial information has been uncovered, FEMA has no further requirement for Section 106 review regarding that Undertaking provided that FEMA:

- a. Confirms that the scope and effect [as defined by 36 CFR § 800.16(i)] of its Undertaking are the same as that of the Undertaking reviewed by the previous agency, and;
  - b. Determines that the previous agency complied with Section 106, including Tribal consultation, appropriately and;
  - c. Adopts the findings and determinations of the previous agency; and
  - d. Documents these findings in its project file in order to confirm that the requirements of Section 106 have been satisfied; or
  - e. Conduct additional Section 106 consultation in accordance with the terms of this Agreement should FEMA, in consultation with SHPO and participating Tribe(s) and Federally recognized Tribes with an interest in that area, determine that the previous Section 106 review was insufficient or involved interagency disagreements about eligibility, effect, and/or Treatment Measures.
6. With the written concurrence of the Signatories, other Federal agencies providing financial assistance for the type of activities covered under the terms of this Agreement as outlined in Appendix A may satisfy their Section 106 responsibilities for the same type of activities by accepting and complying in writing with the terms of this Agreement.
- a. Other Federal Agencies may include States, Tribes, and units of local government who have assumed environmental responsibilities of HUD, and acting as the Responsible Entity pursuant to 24 CFR Part 58, are responsible for environmental review, decision-making and action.
  - b. In such situations, the other Federal Agency shall notify the Signatories in writing of its intent to use this Agreement to achieve compliance with its Section 106 requirements, and consult with the Signatories regarding its Section 106 compliance responsibilities. Resumes of staff who meet the Secretary of the Interior's (SOI's) *Professional Qualification Standard(s)* and will review Second Tier projects in accordance with Appendix B of this Agreement shall be provided to FEMA and SHPO/THPO.
7. FEMA has determined that the following types of activities have limited or no potential to affect historic properties and FEMA has no further Section 106 responsibilities with regards to them, pursuant to 36 CFR § 800.3(a)(1):
- a. Pursuant to 44 CFR § 206.110(m), assistance to individuals and households provided under 44 CFR Part 206, Subpart D and Section 408 of the Stafford Act, including funding for owner occupied home repair and replacement, content

replacement, personal property, transportation and healthcare expenses, is exempt from the provisions of Section 106. For ground disturbing activities, and construction related to 44 CFR §§ 206.117(b)(1)(ii) (temporary housing), 206.117(b)(4) (permanent housing construction), 206.117(c)(1)(vi) (repair or replacement of privately owned access routes), and repair of multi-family housing units, FEMA shall conduct Section 106 review.

- b. Administrative actions such as personnel actions, travel, procurement of services, supplies (including vehicles and equipment) for the support of day-to-day and emergency operational activities, and the temporary storage of goods provided storage occurs within existing facilities or does not require ground disturbance.
- c. Granting of variances, and actions to enforce Federal, State, or local codes, standards or regulations.
- d. Monitoring, data gathering, and reporting in support of emergency and disaster planning, response and recovery, and hazard mitigation activities.
- e. Research and development of hazard warning systems, hazard mitigation plans, codes and standards, and education/public awareness programs.
- f. Assistance provided for planning, studies, design and engineering costs that involve no commitment of resources other than staffing and associated funding.
- g. Assistance provided for training, management and administration, exercises, and mobile/portable equipment purchases; with the exception of potential ground-disturbing activities and modification of existing structures.
- h. Community Disaster Loans for funding to perform administrative governmental functions for any eligible jurisdiction in a designated disaster area that has suffered a substantial loss of tax and other revenue.
- i. Funding the administrative action of acquisition or lease of existing facilities where planned uses conform to past use or local land use requirements.
- j. Funding the administrative action of acquiring properties in acquisition projects, including the real estate transaction.
- k. Labor, equipment and materials used to provide security in the Declaration area, including lease, rental, purchase or repair of equipment or vehicles and payment for staff and contract labor.
- l. Application of pesticides to reduce adverse public health effects, including aerial and truck-mounted spraying.
- m. Unemployment assistance.



- n. Distribution of food coupons.
  - o. Legal services.
  - p. Crisis counseling.
8. Any FEMA Programs authorized by the United States Congress in the future may be included in this Agreement in accordance with Stipulation IV.A, Amendments. Any change in the FEMA name, Programs, or organizational structure shall not affect this Agreement.

## B. Roles and Responsibilities of the Signatories

### 1. FEMA:

- a. FEMA shall use Federal, Tribal, State, subrecipient, or contractor staff whose qualifications meet the Secretary's *Professional Qualifications* set forth in the Federal Register at 48 Fed. Reg. 44716-01 (September 29, 1983), as amended (Qualified) in applying Second Tier Programmatic Allowances (Allowances) listed in Appendix B, completing identification and evaluation of historic properties, and making determinations of effects. FEMA shall review any National Register eligibility determination and make its own findings of effect resulting from the performance of these activities prior to submitting such determinations to SHPO and participating Tribe(s).
- i. FEMA acknowledges that Tribes possess special expertise in assessing the National Register eligibility of properties with religious and cultural significance to them. Tribal leaders, and as appropriate, their representatives, shall decide who meets qualifications/standards as defined by their Tribes for review of Undertakings affecting properties with religious and cultural significance to them.
- b. FEMA alone shall conduct all Section 106 consultation with Tribe(s). In accordance with 36 CFR § 800.2(c)(4), FEMA may authorize Recipient(s), or a subrecipient through Recipient(s), to initiate the Section 106 process with SHPO and other consulting parties, assist in identifying other consulting parties with a demonstrated interest in the Undertaking, and prepare any necessary analyses and documentation, but FEMA shall remain responsible for determinations of National Register eligibility and findings of effect recommended by the authorized party. FEMA shall follow the process set forth in Stipulation I.B.1(a), FEMA Roles and Responsibilities, and notify SHPO in writing when a Recipient or subrecipient has been authorized to initiate consultation on FEMA's behalf.
- c. Prior to authorizing the release of funds for individual Undertakings requiring grant conditions pursuant to this Agreement, FEMA shall inform Recipient(s) of all stipulations and conditions and ensure that they are understood so they can be adequately conveyed to the subrecipient. FEMA shall work in partnership with

Recipient(s) to provide subrecipients with guidance on in-kind repair pursuant to *The Secretary of the Interior's Standards for the Treatment of Historic Properties 1995 (Standards)*, 36 CFR Part 68, or the most updated version, and techniques to avoid or minimize adverse effects to historic properties.

- d. FEMA shall provide the other Signatories and ACHP with an annual report for the previous calendar year on or about April 30<sup>th</sup> of each year that this Agreement is in effect. This annual report will summarize the actions taken to implement the terms of this Agreement, such as, statistics on Undertakings meeting Allowances; expedited review; standard project review; resolution of adverse effects; after-the-fact consultations; use of other agency's determinations; the progress and completion of all treatment measures; and will recommend any actions or revisions to be considered, including updates to the appendices.
  - i. Any Signatory, including FEMA, may request a meeting to review the annual report or discuss issues regarding implementation of the Agreement within the thirty (30)-days following receipt of the annual report.
  - ii. FEMA will notify other Signatories of the request for the meeting; will determine if the meeting shall occur in person or by telephone; and will finalize the meeting arrangements.
- e. FEMA shall notify SHPO and affected Tribe(s), as soon as practicable, following a Declaration to provide specific points of contact and other pertinent information about the Declaration.
- f. FEMA may convene an initial scoping meeting with the Signatories and other interested parties as soon as practicable after each Declaration to address Declaration-specific issues and procedures.
- g. FEMA shall ensure that all documentation resulting from Undertakings reviewed pursuant to this Agreement is consistent with applicable SHPO and Tribal guidelines and the confidentiality provisions of 54 U.S.C. § 307103 and 36 CFR § 800.11(c).

## 2. SHPO:

- a. SHPO shall review FEMA's determination of the Areas of Potential Effects (APE), National Register eligibility determinations, and FEMA's effect findings and respond within timeframes set out in Stipulation I.E.2.
- b. Upon request, SHPO shall provide FEMA and/or its designee(s) with available information about historic properties (such as access to site files, GIS data, survey information, geographic areas of concern). Only Qualified staff and/or designee(s) shall be afforded access to protected historic property information. FEMA and SHPO may execute a written agreement to memorialize data sharing, and FEMA and SHPO shall execute a written agreement if the Louisiana Department of Culture,

Recreation, and Tourism (CRT) requires a fee for FEMA to remotely access restricted data.

- c. SHPO shall identify staff or consultants to assist FEMA staff with their Section 106 responsibilities, and identify, in coordination with FEMA, those activities within the Section 106 review process that SHPO may perform for specific Undertakings as agreed in writing with FEMA.
  - d. As requested, SHPO staff shall be reasonably available as a resource and for consultation through site visits, written requests, telephone conversations or electronic media. In those instances where consultation with SHPO has occurred, FEMA shall provide a written summary via e-mail or regular mail to SHPO, including any decisions that were reached.
  - e. SHPO may delegate some or all of its responsibilities under this Agreement to one or more Liaisons to serve as a dedicated point of contact for consultation with FEMA. SHPO shall confer with FEMA about the selection of any Liaisons, the scope of responsibilities delegated and related implementing procedures. SHPO shall formally document these decisions for concurrence by FEMA. Liaisons are not required to be members of SHPO staff.
  - f. SHPO shall participate in an initial scoping meeting for a Declaration.
  - g. SHPO may assist local jurisdictions and/or Recipient(s) in the State of Louisiana with advance planning efforts to consider historic properties in the context of homeland security considerations, including disaster preparedness, response, recovery, and mitigation programs for which FEMA funding may be requested.
  - h. SHPO shall coordinate with FEMA, to identify consulting parties, including any communities, organizations, or individuals that may have an interest in a specific Undertaking and its effects on historic properties.
  - i. SHPO shall participate in annual reviews convened by FEMA to review the effectiveness of this Agreement in accordance with Stipulation I.B.1(d).
  - j. SHPO may request the involvement of the ACHP in the Section 106 consultation for Undertakings where the subrecipient is located within CRT.
3. Recipient(s):
- a. Recipient(s) shall ensure that their subrecipients understand and acknowledge conditions and potential requirements that may be placed upon Undertakings as a result of Section 106 consultation and the provisions of this Agreement.
  - b. Recipient(s) shall participate in an initial scoping meeting for a Declaration.

- c. Recipient(s) shall ensure that their subrecipients understand that failure to comply with any project-specific conditions that have been placed on their grants could jeopardize FEMA funding.
- d. Recipient(s) shall notify FEMA as soon as possible of any proposed change to the approved scope of work. Recipient(s) shall direct their subrecipient not to implement the changes to the proposed scope of work until any additional review required by this Agreement is complete.
- e. Recipient(s) shall ensure that its subrecipients are made aware that in the event of an unexpected discovery involving an Undertaking that has affected a previously unidentified historic property or human remains, or affected a known historic property in an unanticipated manner, the subrecipient will comply with Stipulation III.B, Unexpected Discoveries, Previously Unidentified Properties, or Unexpected Effects.
- f. Recipient(s) shall ensure that in its sub-grant agreements, any scope of work involving ground disturbance, and resultant contracts to execute said work, provide for the protection of and notification protocols for unexpected discoveries or unexpected effects to historic properties and human remains.
- g. If a Signatory Tribe assumes the role of Recipient for projects on Tribal lands, the Tribe shall assume the same responsibilities as outlined in Stipulation I.B.3 of this Agreement, Roles and Responsibilities of the Signatories.

#### C. Tribal Consultation

1. For FEMA Undertakings on Tribal lands or affecting properties of religious and cultural significance, and where no tribe-specific consultation agreements or protocols are in place, FEMA shall consult with affected Tribe(s) in accordance with 36 CFR Part 800. In determining the specific Tribe(s) affected, FEMA will first establish that it is a type of Undertaking with potential to affect historic properties with religious and cultural significance and may consult with SHPO, Tribe(s), any State Tribal Agency, and access the National Park Service (NPS) Native American Consultation Database, the list of Tribal Areas of Interest in the State of Louisiana, <http://www.crt.state.la.us/Assets/OCD/archaeology/nativeamericancontacts/NatAmContacts.pdf>, or other tools to identify geographic Tribal interests.
2. To the extent permitted by Section 304 of NHPA, Section 9(a) of the Archeological Resources Protection Act (ARPA) (16 U.S.C. §470aa – 470mm), and any other applicable laws, FEMA shall ensure it withholds information protected by such laws from public disclosure.
3. FEMA shall invite affected Tribe(s) to participate in the initial scoping meeting within their geographic area of interest for each Declaration.

#### D. Public Participation

1. FEMA recognizes that the views of the public are essential to informed decision making throughout the Section 106 consultation process. FEMA shall notify the public of proposed Undertakings in a manner that reflects the nature, complexity, significance of historic properties likely affected by the Undertaking, the likely public interest given FEMA's specific involvement, and any confidentiality concerns of Tribe(s), private individuals and businesses.
2. FEMA may consult with Recipient(s), subrecipient, SHPO, and participating Tribe(s), and other consulting parties to determine if there are individuals or organizations with a demonstrated interest in historic properties that should be included as a consulting party for the Undertaking in accordance with 36 CFR § 800.2(c)(5). If such parties are identified or identify themselves to FEMA, FEMA shall provide them with information regarding the Undertaking and its effects on historic properties, consistent with the confidentiality provisions of 36 CFR § 800.11(c).
3. In accordance with the outreach strategy developed for an Undertaking in consultation with SHPO and participating Tribe(s), for involving the public, FEMA shall identify the appropriate stages for seeking public input during the Section 106 consultation process. FEMA shall consider all views provided by the public regarding an Undertaking.
4. FEMA shall also provide public notices and the opportunity for public comment or participation in an Undertaking through the public participation process of the National Environmental Policy Act (NEPA) and its implementing regulations set out at 40 CFR Parts 1500-1508, and/or Executive Orders 11988 and 11990 relating to floodplains and wetlands as set out in 44 CFR Part 9, and if applicable, Executive Order 12898, Environmental Justice, provided such notices specifically reference Section 106 as a basis for public involvement.
5. Should a member of the public object in writing to implementation of the Agreement's terms, FEMA will notify the other Signatories in writing and take the objection into consideration. FEMA shall consult with the objecting party and, if that party so requests, the other Signatories, for not more than thirty (30)-days. In reaching its decision regarding the objection, FEMA shall take into consideration all comments from these parties. Within fifteen (15)-days after closure of this consultation period, FEMA shall provide the other parties with its final decision in writing.

#### E. Timeframes and Communications

1. All time designations shall be in calendar days unless otherwise stipulated. The review period will be extended until the next business day, if a review period included in this Agreement concludes on a Saturday, Sunday, State, or Federal holiday. If requested, FEMA will extend a review period consistent with the time designations in this Agreement for parties affected by an unanticipated state office closure in East Baton Rouge Parish declared by the Louisiana Commissioner of Administration. Any electronic communication forwarding plans or other documents for review under the

terms of this PA that is sent after 4:00 pm Central Time will be deemed to have been received by the reviewing party on the next business day. E-mail comments by the Signatories on any documents submitted for review under this Agreement are timely if they are received at any time on or before the last day of a review period. Responses sent by mail will be accepted as timely if they are postmarked by the last day allowed for the review. If any Signatory does not object to FEMA's finding or determination related to an Undertaking within an agreed upon timeframe, FEMA may proceed to the next step in the consultation process as described in Stipulation II, Project Review.

2. Due to the varied nature of Undertakings, the individual response times to FEMA's requests for comment/concurrence will vary. These response times are contingent upon FEMA ensuring that its findings and determinations are made by Qualified staff and supported by documentation as required by 36 CFR § 800.11(d) and 36 CFR § 800.11(e), and consistent with FEMA guidance.
  - a. For Emergency Undertakings as outlined in Stipulation II.B, Expedited Review of Emergency Undertakings, SHPO and participating Tribe(s) shall respond to any FEMA request for comments within three (3)-days after receipt, unless FEMA determines the nature of the emergency action warrants a shorter time period.
  - b. For Undertakings associated with the Individual Assistance (IA) and Public Assistance (PA) programs, the response time for each request for concurrence shall be a maximum of fifteen (15)-days, or in accordance with temporary timelines established by FEMA on a Declaration by Declaration basis in coordination with SHPO and participating Tribe(s).
  - c. For the Hazard Mitigation Grant Program (HMGP) and all non-disaster programs, the response time for each request for concurrence shall be a maximum of thirty (30)-days.
3. The consulting parties may send and accept official notices, comments, requests for further information and documentation, and other communications required by this Agreement by e-mail.
  - a. If the size of an e-mail message is unusually large or an e-mail is returned to a sender because its size prevents delivery, the sender will contact the recipient(s) and determine alternative methods to deliver the information.
  - b. Time-sensitive information that is not sent by e-mail should be sent by overnight mail, courier, or be hand-delivered. The timeframe for requests for review not sent by e-mail will be measured by the date the delivery is signed for by the individual recipient or the agency or organization representing the Signatory.

## II. PROJECT REVIEW

### A. Programmatic Allowances

1. If FEMA determines an Undertaking conforms to one or more allowances in Appendix B of this Agreement, FEMA shall complete the Section 106 review process by documenting this determination in the project file, without SHPO or tribal review or notification.
2. If the Undertaking involves a National Historic Landmark (NHL) [<https://www.nps.gov/nhl/find/statelists/la/LA.pdf>], FEMA shall notify SHPO, participating Tribe(s), and NPS NHL Program Manager of the NPS Southeast Regional Office that the Undertaking conforms to one or more Allowances. FEMA shall provide information about the proposed scope of work for the Undertaking and the Allowance(s) enabling FEMA's determination.
3. If FEMA determines any portion of an Undertaking's scope of work does not conform to one or more Allowances listed in Appendix B, FEMA shall conduct expedited or standard Section 106 review, as appropriate, for the entire Undertaking in accordance with Stipulation II.B, Expedited Review for Emergency Undertakings, or Stipulation II.C, Standard Project Review.
4. Allowances may be revised and new Allowances may be added to this Agreement in accordance with Stipulation IV.A.3, Amendments.

### B. Expedited Review for Emergency Undertakings

1. Determine Expedited Review
  - a. As part of the Declaration process, FEMA shall define the time interval during which the disaster causing incident occurs (the incident period, as defined in 44 CFR § 206.32(f)). FEMA may approve direct Federal assistance and/or funding for emergency work (as defined in 44 CFR § 206.201(b)) that occurs during the incident period, including work already completed, in response to an immediate threat to human health and safety or property. Pursuant to 36 CFR § 800.12(d), FEMA may conduct expedited review of emergency Undertakings for thirty (30)-days from the beginning of the incident period.
  - b. Should FEMA determine that it is necessary to extend the expedited review period for emergency Undertakings beyond the initial thirty (30)-days, FEMA shall, in thirty (30)-day increments, as needed, notify in writing ACHP, SHPO, GOHSEP, other Recipient(s), as appropriate, and participating Tribe(s).

## 2. Conduct Expedited Reviews

- a. If the emergency Undertaking is an immediate rescue and salvage operation conducted in response to an event to preserve life and property, FEMA has no Section 106 consultation responsibilities in accordance with 36 CFR § 800.12(d); or
  - b. If the emergency Undertaking meets one or more of the Allowances in Appendix B of this Agreement, FEMA shall complete the Section 106 review process pursuant to Stipulation II.A.1, Programmatic Allowances.
  - c. If FEMA determines that the emergency Undertaking would adversely affect a historic property during this expedited review period:
    - i. To the extent practicable, FEMA will propose Treatment Measures that would address adverse effects during implementation, and request the comments of SHPO and participating Tribe(s) within three (3)-days of receipt of this information unless FEMA determines the nature of the emergency warrants a shorter time period.
    - ii. FEMA may provide this information through written requests, telephone conversations, meetings, or electronic media. In all cases, FEMA shall clarify that an “expedited review” is being requested for the Undertaking.
    - iii. FEMA shall take into account any timely comments provided by SHPO and/or participating Tribe(s) in making a decision on how to proceed.
    - iv. Should SHPO and/or participating Tribe(s) not comment within three (3)-days, FEMA shall complete Section 106 consultation for the Undertaking based on the available information.
    - v. FEMA shall notify SHPO and participating Tribe(s) of the final decision, indicating how any comments received were considered in reaching that decision.
- C. Standard Project Review: For Undertakings not exempt from further Section 106 review, FEMA shall ensure that the following standard project review steps are implemented. In the interest of streamlining, FEMA may combine some or all of these steps during consultation in accordance with 36 CFR § 800.3(g).
- 1. Consulting Parties: FEMA shall consider all written requests of individuals and organizations to participate as consulting parties, and consult with SHPO and participating Tribe(s) to identify any other parties that meet the criteria to be consulting parties and invite them to participate in the Section 106 process. FEMA may invite others to participate as consulting parties as the Section 106 consultation proceeds. FEMA shall invite any individual or organization that will assume a specific role or responsibility outlined in a Memorandum of Agreement (MOA) or Programmatic Agreement to participate as an invited signatory to the agreement.



2. Area of Potential Effects:

- a. For standing structures not adjacent to or located within the boundaries of a National Register listed or eligible district, Qualified staff may define the APE as the individual structure when the proposed Undertaking is limited to its repair or rehabilitation (as defined in 36 CFR § 68.2(b)).
- b. For all other Undertakings, Qualified staff shall determine the APE in consultation with SHPO and participating Tribe(s). FEMA may consider information provided by other parties, such as local governments and the public, when establishing the APE.

3. Identification and Evaluation: Qualified staff shall determine, in consultation with SHPO and participating Tribe(s) if the APE contains historic properties, including properties of religious and cultural significance. This may include the review of documentation provided by Recipient(s) or subrecipient in coordination with SHPO.

- a. Level of Effort: FEMA shall make a reasonable and good faith effort to identify historic properties in accordance with 36 CFR § 800.4(b)(1). FEMA may consult with SHPO to determine the level of effort, methodology necessary to identify and evaluate a variety of historic property types, and any reporting requirements. For properties of religious and cultural significance to affected Tribe(s), FEMA shall consult with the affected Tribe(s) to determine geographical areas containing them that may be affected by an Undertaking and determine the necessary level of effort to identify and evaluate or avoid any such historic properties.
- b. National Historic Landmarks: When FEMA identifies an Undertaking with the potential to affect an NHL, FEMA shall contact NPS NHL Program Manager of the Southeast NPS Regional Office in addition to SHPO, participating Tribe(s), and other consulting parties. The purpose of this notification is to ensure early coordination for the Undertaking which FEMA later may determine adversely affects the NHL as outlined in Stipulation II.A.2.
- c. Determinations of Eligibility: FEMA shall review or determine National Register eligibility based on identification and evaluation efforts, and consult with SHPO, participating Tribe(s), and other consulting parties regarding these determinations. Should SHPO, participating Tribe(s), or another consulting party disagree with the determination of eligibility, FEMA shall either:
  - i. Elect to consult further with the objecting party until the objection is resolved;
  - ii. Treat the property as eligible for the National Register; or
  - iii. Obtain a determination of eligibility from the Keeper of the National Register in accordance with 36 CFR § 63.2(d)-(e) and 36 CFR § 800.4(c)(2).

4. Findings of No Historic Properties Affected: FEMA shall make a finding of “no historic

properties affected” under the following circumstances:

- a. If no historic properties are present in the APE; or
  - b. The Undertaking is designed to avoid effects to historic properties, including National Register listed or eligible properties of religious or cultural significance to participating Tribe(s); or
  - c. The Undertaking does not affect the character defining features of a historic property.
  - d. FEMA shall notify SHPO, participating Tribes(s), and any other consulting parties of this finding and provide supporting documentation in accordance with 36 CFR § 800.11(d). Unless SHPO or participating Tribe(s), objects to the finding within the applicable timeframe outlined in Stipulation I.E, Timeframes and Communications, the Section 106 review of the Undertaking will have concluded.
  - e. If SHPO or participating Tribe(s), objects to a finding of “no historic properties affected,” FEMA shall consult with the objecting party to resolve the disagreement.
    - i. If the objection is resolved, FEMA either may proceed with the Undertaking in accordance with the resolution or reconsider effects on the historic property by applying the criteria of adverse effect pursuant to Stipulation II.C.5, Application of the Criteria of Adverse Effect, below.
    - ii. If FEMA is unable to resolve the disagreement, it will forward the finding and supporting documentation to ACHP and request that ACHP review FEMA’s finding in accordance with 36 CFR § 800.4(d)(1)(iv)(A) through 36 CFR § 800.4(d)(1)(iv)(C). FEMA shall consider ACHP’s recommendation in making its final determination. If FEMA’s final determination is to reaffirm its “no historic properties affected” finding, the Section 106 review of the Undertaking will have concluded. Otherwise, FEMA will proceed to Stipulation II.C.5., below.
5. Application of the Criteria of Adverse Effect: If FEMA finds an Undertaking may affect historic properties in the APE, including those of religious or cultural significance to affected Tribe(s), FEMA shall apply the criteria of adverse effect to historic properties within the APE(s) including cumulative effects taking into account the views of the consulting parties and the public concerning effects in accordance with 36 CFR § 800.5(a).
- a. If FEMA determines that an Undertaking does not meet the adverse effect criteria, FEMA shall propose a finding of “no adverse effect” in accordance with 36 CFR § 800.5(b).

- i. FEMA shall notify SHPO, participating Tribe(s), and all other consulting parties of its finding; describe any project specific conditions and future submissions; and provide supporting documentation pursuant to 36 CFR §800.11(e).
  - ii. Unless a consulting party objects within the applicable timeframe outlined in Stipulation I.E, Timeframes and Communications, FEMA will proceed with its “no adverse effect” determination and conclude the Section 106 review.
  - iii. If a consulting party objects to a finding of “no adverse effect,” FEMA will consult with the objecting party to resolve the disagreement.
    - 1) If the objection is resolved, FEMA shall proceed with the Undertaking in accordance with the resolution; or
    - 2) If the objection cannot be resolved, FEMA shall request that ACHP review the findings in accordance with 36 CFR § 800.5(c)(3)(i)-(ii) and submit the required supporting documentation. FEMA shall consider ACHP’s comments in making its final determination.
- b. If FEMA finds the Undertaking may adversely affect historic properties, FEMA shall request through Recipient(s) that the subrecipient revise the scope of work to substantially conform to the *Standards*, and/or avoid or minimize adverse effects for National Register listed or eligible traditional cultural properties and/or archaeological properties.
  - i. If the subrecipient modifies the scope of work to avoid the adverse effect(s), FEMA shall notify SHPO, participating Tribe(s), and all other consulting parties, of its finding; describe any project specific conditions and future submissions; and provide supporting documentation pursuant to 36 CFR §800.11(e). Unless a consulting party makes a timely objection in accordance with the applicable timeframe outlined in Stipulation I.E, Timeframes and Communications, FEMA shall proceed with its “no adverse effect” determination, including any conditions, and conclude the Section 106 review.
  - ii. If an Undertaking is not modified to avoid the adverse effect(s), FEMA shall initiate consultation to resolve the adverse effect(s) in accordance with Stipulation II.C.6, Resolution of Adverse Effects.
- 6. Resolution of Adverse Effects: If FEMA determines that an Undertaking may adversely affect a historic property, it shall resolve the effects of the Undertaking in consultation with SHPO, Recipient(s), subrecipient, participating Tribe(s), ACHP, if participating, and other consulting parties, by one of the following methods depending upon the severity of the adverse effect(s), as well as determination of the historic property’s significance on a local, state or national level. When FEMA determines an Undertaking will adversely affect an NHL, FEMA shall notify and invite the Secretary and ACHP to participate in consultation in accordance with 36 CFR § 800.10. When ACHP

participates in consultation related to an NHL, ACHP shall report the outcome of the consultation to the Secretary and the FEMA Administrator.

- a. **Abbreviated Consultation Process:** After taking into consideration the significance of the historic properties affected, the severity of the adverse effect(s) and avoidance or minimization of the adverse effect(s), FEMA may propose in writing to the consulting parties to resolve the adverse effects of the Undertaking through the application of one or more Treatment Measures outlined in Appendix C as negotiated with SHPO, participating Tribes, and other consulting parties. The use of these Treatment Measures may not require the execution of an MOA or Programmatic Agreement.
  - i. In consultation with SHPO, participating Tribe(s), and other consulting parties, FEMA shall propose in writing the implementation of a specific Treatment Measure, or combination of Treatment Measures, with the intent of expediting the resolution of adverse effects, and provide documentation as required by 36 CFR § 800.11(e) and subject to the confidentiality provisions of 36 CFR § 800.11(c)). Unless a consulting party or ACHP objects to FEMA's proposal within the timeframe outlined in Stipulation I.E, Timeframes and Communications, FEMA shall proceed with the implementation of the Treatment Measure(s) and will conclude the Section 106 review.
  - ii. If any of the consulting parties or ACHP objects within the timeframe outlined in Stipulation I.E, Timeframes and Communications, to the resolution of adverse effects through the application of the Abbreviated Consultation Process, FEMA shall resolve the adverse effect(s) using procedures outlined below in Stipulation II.C.6 (b), MOA or Stipulation II.C.6 (c), Programmatic Agreement.
  - iii. Because funding and implementation details of Treatment Measures for specific Undertakings may vary by program, FEMA shall provide written notice to the consulting parties within sixty (60)-days of the completion of the Treatment Measure(s). This written notice will serve as confirmation that the Treatment Measure(s) for a specific Undertaking have been implemented. FEMA also shall include information pertaining to the progress and completion of Treatment Measures in the annual report pursuant to Stipulation I.B.1(d), FEMA Roles and Responsibilities.
- b. **Memorandum of Agreement:** FEMA shall provide ACHP with an adverse effect notice in accordance with 36 CFR § 800.6(a)(1) if it has not already provided such under the Abbreviated Consultation Process of this Agreement, if a consulting party or ACHP objects in accordance with Stipulation II.C.6(a)(ii), or if FEMA in consultation with SHPO, participating Tribe(s), and other consulting parties has determined that an MOA would be more appropriate to resolve the adverse effect(s). In consultation with SHPO, participating Tribe(s), and other consulting parties, including ACHP (if participating), FEMA shall develop an MOA, in accordance with 36 CFR § 800.6(c) to agree upon Treatment Measures to avoid, minimize, and/or mitigate adverse effects on historic properties. The MOA may also include

Treatment Measures that serve an equal or greater public benefit in promoting the preservation of historic properties in lieu of more traditional Treatment Measures.

- c. Programmatic Agreement: Should the execution of an MOA be inappropriate given the similar nature of effects on historic properties, the inability to determine effects prior to approval of an Undertaking, or where other circumstances warrant, FEMA, shall consult with SHPO, participating Tribe(s), ACHP, if participating, and any other consulting parties to develop a Programmatic Agreement in accordance with 36 CFR § 800.14(b) and identify programmatic conditions or Treatment Measures to govern the resolution of potential or anticipated adverse effects from certain complex project situations for an Undertaking or for multiple, but similar Undertakings by a single subrecipient.
7. Objections: Should any signatory or consulting party object within the timeframes established by this Agreement to any plans, specifications, or actions taken pursuant to resolving an adverse effect, FEMA shall consult further with the objecting party to seek resolution. If FEMA determines the objection cannot be resolved, FEMA shall address the objection in accordance with Stipulation IV.B, Dispute Resolution.

### **III. OTHER CONSIDERATIONS**

- A. Changes to an Approved Scope of Work: Recipient(s) shall notify FEMA and shall require a subrecipient to notify it immediately when a subrecipient proposes changes to an approved scope of work for an Undertaking.
  1. If FEMA determines the change has no potential to affect the property, meets an Allowance, or the previous effect determination is still applicable, FEMA shall approve the change.
  2. If FEMA determines that the change can be modified to meet an Allowance, conform to any applicable *Standards*, or a previously determined finding of effect is still applicable, FEMA shall conclude its Section 106 review responsibilities.
  3. If FEMA determines that the change does not meet an Allowance; may cause additional effects to the property; does not conform to any applicable Standards; or changes a previously determined finding of effect, FEMA shall initiate consultation pursuant to Stipulation II.C, Standard Project Review.
- B. Unexpected Discoveries, Previously Unidentified Properties, or Unexpected Effects: Recipient(s) shall require its subrecipient to notify it immediately of an unexpected discovery (including archaeological deposits found in tree root balls during removal), or if it appears that an Undertaking has affected a previously unidentified property, or affected a known historic property in an unanticipated manner, in accordance with Stipulation I.B.3(e), Recipient(s) Roles and Responsibilities. In addition, any Signatory may notify FEMA if it learns of an unexpected discovery, previously unidentified property, or unexpected effects. Following such notice, FEMA will, at the earliest possible time, notify Recipient and

subrecipient and request that Recipient and subrecipient manage the unexpected discovery, previously unidentified property, or unexpected effects by following the steps set out below:

1. The Recipient(s) shall notify FEMA at the earliest possible time, but no later than twenty-four (24)-hours after Recipient(s) received notification regarding the discovery, previously unidentified property or unexpected effects and the steps that have been taken to secure the site.
2. Recipient(s) shall require its subrecipient stop construction activities in the vicinity of the discovery or unexpected effects, restrict access to the affected area or deposits, and secure the area. Recipient(s) shall inform subrecipient that work in the APE will not be resumed until FEMA completes consultation to consider the effects of the Undertaking on the unexpected discovery or unexpected effects. Subrecipient may be instructed by FEMA and Recipient(s) that work can be resumed in areas beyond the extent of the unexpected discovery, archeological deposit identified by an archaeologist who meets the Professional Qualifications, or unexpected effects as determined by FEMA.
3. Subrecipient will document the unexpected discovery or effects in writing, if requested by the Recipient(s).
4. Subrecipient shall take all reasonable measures to avoid or minimize harm to the property until FEMA has completed consultation with the SHPO, participating Tribe(s), and any other consulting parties and subrecipient has implemented any additional measures identified during FEMA's consultation.
5. Subrecipient shall comply with the Louisiana Unmarked Human Burial Sites Preservation Act (R.S. 8:671 et seq.) if unmarked graves, indications of a burial, burials, human remains, or burial artifacts are discovered during the implementation of a FEMA funded undertaking on privately-owned lands or lands owned by a state or local governmental entity. Within seventy-two (72)-hours after the discovery, subrecipient shall notify the local law enforcement office and the Louisiana Division of Archaeology (LDOA), within the Louisiana Department of Culture, Recreation and Tourism, Office of Cultural Development at 225-342-8170 to assess the nature and age of the human skeletal remains. If the appropriate local official determines that the human skeletal remains are not a crime scene and older than fifty (50)-years of age, LDOA has jurisdiction over the remains. In cases where the human remains are determined to be Native American, the LDOA shall notify and coordinate with Tribes as required by the state law. FEMA will assist LDOA, as requested, to consult with Tribes, Recipient(s), and subrecipient, as appropriate.
6. Discoveries of unmarked graves, burials, human remains, or items of cultural patrimony on Federal or Tribal lands shall be subject to the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. §3001-3013, 18 U.S.C. § 1170) and the Archaeological Resources Protection Act of 1979 (ARPA)(16 U.S.C. §470aa – 470mm).

7. Recipient and its subrecipient shall assist FEMA in completing the following actions, as required:
  - a. FEMA shall notify SHPO, participating Tribe(s), and other parties that may have an interest in discovery of the previously unidentified property or unexpected effects at the earliest possible time, but no later than seventy-two (72)-hours after FEMA is notified by Recipient(s) or Signatory. FEMA shall consult with SHPO, participating Tribe(s), and other consulting parties in accordance with the consultation process outlined in Stipulation II, Project Review, to develop a mutually agreeable action plan with timeframes to identify the discovery or previously unidentified property and determine the National Register eligibility of any previously unidentified property; take into account the effects of the Undertaking on historic properties; resolve adverse effects if necessary; and ensure compliance with applicable Federal, State, and local statutes.
  - b. FEMA shall coordinate with Recipient(s) and subrecipient regarding any needed modification to the scope of work for the Undertaking necessary to implement recommendations of the consultation and facilitate proceeding with the Undertaking.
  - c. In cases where discovered human remains are determined to be Native American, FEMA shall consult with the appropriate Tribal representatives and SHPO. In addition, FEMA shall follow the guidelines outlined in the ACHP's *Policy Statement Regarding the Treatment of Burial Sites, Human Remains, and Funerary Objects* (2007) and any state-specific policies that may be in force.

#### C. Curation

1. Recovered archaeological collections from a FEMA-funded archaeological survey, evaluation, and mitigation remain the property of the land owner. FEMA and Recipient(s), in coordination with SHPO and affected Tribe(s) shall encourage private land owners to transfer any recovered artifacts and related documentation to an appropriate archive or public or Tribal entity. FEMA, in coordination with SHPO and affected Tribe(s), shall work with all Tribal, State, and local subrecipients to support steps that ensure the long-term curation of these artifacts and documents through the transfer of the materials to a suitable repository as agreed to by FEMA, SHPO, and affected Tribes(s) and following applicable State or Tribal guidelines. FEMA shall ensure that recovered artifacts, as well as field and laboratory records sufficient to document the collection, are curated in a suitable repository as agreed to by FEMA, SHPO, and affected Tribe(s), and follow applicable State or Tribal guidelines.
2. Human Remains: The disposition of human remains and associated burial items will comply with the Louisiana Unmarked Burial Sites Preservation Act (R.S. 8:681) if on private or state lands.

#### D. Review of Undertakings Initiated Before Initiation or Completion of Section 106 Review

1. In accordance with Section 110(k) of NHPA, FEMA shall not grant assistance to a subrecipient who, with intent to avoid the requirements of this Agreement or Section 106 of NHPA, has intentionally significantly and adversely affected a historic property to which the assistance would relate, or having legal power to prevent it, allowed an adverse effect to occur. However, if after consultation with SHPO, appropriate Tribes(s), and ACHP, FEMA determines that extraordinary circumstances justify granting assistance despite the adverse effect created or permitted by the subrecipient, FEMA shall complete consultation for the Undertaking pursuant to the terms of this Agreement.
2. FEMA shall specifically advise Recipient(s) and shall require that Recipient(s) advise its subrecipients in writing that they may jeopardize Federal funding if work is performed without all required local, State, and Federal licenses, permits and/or approvals, including the completion of the Section 106 process. FEMA also shall document this requirement in its Record of Environmental Consideration, as applicable, as well as all project approval documents specifying the project scope and limits, and containing all conditions and caveats.
3. In circumstances where FEMA determines a subrecipient has initiated an Undertaking without willful intent to avoid the requirements of this Agreement or Section 106 of NHPA, FEMA shall proceed as follows:
  - a. Determine if the Undertaking is of a type for which FEMA has no further Section 106 responsibilities, namely:
    - i. An Undertaking listed in Stipulation I.A.7; or
    - ii. An immediate rescue and salvage operation in accordance with 36 CFR § 800.12(d); or
    - iii. A Programmatic Allowance as described under Stipulation II.A.
  - b. In any such cases listed in Stipulation III.D.3.a., above, FEMA shall document this determination in the project files, and consider the Undertaking Section 106 compliant.
  - c. If FEMA determines the Undertaking would have required Section 106 review, FEMA shall coordinate with SHPO and appropriate Tribe(s) to determine if consultation is feasible.
    - i. If after coordination with SHPO and appropriate Tribe(s), FEMA determines that consultation is feasible, FEMA shall review the Undertaking in accordance with Stipulation II.C, Standard Project Review.
    - ii. If after coordination with SHPO and appropriate Tribe(s), FEMA determines that review is infeasible, FEMA shall document the outcome to the Section 106 review process and inform the Federal Preservation Officer (FPO), and the



applicable FEMA program shall take the outcome into account before making a decision whether to fund the Undertaking. FEMA shall provide written notification of its funding decision to SHPO, GOHSEP, other Recipient(s), if any, appropriate Tribe(s), and ACHP.

4. FEMA shall ensure that all Undertakings considered for after the fact review in accordance with this stipulation are included in the annual report pursuant to Stipulation I.B.1(d), FEMA Roles and Responsibilities.

#### **IV. IMPLEMENTATION OF AGREEMENT**

##### **A. Amendments**

1. If any Signatory determines that an amendment to the terms of this Agreement must be made, the Signatories shall consult for no more than ninety (90)-days to seek amendment of the Agreement.
2. An amendment to this Agreement, exclusive of the appendices, shall be effective only when it has been signed by all the Signatories. An amendment shall be effective for Undertakings occurring on or affecting historic properties on Tribal lands only when the Tribe has signed the Agreement and its amendment.
3. Appendix A (FEMA Programs), Appendix B (Programmatic Allowances), and Appendix C (Treatment Measures) may be amended at the request of FEMA or another Signatory in the following manner:
  - a. FEMA, on its own behalf or on behalf of another Signatory, shall notify the Signatories of the intent to modify the current Appendix or Appendices and shall provide a draft of the updated Appendix or Appendices to all Signatory parties.
  - b. If no Signatory objects in writing within thirty (30)-days of receipt of FEMA's proposed modification, FEMA shall date and sign the amended Appendix and provide a copy of the amended Appendix to the other Signatories. Such an amendment shall go into effect on the date FEMA transmits the amendment to the other Signatories.

##### **B. Dispute Resolution**

1. Should any Signatory object in writing to the terms of this Agreement or to any plans, specifications, or actions provided for review pursuant to this Agreement, FEMA shall consult with the objecting party for not more than ninety (90)-days to resolve the objection.
2. If the objection is resolved within ninety (90)-days, FEMA shall proceed in accordance with the resolution.

3. If FEMA determines within ninety (90)-days that the objection cannot be resolved, FEMA shall forward to ACHP all documentation relevant to the objection, including FEMA's proposed resolution. Within thirty (30)-days of receipt, ACHP will:
  - a. Concur with FEMA's proposed resolution; or
  - b. Provide FEMA with recommendations, which FEMA shall take into account in reaching a final decision regarding the objection; or
  - c. Notify FEMA that the objection will be referred for comment in accordance with 36 CFR § 800.7(a)(4), and proceed to do so.
4. FEMA shall take into account any ACHP recommendations or comments, and any comments from the other Signatories, in reaching a final decision regarding the objection. FEMA shall provide in writing to ACHP and Signatories a summary of its final decision before authorizing any disputed action to proceed. The Signatories shall continue to implement all other terms of this Agreement that are not subject to objection.
5. Should ACHP not respond within thirty (30)-days, FEMA may assume ACHP has no comment and proceed with its proposed resolution to the objection after providing ACHP and Signatories a written summary of its final decision.

#### C. Severability and Termination

1. In the event any provision of this Agreement is deemed by a Federal court to be contrary to, or in violation of, any applicable existing law or regulation of the United States of America, only the conflicting provision(s) shall be deemed null and void, and the remaining provisions of the Agreement shall remain in effect.
2. FEMA, SHPO, ACHP, GOHSEP, or other Recipient(s) who execute this PA as a Signatory may terminate this Agreement by providing thirty (30)-days written notice to the other Signatories, provided that the Signatories consult during this period to seek amendments or other actions that would prevent termination. If this Agreement is terminated, FEMA shall comply with Section 106 through other applicable means pursuant to 36 CFR Part 800. Upon such determination, FEMA shall provide all other Signatories and ACHP with written notice of the termination of this Agreement.
3. A participating Tribe organization may notify the other Signatories that it is fully withdrawing from participation in the Agreement. Following such a withdrawal, FEMA shall review Undertakings that may affect historic properties of religious and cultural significance to the Tribe, and Undertakings that occur on the Tribal lands of the relevant Tribe, in accordance with 36 CFR §§ 800.3 through 800.7, 36 CFR § 800.8(c), or an applicable alternative under 36 CFR § 800.14. Withdrawal from this Agreement by a Tribe does not terminate the Agreement. At any time that this Agreement remains in effect, a Tribe that has withdrawn from the Agreement may notify FEMA, Recipient(s), and SHPO in writing that it has rescinded its notice withdrawing from participation in the Agreement.

4. This Agreement may be terminated by the implementation of a subsequent Agreement, pursuant to 36 CFR § 800.14(b), that explicitly terminates or supersedes this Agreement, or by FEMA's implementation of Alternate Procedures, pursuant to 36 CFR § 800.14(a).

#### D. Duration and Extension

1. This Agreement shall remain in effect from the date of execution for a period not to exceed seven (7)-years unless otherwise extended pursuant to Stipulation IV.D.2 below, or terminated pursuant to Stipulation IV.C.2 or IV.C.4, Severability and Termination. The Agreement shall remain in effect for Declarations made prior to expiration of the Agreement until a new Agreement is executed in order to minimize delays in delivery of FEMA assistance.
2. The Signatories may collectively agree to extend this Agreement to cover additional calendar years, or portions thereof, through an amendment per Stipulation IV.A., provided that the original Agreement has not expired.


#### E. Execution and Implementation

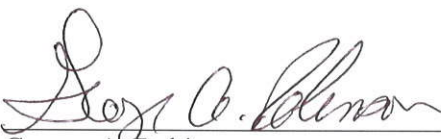
1. This Agreement may be executed in counterparts, with a separate page for each Signatory, and shall become effective on the date of the final signature of FEMA and SHPO/THPO.
2. The Agreement shall go into effect regarding Undertakings occurring, or affecting historic properties, on Tribal lands when the subject Tribe has signed the Agreement.
3. FEMA shall ensure that each Signatory and Invited Signatory is provided with an electronic (pdf) copy of the Agreement including signatures. FEMA shall provide electronic copies of additional executed signature pages to the Signatories and Invited Signatories as they are received. FEMA shall provide a complete copy of the Agreement with original signatures to any Signatory on request.
4. Execution and implementation of this Agreement is evidence that FEMA has afforded ACHP a reasonable opportunity to comment on FEMA's administration of all referenced Programs, and that FEMA has satisfied its Section 106 responsibilities for all individual Undertakings of its referenced Programs.

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**SIGNATORY PARTIES**

**FEDERAL EMERGENCY MANAGEMENT AGENCY**

 Date: 12/20/16  
Kevin Jaynes  
Regional Environmental Officer  
Region 6

 Date: 12/20/16  
George A. Robinson  
Regional Administrator  
Region 6

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**LOUISIANA STATE HISTORIC PRESERVATION OFFICER**

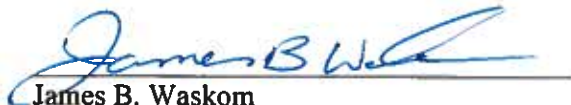


Phillip E. Boggan II  
State Historic Preservation Officer

Date: 12-20-16

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**GOVERNOR'S OFFICE OF HOMELAND SECURITY AND EMERGENCY  
PREPAREDNESS**



James B. Waskom

Director

Governor's Office of Homeland Security and Emergency Preparedness

Date: 12-21-16

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**TRIBAL SIGNATURE PAGES:**

FEMA invited the Alabama-Coushatta Tribe of Texas (ACTT); Caddo Nation (CN); Chitimacha Tribe of Louisiana (CTL); Choctaw Nation of Oklahoma (CNO); Coushatta Tribe of Louisiana (CT); Jena Band of Choctaw Indians (JBCI); Mississippi Band of Choctaw Indians (MBCI); Muscogee (Creek) Nation (MCN); Poarch Band of Creek Indians (PBCI); Seminole Nation of Oklahoma (SNO); Seminole Tribe of Florida (STF); Quapaw Tribe of Oklahoma (QTO); and Tunica-Biloxi Tribe of Louisiana (TBTL) to participate in the consultation to develop this Agreement and to enter into this Agreement as an Invited Signatory.

FEMA also invited ACTT, CN, CTL, CNO, CT, JBCI, MBCI, MCN, PBCI, SNO, STF, QTO, and TBTL to notify FEMA if the Tribe may have an initial interest in executing this Agreement and signature pages for all Tribes indicating an initial interest are included in this Agreement.

FEMA will initiate government-to-government consultation with all other Tribes that may have an interest in historic properties, including properties of religious and cultural significance, in the State of Louisiana as these Tribes are identified by FEMA. In addition to providing these Tribes with the opportunity to enter into a separate Programmatic Agreement or other agreement with FEMA to address FEMA’s Section 106 responsibilities for its Undertakings in the State of Louisiana, FEMA will invite each Tribe to enter into this Agreement as an Invited Signatory.

FEMA will incorporate additional executed signature pages by Tribal Invited Signatories into this Agreement in the order they are received by FEMA.

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**ALABAMA-COUSHATTA TRIBE OF TEXAS**

By: \_\_\_\_\_  
Colabe III Clem Sylestine  
Principal Chief

Date: \_\_\_\_\_



**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**


**CHITIMACHA TRIBE OF LOUISIANA**

By: \_\_\_\_\_  
O’Neill Darden  
Chairman

Date: \_\_\_\_\_

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**CHOCTAW NATION OF OKLAHOMA**

By:   
Gary Batton  
Chief

Date: 12/7/17

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**COUSHATTA TRIBE OF LOUISIANA**

By: \_\_\_\_\_  
Lovelin Poncho  
Chairman

Date: \_\_\_\_\_

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**JENA BAND OF CHOCTAW INDIANS**

By: \_\_\_\_\_  
B. Cheryl Smith  
Chief

Date: \_\_\_\_\_

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS, AND PARTICIPATING TRIBES**

**MUSCOGEE (CREEK) NATION**

By:   
James Floyd  
Principal Chief

Date: 04/04/2017

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
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**SEMINOLE TRIBE OF OKLAHOMA**

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Leonard M. Harjo  
Principal Chief

Date: \_\_\_\_\_

**TABLE A (updated 04/2020)**  
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Signatories shall provide FEMA with updated contact information as it becomes available, and revisions to this Table will be made without an amendment to this Agreement. This Table will be updated annually by FEMA and included in the Annual Report.

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## **Appendix A**

### **FEMA Program Summaries**

#### **Disaster Response and Recovery Programs**

The following programs are authorized under Titles IV and V of the Stafford Act.

##### *Fire Management Assistance Grant Program (FMAG)*

The FMAG is available to State, Tribal, and local governments for the mitigation, management, and control of fires on publicly or privately owned lands. Eligible costs may include expenses for field camps, equipment use, repair and replacement, materials and supplies, and mobilization and demobilization activities.

##### *Hazard Mitigation Grant Program (HMGP)*

The HMGP provides grants to States, Territories, Tribes, and local governments to implement long-term hazard mitigation measures after a Declaration. Activities may include buyouts, retrofits, relocations, elevations, and minor flood control projects.

##### *Individual Assistance Programs (IA)*

These programs help to ensure that individuals and families that have been affected by disasters have access to the full range of FEMA assistance including: crisis counseling (Section 416), disaster legal services (Section 415), essential assistance (Section 403), emergency sheltering assistance (Section 403), transportation (Section 419), funeral services, minor home repairs (Section 408), and temporary housing assistance (Section 408). It should be noted that other Federal agencies provide disaster assistance programs, services, and activities to individuals as well, including the U.S. Small Business Administration, U.S. Department of Agriculture, and U.S. Department of Labor, but these other assistance programs are not subject to the terms of this Agreement.

##### *Public Assistance Program (PA)*

This program assists States, Tribal and local governments, and certain types of private nonprofit organizations quickly respond to and recover from major disasters or emergencies declared by the President. Grants are provided for debris removal (Category A), emergency protective measures (Category B), and the repair, replacement, or restoration of disaster-damaged, publicly owned and certain private non-profit facilities (Categories C-G).

## **Non-Disaster Programs**

### *Assistance to Firefighters Grant Program (AFG)*

The AFG program provides funding for purchase of equipment and retrofit or construction of fire stations to improve first responder capabilities.

### *Emergency Management Performance Grants (EMPG)*

The purpose of the EMPG program is to assist State and local governments in enhancing and sustaining all-hazards emergency management capabilities.

### *Flood Mitigation Assistance Program (FMA)*

The FMA program provides grants to States, Territories, Tribal entities, and communities to assist in their efforts to reduce or eliminate the risk of repetitive flood damage to buildings and structures insurable under the National Flood Insurance Program (NFIP).

*Freight Rail Security Grant Program (FRSGP)* The FRSGP funds security training for frontline employees, the completion of vulnerability assessments, the development of security plans within the freight rail industry and GPS tracking systems for railroad cars transporting toxic inhalation materials.

### *Homeland Security Grant Program (HSGP)*

The HSGP plays an important role in the implementation of the National Preparedness System by supporting the building, sustainment, and delivery of core capabilities essential to achieving the National Preparedness Goal (NPG) of a secure and resilient Nation. HSGP is comprised of three interconnected grant programs: (1) the State Homeland Security Program (SHSP), (2) the Urban Areas Security Initiative (UASI), and (3) the Operation Stonegarden (OPSG). Together, these grant programs and other future projects that may be included under the HSGP fund a range of preparedness activities, including planning, organization, equipment purchase, training, exercises, management, and administration.

### *Integrated Public Alert and Warning System (IPAWS)*

The Integrated Public Alert and Warning System (IPAWS) was established by Executive Order 13407 in 2006. In the event of a national emergency, the President may use IPAWS to send a message to the American people quickly and simultaneously through multiple communications pathways. FEMA has identified several radio transmission sites across the nation with significantly powerful signals for this purpose, and FEMA is responsible for upgrading, maintaining, and managing the agency installed and owned auxiliary fuel systems at each of these radio transmission sites.

### *Intercity Bus Security Grant Program (IBSGP)*

The IBSGP provides funding to create a sustainable program for the protection of intercity bus systems and the traveling public from terrorism. The program seeks to assist operators of fixed-route intercity and charter bus services in obtaining the resources required to support security measures such as enhanced planning, facility security upgrades and vehicle and driver protection.

#### *Intercity Passenger Rail (Amtrak)*

The purpose of the Intercity Passenger Rail (IPR) is to create a sustainable, risk-based effort to protect critical surface transportation infrastructure and the traveling public from acts of terrorism, major disasters and other emergencies within the Amtrak rail system.

#### *Nonprofit Security Grant Program (NSGP)*

NSGP provides funding support for target-hardening activities to nonprofit organizations that are at high risk of a terrorist attack and are located within one of the specific UASI-eligible urban areas.

#### *Operation Stonegarden (OPSG)*

The intent of OPSG is to enhance cooperation and coordination among local, State and Federal law enforcement agencies in a joint mission to secure the United States borders along routes of ingress from international borders to include travel corridors in States bordering Mexico and Canada, as well as States and territories with international water borders.

#### *Port Security Grant Program (PSGP)*

The PSGP provides grant funding to port areas for the protection of critical port infrastructure from terrorism. PSGP funds are primarily intended to assist ports in enhancing maritime domain awareness, enhancing risk management capabilities to prevent, detect, respond to and recover from attacks involving improvised explosive devices (IEDs), weapons of mass destruction (WMDs) and other non-conventional weapons, as well as training and exercises and Transportation Worker Identification Credential (TWIC) implementation.

#### *Pre-Disaster Mitigation Program (PDM)*

The PDM program provides competitive grants to States, Territories, Tribes, and local governments for hazard mitigation planning and the implementation of mitigation projects prior to a disaster event. Activities may include planning, buyouts, retrofits, relocations, elevations, minor flood control projects, and vegetative fuels reduction.

#### *State Homeland Security Program (SHSP)*

This core assistance program provides funds to build capabilities at the state and local levels and to implement the goals and objectives included in state homeland security strategies and initiatives in the State Preparedness Report.

#### *State Homeland Security Program Tribal (SHSP Tribal)*

To provide supplemental funding to directly eligible tribes to help strengthen the nation against risks associated with potential terrorist attacks. Pursuant to the 9/11 Act, “a directly eligible tribe applying for a grant under section 2004 [SHSP] shall designate an individual to serve as a tribal liaison with [DHS] and other Federal, state, local, and regional government officials concerning preventing, preparing for, protecting against and responding to acts of terrorism.”

#### *Transit Security Grant Program (TSGP)*

The TSGP provides grant funding to the nation’s key high-threat urban areas to enhance security measures for their critical transit infrastructure including bus, ferry and rail systems.

This appendix includes all programs administered by FEMA that have the potential to affect historic properties and may be amended in accordance with Stipulation IV.A., Amendments.



## **Appendix B**

### **Programmatic Allowances**

This list of Programmatic Allowances (Allowances) enumerates FEMA-funded activities that based on FEMA experience, may have no or minimal effect on historic properties if implemented as specified in this Appendix and will not require review by the SHPO and participating Tribe(s). Should an unexpected discovery, unidentified property, or unexpected effect be encountered, work must stop and compliance with Stipulation III.B is required.

The Allowances consist of two tiers – First Tier and Second Tier. Staff meeting the applicable SOI Professional Qualifications Standards in accordance with Stipulation I.B(1)(a) of this Agreement may apply Second Tier Allowances. When both First Tier and Second Tier Allowances are applicable for a project, review staff must meet relevant SOI Professional Qualification Standards. In accordance with Stipulation II.A, Undertakings composed entirely of work described by the Allowances do not require Section 106 review.

“In-kind,” when referenced in the Allowances for historic materials and features shall be in accordance with the *Standards*, and shall mean that it is either the same or a similar material, and the result shall match all physical and visual aspects, including design, design form, texture, profile, dimensions, proportion, and workmanship. Where severity of deterioration requires replacement of a distinctive feature, the new feature will match the old in design, color, texture and, where possible, materials.

#### **I. First Tier Allowances**

**A. GROUND-DISTURBING ACTIVITIES AND SITE WORK** are limited to the proposed activities, described below. Project review should take into account the entirety of the proposed activities including any staging, site access, site cleanup, and possible site work (e.g., grading for positive drainage, vegetation removal) as potential ground-disturbing activities. This is not the entire list of possible ground-disturbing activities; other possible ground-disturbing activities are listed under other activity types in this appendix.

##### **1. Debris and Snow Removal**

- a. Debris removal and collection, including removal of snow, tree trunks, limbs and branches, excluding root balls, from public rights of way and public areas as well as the transport and disposal of such waste to existing licensed waste facilities or landfills. This includes the temporary establishment and expansion of non-hazardous debris staging, reduction, and disposal areas at licensed transfer stations, or existing hard-topped or graveled surfaces (e.g. parking lots, roads, athletic courts). This Allowance does not apply to cemeteries or the creation of new or temporary access roads.
- b. Removal of debris from private property, including leaning trees and hanging branches, *provided that structures, including damaged structures, are not affected*, ground disturbance is limited to surface scraping, and in-ground elements, such as driveways, walkways or swimming pools are left in place. This Allowance does not apply to the removal of root balls. This Allowance does not apply to cemeteries.
- c. Chipping and disposal of woody debris by broadcasting within existing rights-of-way.

- d. Dewatering flooded developed areas by pumping.
2. Temporary Structures and Housing
- a. Installation and removal of temporary structures for use as school classrooms, offices, or temporary shelters for essential public service agencies, such as police, fire, rescue and medical care, as well as temporary housing for disaster personnel and survivors at the following types of locations:
    - i. Single units on private residential sites when all new utilities are installed above ground and tie into pre-existing utility lines or a mobile utility source;
    - ii. Existing RV/Mobile Home Parks and campgrounds using pre-existing utility hookups or a mobile utility source;
    - iii. Paved areas, such as parking lots at such facilities as conference centers, shopping malls, airports, industrial port facilities business parks, and military bases, when all new utilities are installed above ground and tie into pre-existing utility lines or a mobile utility source; and
    - iv. Existing hard-surfaced sites developed for construction, such as for public housing, office buildings, city parks, ball fields, schools, etc. when all new utilities are installed above-ground and tie into pre-existing utility lines or a mobile utility source.
3. Recreation and Landscaping
- a. Installation of temporary removable barriers (e.g., chain link fences), polyethylene sheeting, or tarps, provided such work will not result in additional damage, irreversible alterations, or significant loss of building fabric or substantial ground disturbance.
  - b. In-kind repair, or in-kind replacement, or minor upgrades/mitigation of bollards and associated protective barriers when placed in the existing footprint.
  - c. Placement of emergency beach berms seaward of improved property where severe erosion has occurred, with work performed under the authority of U.S. Army Corps of Engineers and/or a State environmental enforcement agency's permits for the sand deposit areas and upland or offshore borrow sites, including dredge spoil piles.

## **B. STANDING STRUCTURES**

- 1. Above-ground repair or retrofit of buildings or structures less than forty-five (45)-years old (construction date as noted in the project documentation, or by the Recipient or subrecipient, or by a photograph/site visit).
- 2. Removal of water by physical or mechanical means without ground disturbance.
- 3. Installation of exterior security features and early warning devices on existing light poles or other existing utilities.

4. Substantially in-kind repair or in-kind replacement of metal utilitarian structures (e.g. pump houses, storage buildings) less than forty-five (45)-years old (construction date as noted in the project documentation, or by the Recipient or subrecipient, or by a photograph/site visit), including above-ground pipelines within the existing footprint that do not require pile-driven foundations.
5. Repair or replacement of building contents including furniture, partitions, computers, cabinetry, supplies, and equipment and any other moveable items. This Allowance does not apply to built-in features (e.g. furniture, cabinets, and partitions), archaeological collections, archival and historical records, and museum collections.
6. Sealing or installing flood panels in a building that is less than forty-five (45)-years of age (construction date as noted in the project documentation, or by the Recipient or subrecipient, or by a photograph/site visit) to make it watertight or impermeable to floodwaters.
7. Providing openings and installation of flood resistant materials above ground only in a building that is less than forty-five (45)-years of age (construction date as noted in the project documentation, or by the Recipient or subrecipient, or by a photograph/site visit) to allow in water in conjunction with floodproofing.

**C. TRANSPORTATION FACILITIES** are limited to the proposed activities, as described below, and staging areas are limited to existing hardscape or gravel surfaces.

1. Roads and Roadways

- a. Construction of temporary emergency access roads to allow for passage of emergency vehicles, per Stipulation II.B, Expedited Review.
- b. Repairs to road slips and landslides that do not require grading of undisturbed soils outside of the original road right-of-way.
- c. Re-establishment, armoring and/or minor upgrading of existing roadway ditches.
- d. In-kind repair or in-kind replacement of traffic control devices such as traffic signs and signals, delineators, pavement markings, traffic surveillance systems.
- e. Installation and removal of temporary traffic control devices, (e.g., pre-formed concrete barriers and fencings).
- f. In-kind repair or in-kind replacement of roadway safety elements such as barriers, guardrails, and impact-attenuation devices. In the case of guardrails, the addition of safety end treatments is permitted.

2. Airports

- a. In-kind repair or in-kind replacement of existing runways, taxiways, roadways, aprons and other hard surfaces (e.g. asphalt, concrete, gravel, and dirt).

- b. In-kind repair of safety components, including lighting bars, beacons, signage, and weather sensors, on airport property.
- 3. Rail Systems and Streetcars
  - a. In-kind repair or in-kind replacement of safety components.
  - b. In-kind repair or in-kind replacement of existing active track systems and in-kind repair of passenger loading areas.
  - c. Repair of crossings, gates, and signals.

#### **D. FEES AND SERVICES**

- 1. Reimbursement of a subrecipient's insurance deductible, not to exceed \$2,500.
- 2. Miscellaneous labor costs.
- 3. Rental or purchase of vehicles or other motorized equipment.
- 4. Builder's fees, dumpster rental.
- 5. Fees for architectural and engineering or other design services.

#### **E. UTILITIES**

- 1. In urban or developed settings, replacement in the same hole or the relocation of existing utility poles between the edge of sidewalk and the road. Minor mitigation measures (e.g., increased in pole diameter) shall be covered by this Allowance. This Allowance does not apply to decorative or period streetlights.
- 2. In rural settings, replacement of poles located along road shoulders. Minor mitigation measures (e.g., increased in pole diameter) shall be covered by this Allowance.
- 3. In off-road alignments, replacement of power/utility poles within an established right of way that are either replaced in the same hole or replaced adjacent to existing poles. Minor mitigation measures (e.g., increases in pole diameter) shall be covered by this Allowance.
- 4. Repair or replacement of damaged equipment, (e.g. generators, switch boards), and pumping equipment that is less than forty-five (45) years of age (construction date as noted in the project documentation, or by the Recipient or subrecipient, or by a photograph/site visit).
- 5. Installation of exterior security features and early warning devices on existing utility poles on other existing utilities.

## **II. Second Tier Allowances**

#### **A. GROUND DISTURBING ACTIVITIES AND SITE WORK** GROUND DISTURBING ACTIVITIES AND SITE WORK are limited to the proposed activities, including the areas

where the activity is staged, as described below. Project review should take into account the entirety of the proposed activities including staging, site access, site cleanup, and possible site work (e.g. grading for positive drainage, vegetation removal) as potential ground-disturbing activities. Other possible ground-disturbing activities are listed under other activity types in this appendix. If portions of the Scope of Work are larger than the existing footprint, a review of the Louisiana Division of Archaeology Cultural Resource (LDACR) Map is required for the entirety of the project location. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied. If a potential ground-disturbing activity including staging, site access, site cleanup, and possible site work (e.g. grading for positive drainage, vegetation removal) falls within a known eligible or unassessed site, standard Project Review per Stipulation II.C., will apply.

#### 1. Footings, Foundations, Retaining Walls, Slopes, and Slope Stabilization Systems

- a. In-kind repair, or in-kind replacement, or reinforcement of footings, foundations, retaining walls, slopes, and slope stabilization systems (e.g., gabion baskets, crib walls, etc.) if related ground disturbing activities are placed within the existing footprint or immediately adjacent to the existing footprint, if after a review of the LDACR, the area is not within a known eligible or unassessed site and do not require pile driving or fall within the footprint of a previous pile-supported structure. This Allowance does not apply to historic forts.
- b. Installation of perimeter drainage for structures (e.g. French drains).

#### 2. Recreation and Landscaping

- a. In-kind repair or in-kind replacement, or minor upgrades in the same location to recreational facilities (e.g., playgrounds, campgrounds, athletic fields, and parks). This includes features (e.g., fire pits, dump stations and utility hook-ups, above-ground swimming pools, pathways, simple wooden/wire stream crossings, decks), recreational structures and equipment (e.g., benches, bleachers, permanent seating, score boards, batting cages, basketball goals, swing sets, picnic tables), and signage (e.g. street signs, traffic signs, and freestanding facility signage).
- b. In-kind repair or in-kind replacement, or minor upgrades to landscaping elements (e.g., fencing, free standing walls, paving, planters, irrigation systems, lighting elements, signs, flag poles, ramps, steps, trellises). Minor mitigation measures (e.g. increases in pole diameter, addition of new safety anchors) will be covered by this Allowance.

#### 3. Piers, Docks, Boardwalks, Boat Ramps, and Dune Crossovers

- a. In-kind repair or in-kind replacement, or minor upgrades such as, codes and standards, to existing piers, docks, boardwalks, boat ramps, stands, gazebos, and dune crossovers when placed in the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

#### 4. Debris Removal

- a. Removal of woody debris such as branches and limbs, from cemeteries, provided that heavy equipment and other machinery are not operated or staged on areas potentially containing human remains.
- b. Removal of root balls, except from cemeteries and/or known archeological sites.
- c. Sediment and debris removal from human-made drainage facilities, including retention/detention basins, ponds, ditches, and canals, in order to restore the facility to its pre-disaster condition. The sediment may be used to repair eroded banks or disposed of at an existing licensed or permitted spoil site. This allowance does not apply to historic canals, canal structures, or historic forts.

#### 5. Temporary Structures and Housing

- a. Installation of temporary structures for uses such as classrooms, offices, medical support facilities, or housing, except when located in historic districts or on or immediately adjacent to eligible or unassessed archaeological sites.
- b. Removal of temporary structures provided that FEMA confirms that no eligible or unassessed archaeological site(s) was identified on the property during the installation of the temporary structure(s).

**B. STANDING STRUCTURES** when proposed activities, including the area where the activity is staged, described below substantially conform to the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

#### 1. Interior Work: Floors, Walls, Stairs, Ceilings and Trim

- a. In-kind repair or in-kind replacement, provided that the replacement pieces match the original in detail, design, profile, proportion, and materials; restoration; preservation; protection; maintaining of materials or features for interior floors, walls, stairs, ceilings, and/or trim. The Allowance applies to repair of interior finishes, including plaster and wallboard, provided the repair is restricted to damaged areas and does not affect adjacent materials. This Allowance does not apply to decorative finishes, including murals, glazed paint, gold leaf, or ornamental plaster and/or any other character defining interior feature of a National Register listed and/or eligible resource that may require highly specialized study and/or skills for the purpose of repair and/or replacement.
- b. Interior cleaning of surfaces using a weak solution of household bleach and water, mold remediation, or mold removal. The Allowance applies to interior finishes, including plaster and wallboard, provided the cleaning is restricted to damaged areas and does not affect adjacent materials, and is appropriately flushed or rinsed to remove residue. This Allowance does not apply to historic brick or stone.
- c. Non-destructive or concealed testing for hazardous materials (e.g., lead paint, asbestos) or for assessment of hidden damages.

- d. Replacement of damaged plaster and lath with drywall where the plaster is non character-defining detail.
  - e. Repair or replacement of suspended or glued ceiling tile.
  - f. Replacement of wood gymnasium floors with compatible substitute materials.
  - g. Replacement of damaged vinyl floor tile or asbestos floor tile with contemporary floor tile of the same dimension and thickness, and similar texture or pattern.
2. Building Contents
- a. Storage, cleaning and / or handling of archaeological collections, archival and historical records, and museum collections in accordance with FEMA's collection policy.
3. Utilities and Mechanical, Electrical, and Security Systems Allowances do not apply to ground disturbing activities
- a. In-kind repair or in-kind replacement, or limited upgrading of interior utility systems, including mechanical (e.g., heating, ventilation, air conditioning), electrical, and plumbing systems. This Allowance does not provide for the installation of new exposed ductwork or the lowering of ceilings to accommodate mechanical, electrical, and security systems. This Allowance does not apply to character defining features (e.g. grilles) where exposed to view. Surface-mounted wiring, conduits, or piping is acceptable provided that installation of system hardware does not damage or cause the removal of character-defining architectural features or materials, and can be easily removed in the future. This Allowance does not include increasing the size (e.g. width, depth, length) of existing channels or cuts in historic material.
  - b. The elevation of heating, ventilation, and air conditioning system (HVAC) and mechanical equipment within a structure or on a roof provided that it is not visible from the ground level.
  - c. Installation or replacement of interior fire detection, fire suppression, or security alarm systems. Surface-mounted wiring, conduits, or piping is acceptable provided that installation of system hardware does not damage or cause the removal of character-defining architectural features or materials, and can be easily removed in the future. This Allowance does not include increasing the size (e.g. width, depth, length) of existing channels or cuts in historic materials.
  - d. Installation or replacement of communication and surveillance security systems, such as cameras, closed-circuit television (CCTV), alarm systems, and public address systems. Surface-mounted wiring, conduits, or piping is acceptable provided that installation of system hardware does not damage or cause the removal of character-defining architectural features or materials, and can be easily removed in the future. This Allowance does not include increasing the size (e.g. width, depth, length) of existing channels or cuts in historic materials.
  - e. Installation of building access security devices, such as card readers, enhanced locks, and security scanners (e.g., metal detectors), provided the device does not damage or

cause the removal of character-defining architectural features or materials and can be removed in the future without impacts to significant architectural features.

#### 4. Windows and Doors

- a. In-kind repair of damaged or severely deteriorated windows and window frames, shutters, storm shutters, doors and door frames, and associated hardware, where profiles, elevations, details and materials match those of the originals. Whenever possible original materials should be retained for future information and/or repair and/or reuse.
- b. In-kind replacement of window panes. Clear plate, double, laminated or triple insulating glazing can be used, provided it does not result in altering the existing window material, tint, form, muntin profiles, or number of divided lights. This Allowance does not apply to the replacement of intact decorative or archaic glass. Historic windows or glazing may be treated with clear window films.
- c. Replacement of exterior, utilitarian, non-character-defining metal doors and frames leading into non character-defining spaces with metal blast resistant doors and frames.
- d. Installation of security bars over windows on off-street elevations that does not result in additional damage to character-defining features.
- e. In-kind repair or in-kind replacement of interior or exterior protective shutters, storm screens, screen drops, storm fabric, interior blast shields, and door glazing.
- f. Removal of non-contributing, incompatible windows and doors which were replaced within the past fifty years and their replacement with new window, door, and hardware which meets the *Standards*.
- g. Strengthening of entry doors and bracing of garage doors provided they do not result in altering the existing door form and appearance.
- h. In-kind replacement of greenhouse glass panels.

#### 5. Exterior Walls, Cornices, Porches, and Foundations (for any proposed ground disturbance, refer to Tier II.A)

- a. In-kind repainting of surfaces, provided that destructive surface preparation treatments are not used, such as water blasting, sandblasting, power sanding and chemical cleaning.
- b. In-kind repair of walls, porches, foundations, columns, cornices, siding, balustrades, stairs, dormers, brackets, trim, and their ancillary components or in-kind replacement of severely deteriorated or missing or lost features, as long as the replacement pieces match the original in detail, design, profile, proportion, and material.
- c. In-kind repair or in-kind replacement of signs or awnings.



- d. Installation of temporary stabilization bracing or shoring, provided such work does not result in additional damage and is reversible.
  - e. Anchoring of walls to floor systems provided the anchors are embedded and not visible on the exterior; are reversible to the greatest extent possible, and does not result in additional damage or alteration to character-defining features.
  - f. In-kind repair of concrete and masonry walls, columns, parapets, chimneys, or cornices or limited in-kind replacement of damaged components including comparable brick, and mortar that is as soft or softer than and matches the color, content, rake, and joint width of historic mortar.
  - g. Bracing and reinforcing of walls, chimneys and fireplaces, provided the bracing and reinforcing are not visible on the exterior; is reversible to the greatest extent possible, and does not result in additional damage or alteration to character defining features.
  - h. Strengthening of foundations and the addition of foundation bolts, provided that visible new work is in-kind, including mortar that matches the color, content, rake, tooling, and joint width where occurring.
  - i. In-kind repair or in-kind replacement of elements of curtain wall assemblies or exterior cladding that is hung on the building structure, usually from floor to floor, and when the color, size reflectivity, materials, and visual patterns are unaltered.
6. Roofing
- a. Installation of scaffolding, polyethylene sheeting, or tarps, provided such work will not result in additional damage or irreversible alterations to character defining features.
  - b. In-kind repair or replacement, or strengthening of roofing, rafters, fascia, soffits, gutters, verge boards, leader boxes, downspouts, or other damaged roof system components provided that work does not result in alterations to character defining features.
  - c. Repairs to flat roof cladding, including changes in roofing materials, where the repairs are not highly visible from the ground level.
  - d. Replacement of three-tab asphalt singles with dimensioned architectural shingles; replacement of cement asbestos shingles with asphalt-based shingles or other roofing of similar appearance to the original such as slate; in-kind replacement of metal roofing materials; replacement of corrugated asbestos panels with corrugated metal panels or other roofing of similar appearance to the original; and replacement of untreated wood shingles or shakes with similar items of fire resistant wood.
7. Weatherproofing and Insulation
- a. Caulking and weather-stripping to complement the color of adjacent surfaces or sealant materials.

- b. In-kind repair or in-kind replacement of insulation systems, provided that existing interior plaster, woodwork, exterior siding, or exterior architectural detail is not altered. This Allowance does not include spray foam insulation.
8. Structural Retrofits (for any proposed ground disturbance, refer to Tier II.A)
- a. The installation of the following retrofits/upgrades, provided that such upgrades are not visible on the exterior or within character-defining historic interiors; is reversible to the greatest extent possible, and does not result in additional damage or alterations to character defining features: attic bracing, cross bracing on pier and post foundations; fasteners; collar ties; gussets; tie downs; strapping and anchoring of mechanical, electrical, and plumbing equipment; concealed anchoring of furniture; installation of plywood diaphragms beneath first floor joists, above top floor ceiling rafters, and on roofs; and automatic gas shut off valves.
  - b. Replacement, repair or installation of lightning rods.
  - c. Anchoring of buildings to resist flotation, collapse, and lateral movement provided the anchors are not visible on the exterior, is reversible to the greatest extent possible, and does not result in additional damage or alteration to character defining features.
  - d. The installation of the following upgrades, provided that such upgrades are not visible on the exterior, not attached to character-defining structural elements, and is reversible to the greatest extent possible: installation of tie down straps, hurricane clips; anchoring of fuel tanks; installation of backflow valves; bracing of building contents.
  - e. Bracing and bolting of walls to address hydrostatic and hydrodynamic forces provided the bracing is not visible on the exterior, is reversible to the greatest extent possible and does not result in additional damage or alteration to character defining features.
9. Americans with Disabilities Act (ADA) Compliance
- a. Alterations for ADA compliance in restrooms or other minor interior modifications for ADA compliance (e.g. grab bar, handrails, door openers, and toilet partitions). This Allowance does not apply to modification of staircases that are character-defining.
10. Safe Rooms (for any proposed ground disturbance refer to Tier II.A)
- a. Installation of individual safe rooms within the property limits of a residence or public facility where the installation would occur within the existing building, and does not result in damage or alterations to character defining features or spaces.
  - b. Installation of individual safe rooms on an existing foundation or attached to a current structure less than 45 years of age (construction date as noted in the project documentation, or by the Recipient of subrecipient, or by a photograph/site visit) and is not located within a National Register-listed or eligible historic district.

## 11. Elevation, Demolition, and Reconstruction

- a. Activities related to the elevation, demolition and/or reconstruction of buildings or structures less than forty-five (45)-years of age (construction date as noted in the project documentation by the Grantee or sub-Grantee, or by an photographic evaluation and/or site visit conducted by a Standing Structures specialist so long as the proposed activities are not located within or adjacent to a National Register-listed or eligible historic district or within the viewshed of a listed or eligible National Register property
- b. Ground disturbing activities related to the elevation, demolition and/or reconstruction of buildings or structures so long as the proposed activities substantially conforms to the existing footprint, or immediately adjacent to the existing footprint, if after a review of the LDACR, the area does not fall within one-thousand (1,000)-feet of a known eligible or unassessed archaeological site.

**C. TRANSPORTATION FACILITIES** are limited to proposed activities when they substantially conform to the existing footprint and staging areas are limited to existing hardscape or gravel surfaces. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

1. Roads and Roadways: When proposed activities substantially conform to the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied. This Allowance does not apply to a project, including staging areas, on a known eligible or unassessed archaeological site.
  - a. Repair or rebuilding of roads to pre-disaster geometric design standards and conditions using in-kind materials, including maintaining the number and width of lanes, shoulders, medians, curvatures, clearances, curbs, and side slopes (e.g. lag and piling wall, gabions, rock fill, etc.). This Allowance permits minor improvement to meet current code and standards or hazard mitigation measures, such as those designed to harden exposed surfaces, including the application of gravel armoring to side slopes and ditches, minor elevation (within 1'-0" of existing elevation) of roadway surface, and other minor mitigation measures. This Allowance does not include alteration of soils or the ground outside of the existing footprint.
  - b. In-kind repair or in-kind replacement, or minor upgrade of culvert systems and arches beneath roads or within associated drainage systems, including provision of headwalls, riprap and any modest increase in capacity for the purposes of hazard mitigation or to meet current codes and standards, provided that the work substantially conforms to the existing footprint and is limited to the existing right-of-way. For stone or brick culverts or arches beneath roadways, this Allowance only applies to in-kind repair.
2. Roads and Roadways (In kind/ADA):
  - a. In kind repair to historic paving materials for roads and walkways using the same materials.

- b. In-kind repair or in-kind replacement, or minor upgrade of road lighting systems, including period lighting fixture styles.
- c. In-kind repair or in-kind replacement, or minor upgrade of road appurtenances such as curbs, shoulders, fences, crosswalks, and sidewalks.
- d. Installation of speed bumps and other traffic calming devices and/or enhanced curbs.
- e. Construction of new ADA ramps, curbs, and crosswalks. This allowance applies within a National Register-listed or eligible historic district, provided the work meets the following:
  - i. Cutting and removal of historic materials is limited to the footprint of the proposed ramp;
  - ii. Historic materials are re-used, if feasible;
  - iii. New paving materials match the physical characteristics of the historic material (size, configuration, color, texture, and material type);
  - iv. Truncated dome mats will be neutral in color to the extent consistent with ADA requirements; and
  - v. Character-defining identification or wayfinding features (e.g., signage, street tiles, historical markers) shall be salvaged and reinstalled in their original locations and orientation, or as close to their original locations as possible. Damaged or missing elements will be replaced with salvaged or in-kind materials.

### 3. Bridges and Flood Control Structures

- a. Installation of a temporary (Bailey-type) bridge over an existing structure, such as a former road or bridge location, to allow passage of emergency vehicles.
- b. In-kind repair or in-kind replacement of bridges and bridge components (e.g. abutments, wing walls, piers, decks, and fenders) within the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied. This Allowance does not apply to the replacement of historic bridges identified on the Louisiana Department of Transportation website (Louisiana Bridges – National Register Status, dated 11/18/2014):  
[http://www.wapps.dotd.la.gov/administration/public\\_info/projects/docs\\_test/48/documents/Louisiana\\_Bridges\\_-\\_National\\_Register\\_Status.pdf](http://www.wapps.dotd.la.gov/administration/public_info/projects/docs_test/48/documents/Louisiana_Bridges_-_National_Register_Status.pdf).
- c. Removal, replacement and/or installation of flap-gates or flood gates, and bar screeners provided that activities are confined to the existing footprint or does not require new or additional areas to be excavated to construct said features. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

- d. Elevation of non-historic bridges on existing foundations and footings. This Allowance does not apply to work located within or adjacent to a National Register listed or eligible historic district.

**D. UTILITIES, COMMUNICATIONS SYSTEMS, AND TOWERS** are limited to distribution and collection systems for water, electricity, gas, and communications, including sewer, water, drains, electrical service and distribution, gas, communications, leaching systems, cess pools, and septic tanks, when proposed repair and replacement activities substantially conform to the existing footprint. Any proposed new or upgraded construction outside of the existing footprint, including associated features and structures, are limited to archaeologically surveyed areas and not on a known eligible or unassessed archaeological site.

1. General

- a. In-kind repair or in-kind replacement, or minor upgrading of utilities within the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.
- b. Installation of new utilities and associated features within existing rights-of-way provided the activities are not within a National Register listed or eligible historic district.
- c. Within the existing rights-of-way, elevation of existing utilities and associated features and structures within existing footprint provided the activities are not within a National Register listed or eligible historic district. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.
- d. Directional boring of new/replacement service line and related appurtenances within existing rights-of-way or utility corridors.
- e. The excavation of slit trenches along existing rights-of-way.
- f. In-kind repair or replacement, or minor upgrades of water towers provided activities substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied. Ground-level facilities that do not expand the footprint by more than 10% may be added or expanded. This allowance does not apply to the replacement of water towers over forty-five (45)-years of age (construction date as noted in the project documentation, or by the Recipient or subrecipient, or by a photograph/site visit).
- g. In off-road alignments, additions of new poles within the existing rights-of-way, such as mid-span poles, and relocation/realignment of segments of power lines to existing roadways. Minor mitigation measures (e.g., increases in pole diameter) shall be covered by this Allowance.

## 2. Generators and Utilities

- a. In-kind repair or in-kind replacement, or minor upgrades, elevation, and/or installation of generators, HVAC system and similar equipment as long as they are placed or located where not highly visible from the street and activities substantially conforms to the original footprint.
- b. Elevation, and/or installation of generators, HVAC systems and similar equipment if not located within the viewshed of a listed or eligible National Register property.

## 3. Communication Equipment/Systems and Towers

- a. Acquisition, installation, or operation of communication and security equipment/systems that use existing distribution systems, facilities, or existing infrastructure right-of-way.
- b. The collocation of communication and security equipment on existing towers and buildings/structures less than forty-five (45)-years in age (construction date as noted in the project documentation, or by the Recipient of subrecipient, or by a photograph/site visit), provided that the work does not increase existing tower height or existing footprint by more than 10%.
- c. Enhancement, repair or replacement of existing communication towers and antenna structures provided the work does not increase existing tower height or existing footprint by more than 10%.
- d. Installation of new temporary (not to exceed twelve (12)-months) communications towers and antenna structures provided that the work does not require modification of buildings/structures forty-five (45)-years or older and does not have ground disturbing activities that occur on a known eligible or unassessed archaeological site.
- e. Installation of new communication towers, less than two-hundred (200)-feet tall, in previously developed urban complexes when the work does not require modification of buildings/structures forty-five (45)-years or older, and is not within one-thousand (1,000)-feet of the boundaries of a historic property.

**E. WATER RESOURCE MANAGEMENT AND CONTROLS** when proposed activities substantially conform to the existing footprint or area immediately adjacent to the existing footprint, if after a review of the LDACR, the area is not within a known eligible or unassessed site and staging areas are limited to existing hardscape or gravel surfaces:

### 1. Canal Systems

- a. In-kind repair or in-kind replacement to canal systems and in-kind repairs or in-kind replacement of minor associated elements (e.g. weirs, gates, revetments, and safety elements).

### 2. Dams, Levees, Locks, and Floodwalls

- a. In-kind repair of dams, levees, locks, floodwalls and related features, including spillways, tide gates, and fuse plugs, provided the work occurs within the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

3. Fish Hatcheries

- a. In-kind repair or in-kind replacement of fish hatcheries and fish ladders.

4. Waste-Water Treatment Lagoon Systems

- a. In-kind repair or in-kind replacement, or minor upgrades of waste-water treatment lagoon systems.

**F. WILDFIRE MANAGEMENT** Wildfire management activities to include defensible space activities that involve the creation of perimeters and protection through ignition-resistant construction activities, and hazardous fuels reduction activities where all work is being performed in archaeologically surveyed areas with no recorded eligible archaeological site(s).

## **Appendix C**

### **Treatment Measures**

As provided in Stipulation II.C.6 (a), if an Undertaking may adversely affect a historic property, FEMA may propose to resolve the adverse effect through the application of one or more of the Treatment Measures set out below. The selected measures will be developed by FEMA after discussions with the Recipient(s), subrecipient, SHPO, participating Tribes, and other consulting parties, as appropriate, and will be documented in writing. FEMA will provide Recipient(s), subrecipient, SHPO, and/or participating Tribes, and other consulting parties, as appropriate, with the opportunity to object to proposed Treatment Measures as set out in II.C.6 (a) ii. If FEMA, in consultation with Recipient(s), subrecipient, SHPO, participating Tribes, and other consulting parties, determines that a treatment measure, including Alternative Mitigation, not included in the list below is in the public interest and is the most appropriate means to resolve an adverse effect, FEMA will initiate consultation to develop an MOA or a Programmatic Agreement as set out in Stipulation II.C.6 (b) and (c).

The Treatment Measures shall identify, as appropriate: the responsible party/entity that will implement and complete each treatment measure; the scope of work and the standards that will apply to the preparation and distribution of a deliverable; the deliverable(s) (e.g. the quantity, approximate size, materials, content, final ownership/copyrights); measures to ensure that any treatment measure documenting the condition of or requiring the data recovery on the historic property is implemented before the property is adversely affected; any professional qualifications that will be required to prepare deliverable(s) described in the Treatment Measure(s); the repositories and/or parties that will receive copies of a deliverable and the disposition of any deliverable that is not curated; points when FEMA, Recipient, subrecipient, SHPO, and/or participating Tribes, and other consulting parties, as appropriate, will be given the opportunity to review and comment on the deliverable; and timeframes for each review and deliverable.

FEMA will provide written notice to Recipient, subrecipient, SHPO, and/or participating Tribes, and other consulting parties, as appropriate, within sixty (60)-days of the completion of the Treatment Measures as required by Stipulation II.C.6 (a) iii. FEMA shall include information pertaining to the progress of and completion of all Treatment Measures in the annual report pursuant to Stipulation I.B.1 (d), FEMA Roles and Responsibilities.

Any dispute regarding the implementation of a Treatment Measure will be resolved following the process set out in Stipulation IV.B.

Other Federal agencies that will be providing financial assistance for the types of activities covered by this agreement may, with the written concurrence of the Signatories, satisfy their Section 106 responsibilities by accepting the terms of this agreement in writing. Such agency will assume the full responsibility for negotiating and implementing any Treatment Measures.

This Appendix may be amended in accordance with Stipulation IV.A.3 of this Agreement, Amendments.

#### **List of Treatment Measures:**

**PHOTOGRAPHIC RECORDATION:** FEMA, in consultation with SHPO, and/or participating Tribes, and other consulting parties, will select the photographic medium or mediums from the options described below and identify a list of photographs that will serve to document the historic property that will be adversely affected by an Undertaking. The photographic specifications set out below were previously



determined by FEMA, in consultation with SHPO, to meet archival standards and are provided for guidance. Photographic images may include existing drawings and plans. If the parties determine that it is in the public interest to document a property through the preparation of measured drawings, FEMA will initiate consultation to develop an MOA.

**I. Recordation for Standing Structures:** The responsible entity will photograph the exterior and/or interior, if it is accessible, in the selected photographic format(s) with an emphasis on documenting those portions of the exterior and/or interior that will be altered. The responsible entity will take photographs of the views identified by FEMA, in consultation with Recipient, subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, and will print specifically identified images:

**A. Digital Photography:** The digital photography and color photographs must comply with the “Best” category of requirements from the National Register Photo Policy Fact Sheet: [http://www.nps.gov/nr/publications/bulletins/photopolicy/Photo\\_Policy\\_update\\_2013\\_05\\_15.pdf](http://www.nps.gov/nr/publications/bulletins/photopolicy/Photo_Policy_update_2013_05_15.pdf), with the following additional requirements:

1. Image files must be saved as both TIFF and JPEG files.
2. Color images must be produced in RGB (Red/Green/Blue) color mode as 24-bit or 48-bit color files.
3. In addition to the requirements specified by the latest National Register Photo Policy, photographs will be digitally labeled to state the address (name of facility, street number, street name, city, and state); date of photograph; description of view, including direction of camera; and name of photographer/agency.

**B. 35mm Black/White and Color Photography:** Photographs must be taken with a 35MM SLR Camera or a 35 MM point-and-shoot camera using 35 MM black/white or color film. Photographs taken with disposable cameras are not acceptable.

1. The 35 mm film black/white or color film photography package will include one (1) full set of 35mm film black/white or color photographs printed on acid free paper specifically designed for color prints, the corresponding 35mm film negatives in acid free sleeves.
2. Photographs will be labeled in pencil on the back to state the address, name of facility, street number, street name, city, and state; date of photograph; description of view, including direction of camera; and name of photographer/agency.

**C. Large Format Photography:** Photographs must be taken with a large-format view camera with ample movement for perspective correction. The minimal complement of lenses includes a sharp rectilinear wide angle, a normal, and a mildly telephoto lens.

1. Acceptable film formats are 4x5, 5x7, and 8x10. Acceptable polyester-based films include those of medium and slow speed (100 and 400 ASA) produced by Kodak, Ilford, and others.
2. The large format film photography package will include one (1) full set of 4 x 5 or 5 x 7-inch photographs printed on acid free paper, the corresponding 4 x 5 or 5 x 7-inch negatives in acid free sleeves.
3. Photographs will be labeled in pencil on the back to state the address name of facility, street number, street name, city, and state; date of photograph; description of view, including direction of camera; and name of photographer/agency.

- D. Video: A video documentary regarding the historic property may include on-camera interviews, archival footage and/or images, current footage of the historic property, and current footage of other similar historic properties. The content and length of the video will be described in the treatment measure.
- E. Narrative History: A narrative history may be prepared to provide a context for the photographs following the Historic American Building Survey (HABS) Historical Reports: Short or Outline format.
- F. Recordation Package: The recordation package will include a photo log, printed copies of selected photographs, digital copies of photographs, and may include a narrative history. The recordation package may include reproductions of historic photographs, existing building plans, contemporary sketch plans, and/or maps. All materials will be packaged in archival sleeves and boxes. Archival disks will be used for all digital materials.
- G. Review: The responsible entity may informally consult with FEMA and SHPO, and/or participating Tribe(s) to select photographs and other images that will be included in the recordation materials. The process to review and finalize the photographs and other images will be described in the treatment measure.
- H. Distribution: The responsible entity will prepare a minimum of three archival quality copies of the recordation materials and will forward two copies to SHPO and one copy to a willing local archive, such as the Earl K. Long Library, University of New Orleans, Louisiana Special Collections for projects in Orleans Parish. FEMA, in consultation with Recipient, subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, may identify additional archives and/or parties that will receive copies of the recordation materials. The responsible entity will provide FEMA with documentation confirming that the recordation materials have been archived as described in the treatment measure.

**DESIGN REVIEW:** The purpose of this treatment measure is to determine if there are feasible alternatives that may avoid or minimize a potential adverse effect. FEMA anticipates that it will identify work items that may cause an adverse effect during the review of a project; project worksheet; or subgrant application, at an early stage of project planning, when the design has not been developed. The implementation of this treatment measure will allow the Recipient(s) and subrecipient to continue with plan development, and has the potential to influence the design. FEMA may include this treatment measure with other measures that are intended to mitigate any adverse effects that cannot be avoided.

- II. **Design Review:** Based on FEMA's review of the scope of work and/or plans, if FEMA determines that the proposed Undertaking may adversely affect historic properties FEMA will include a comment in its review of the project; project worksheet; or subgrant application that requires the Recipient and/or subrecipient to provide additional information to FEMA during plan development.
  - 1. FEMA will request that the Recipient(s) and subrecipient revise the scope of work to substantially conform to the *Standards* as described in Stipulation II.C.5.b, or alternatively to identify and assess feasible alternatives, if any, which may avoid or minimize the adverse effect. Prior to project implementation, the Recipient(s) and subrecipient will provide this information to FEMA with sufficiently developed plans, and FEMA will provide the written alternatives assessment and plans to SHPO and/or participating Tribe(s) for a fifteen (15)-day review and comment period.

2. If FEMA, in consultation with Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, determines that plans avoid the potential adverse effect, then design review is complete and the responsible entity is not required to carry out any additional Treatment Measures that may have been identified to offset the potential adverse effect; or
3. If FEMA in consultation with Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, determines that the plans do not avoid an adverse effect, FEMA will forward comments, if any, from SHPO and/or participating Tribe(s), or other consulting parties to the Recipient(s) and subrecipient and request that the subrecipient consider the comments in the development of the final construction documents. Recipient(s) and subrecipient will provide a written response to the comments to FEMA, and FEMA will forward this response to SHPO, and/or participating Tribe(s), and other consulting parties, and the responsible entity will implement any additional Treatment Measures.

### **III. Public Interpretation**

FEMA, the Recipient(s), and subrecipient shall consult with SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to design an educational or public interpretive plan. The educational or public interpretive plan may include historical markers, signs, displays, educational pamphlets, websites, workshops, videos, and other similar mechanisms to educate the public on historic properties within the local community, state, or region. In certain instances SHPO may request that the proposed historical marker conform to the requirements of the Louisiana Historical Marker Program in the Department of Culture, Recreation, and Tourism and request that the responsible entity apply to this program.

### **IV. Historical Context Statements**

FEMA, Recipient(s), and subrecipient shall work with SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to identify the topic; audience; framework of a historic context statement; and format for the final deliverable. The context statement may focus on an individual property, a historic district, a set of related properties, or relevant themes as identified in the statewide preservation plan or the National Park Service's National Historic Landmark Thematic Framework.

### **V. Oral History Documentation**

FEMA, Recipient(s), and subrecipient shall work with SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to identify the list of potential interview candidates; the parameters of the oral history project; qualifications of the individual or individuals conducting the oral interviews; the process for any ongoing coordination with SHPO and participating Tribe(s); and format for the final deliverable.

### **VI. Historic Property Inventory**

FEMA, Recipient(s), and subrecipient shall work with SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to establish the appropriate level of effort to accomplish a historic property inventory. Efforts may be directed toward the resurvey of previously designated historic properties and/or districts which have undergone change or lack sufficient documentation, or the survey of new historic properties and/or districts that lack formal designation. The survey may

also include archaeological properties. The proposed treatment measure will describe the boundaries of the survey area and the data collection method.

## **VII. National Register and National Historic Landmark Nominations**

FEMA, the Recipient(s), and subrecipient shall work with SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to identify the individual properties that would benefit from a completed National Register of Historic Places (NRHP) or National Historic Landmark (NHL) nomination form. Once the parties have agreed to a property, the responsible entity will continue to coordinate with FEMA, Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, through the drafting of the NRHP nomination form or will contact the NHL Program to begin the nomination process. The SHPO and/or participating Tribe(s) will provide adequate guidance to the responsible entity during the preparation of the nomination form. The proposed treatment measure may include provisions that describe the submission of the completed NRHP nomination to the State Review Board and the Keeper for inclusion in the NRHP.

## **VIII. Geo-Analysis and/or Geo-References of Historical Maps and Aerial Photographs**

FEMA, Recipient(s), and subrecipient shall work with SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to identify the subject for a GIS-based analysis and/or the historical maps and/or aerial photographs for scanning and geo-referencing. Once a subject, list of maps and/or aerial photographs have been agreed upon, the responsible entity will continue to coordinate with FEMA, Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, through the scanning and geo-referencing process and will submit drafts of paper maps and electronic files to FEMA, Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, for review. The final deliverable produced by the responsible entity will include, as appropriate, a 1) paper copy of each scanned image, 2) a geo-referenced copy of each scanned image, 3) original high-resolution digital image of map/aerial photograph in TIFF file format, 4) copies of the user agreements for every geo-referenced image with transferability of use to all parties, 5) a process report outlining the research, and 6) the metadata relating to both the original creation of the paper maps and the digitization process.

## **IX. Archaeological Research Design and Data Recovery Plan**

FEMA shall develop a data recovery plan with a research design in consultation with Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to recover data from archaeological properties listed in, or eligible for listing in the NRHP, which will be adversely affected by ground-disturbing activities that are part of the Undertaking. The research design and data recovery plan will be consistent with the Secretary of the Interior's Guidelines for Archaeological Documentation ([http://www.nps.gov/history/local-law/arch\\_stnds\\_7.htm](http://www.nps.gov/history/local-law/arch_stnds_7.htm)) ACHP's recommendations on the recovery of significant information from archaeological sites. <http://www.achp.gov/archguide.html>. All work shall conform to the Louisiana Division of Archaeology's Section 106 Field Methods and Report Standards, as well as the Louisiana Unmarked Human Burial Sites Preservation Act (RS 8:671 et seq). This treatment measure does not apply to the excavation of burials or burial objects.

## **X. Marketing Plan for Demolition or Abandonment**

FEMA in coordination with Recipient(s), subrecipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, shall consult to develop and implement a feasible marketing plan

to advertise the availability of historic structures identified for demolition or abandonment for sale and/or relocation. A good faith and reasonable marketing plan will include publicizing and advertising the property in newspapers, magazines, and/or websites of record for a specific period of time. The plan may require the purchaser to relocate the property outside of the Special Flood Hazard Area (100-year floodplain), and the plan will give preference to a purchaser who proposes to use a professional house mover that follows the recommendations in *Moving Historic Buildings* by John Obed Curtis (1975, reprinted 1991 by W. Patram for the International Association of Structural Movers) or other similar updated reference material. If a good faith and reasonable marketing effort does not result in the identification of a party or parties willing to purchase and, if necessary, relocate the property, the property may be demolished or abandoned. This marketing plan will be used in conjunction with Treatment Measure A., Recordation Package and FEMA will ensure that the property is recorded prior to relocation or demolition.

## **XI. Salvage**

The subrecipient shall work with FEMA, Recipient, SHPO, and/or participating Tribe(s), and other consulting parties, as appropriate, to identify selective architectural elements that may be salvaged from a building slated for demolition. The elements will be removed at the subrecipient's expense. The salvaged elements may be re-used in another structure or in displays for educational purposes. As an alternative, the subrecipient, in consultation with FEMA, Recipient, SHPO, and/or participating Tribe(s), and other consulting parties will attempt to identify a private or public not-for-profit local or regional historic preservation organization interested in receiving a donation of the architectural features. The organization may sell the architectural features to the general public for the specific purpose of raising funds to support future historic preservation activities in the region. Any income derived by the subrecipient from the sale of architectural features may be considered project income by the program to be deducted from proceeds of the grant. Salvage activities shall not occur at or below grade in order to avoid affecting unevaluated archaeological resources.

### **FEDERAL EMERGENCY MANAGEMENT AGENCY**

\_\_\_\_\_  
Kevin Jaynes  
Regional Environmental Officer  
Region 6

Date: \_\_\_\_\_

APPENDIX E

TEXAS STATEWIDE PROGRAMMATIC AGREEMENT

**TEXAS PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY;  
THE TEXAS HISTORICAL COMMISSION;  
THE TEXAS DIVISION OF EMERGENCY MANAGEMENT; and  
PARTICIPATING TRIBES**

**WHEREAS**, the mission of the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards; and

**WHEREAS**, FEMA makes assistance available to States, Territories, Commonwealths, local governments, Federally recognized Indian Tribes (Tribes), nonprofit organizations, institutions of higher education, individuals, and other eligible entities through programs set forth in Appendix A (Programs), pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296 (2002) (codified as amended at 6 U.S.C. § 101 *et seq.*); Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (1974) (codified as amended at 42 U.S.C. § 5121 *et seq.*, (Stafford Act); the National Flood Insurance Act of 1968, Pub. L. No. 90-448 (1968) (codified as amended at 42 U.S.C. § 4001 *et seq.*); the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2006) (codified as amended at 6 U.S.C. § 741 *et seq.*); implementing regulations contained in Title 44 of the Code of Federal Regulations (CFR), Executive Order 13407, *Public Alert and Warning System*, (2006), and such other acts, executive orders, or implementing regulations as are enacted from time to time; and

**WHEREAS**, FEMA has determined that implementation of these Programs may result in Undertakings [as defined by 54 U.S.C. § 300320 and 36 CFR § 800.16(y)] that may affect properties in the State of Texas (State) that are listed in or eligible for listing in the National Register of Historic Places (National Register) pursuant to 36 CFR Part 60 (historic properties); and FEMA has consulted with the Texas Historical Commission, as the State Historic Preservation Officer (SHPO), pursuant to Section 106 of the National Historic Preservation Act (NHPA), Pub. L. No. 89-665 (1966) (codified as amended at 54 U.S.C. § 306108), and the regulations implementing Section 106 of the NHPA (Section 106) at 36 CFR Part 800 (Protection of Historic Properties); and

**WHEREAS**, FEMA, the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) have determined that FEMA's Section 106 requirements can be more effectively and efficiently implemented and delays to the delivery of FEMA assistance minimized if a programmatic approach is used to stipulate roles and responsibilities, exempt certain Undertakings from Section 106 review, establish protocols for consultation, facilitate identification and evaluation of historic properties, and streamline the assessment and resolution of adverse effects; and

**WHEREAS**, FEMA has developed a Prototype Programmatic Agreement (FEMA Prototype Agreement) pursuant to 36 CFR § 800.14(b)(4) in consultation with the ACHP and NCSHPO to

serve as a basis for negotiation of a State/Tribal specific Programmatic Agreement (Agreement) with the SHPO, State/Tribal Emergency Management Agency, and/or participating Tribe(s); and

**WHEREAS**, FEMA executed an Agreement with the SHPO and Texas Division of Emergency Management (TDEM) on September 11, 2014 (2014 Agreement), that conformed to the FEMA Prototype Agreement as designated by the ACHP on December 17, 2013, and therefore did not require the participation or signature of the ACHP; and

**WHEREAS**, the 2014 Agreement expired on September 11, 2021; and

**WHEREAS**, this Agreement also conforms to the FEMA Prototype Agreement as designated by the ACHP on December 17, 2013, and therefore does not require the participation or signature of the ACHP; and

**WHEREAS**, in order to implement its Programs, FEMA will provide assistance to the State, which will in turn provide assistance to eligible Subrecipients, and as such FEMA has invited the TDEM, the Recipient responsible for administering funds provided under the Programs, to execute this Agreement as an Invited Signatory; and

**WHEREAS**, FEMA also may directly perform its own Undertakings pursuant to this Agreement; and

**WHEREAS**, in anticipation or in the immediate aftermath of an event, impacted communities and the State of Texas, and/or affected Tribes, may conduct critical preparedness, response and recovery activities to safeguard public health and safety and to restore vital community services and functions before, during, and/or following an event. Some of these activities may become Undertakings requiring Section 106 review subject to the terms of this Agreement, and FEMA shall coordinate the appropriate review as warranted; and

**WHEREAS**, FEMA has determined that its Programs may result in Undertakings with the potential to affect historic properties having religious and cultural significance to Tribes including sites that may contain human remains and/or associated cultural items; and

**WHEREAS**, FEMA may invite additional Tribes that have sites of religious and cultural significance to enter into the terms of this Agreement as invited Signatories or concurring parties in accordance with 36 CFR § 800.14(f), and nothing in this Agreement prevents a Tribe from entering into a separate Programmatic Agreement or other agreement with FEMA for administration of FEMA Programs; and

**WHEREAS**, FEMA recognizes that the Absentee Shawnee Tribe of Oklahoma, Alabama-Coushatta Tribe of Texas, Apache Tribe of Oklahoma, Caddo Nation, Choctaw Nation of Oklahoma, Comanche Nation, Delaware Nation, Fort Sill Apache Tribe of Oklahoma, Jena Band of Choctaw Indians, Jicarilla Apache Nation, Kialegee Tribal Town, Kickapoo Traditional Tribe of Texas, Kiowa Tribe, Mescalero Apache Tribe, Muscogee (Creek) Nation, Osage Nation, Quapaw Nation, Thlopthlocco Tribal Town, Tonkawa Tribe of Indians of Oklahoma, United Keetoowah Band of Cherokee Indians, Wichita and Affiliated Tribes and Ysleta del Sur Pueblo may have sites of religious and cultural significance on or off Tribal Lands [as defined in 36 CFR



§ 800.16(x)], and in meeting its Federal trust responsibility, FEMA has engaged in government-to-government consultation with Tribe(s), and pursuant to 36 CFR § 800.2 (c)(2)(ii)(E) has invited the Tribe(s) to enter into an agreement that specifies how FEMA and the Tribe(s) will carry out Section 106 responsibilities, including the confidentiality of information; and

**WHEREAS**, the Absentee Shawnee Tribe of Oklahoma, Alabama-Coushatta Tribe of Texas, Choctaw Nation of Oklahoma, Comanche Nation, Jicarilla Apache Nation, Kialegee Tribal Town, Mescalero Apache Tribe, Muscogee (Creek) Nation, Osage Nation, Quapaw Nation, Thlopthlocco Tribal Town, Wichita and Affiliated Tribes and Ysleta del Sur Pueblo have assumed the responsibilities of the SHPO in its/their Tribal lands through appointment of a Tribal Historic Preservation Officer (THPO) in accordance with Section 101 of the NHPA, and FEMA shall consult with the THPO in lieu of the SHPO for Undertakings occurring on or affecting its/their Tribal lands; and

**WHEREAS**, notwithstanding the aforementioned invitation to enter into an agreement, FEMA has invited the Absentee Shawnee Tribe of Oklahoma, Alabama-Coushatta Tribe of Texas, Apache Tribe of Oklahoma, Caddo Nation, Choctaw Nation of Oklahoma, Comanche Nation, Delaware Nation, Fort Sill Apache Tribe of Oklahoma, Jena Band of Choctaw Indians, Jicarilla Apache Nation, Kialegee Tribal Town, Kickapoo Traditional Tribe of Texas, Kiowa Tribe, Mescalero Apache Tribe, Muscogee (Creek) Nation, Osage Nation, Quapaw Nation, Thlopthlocco Tribal Town, Tonkawa Tribe of Indians of Oklahoma, United Keetoowah Band of Cherokee Indians, Wichita and Affiliated Tribes and Ysleta del Sur Pueblo to enter into this Agreement as a Signatory party to fulfill the requirements of Section 106; and

**WHEREAS**, as of the date of this Agreement no Tribe(s) have agreed to enter into a separate Programmatic Agreement or other agreement with FEMA; and

**WHEREAS**, the terms of this Agreement shall not apply to Undertakings on or affecting Tribal lands without prior execution of the Agreement by the affected Tribe(s); and

**WHEREAS**, for the review of specific Undertakings under this Agreement, FEMA may invite other agencies, organizations, and individuals to participate as consulting parties; and

**WHEREAS**, the definitions in 36 CFR § 800.16 apply to this Agreement; and

**NOW, THEREFORE**, FEMA, SHPO, and TDEM agree that FEMA Programs in the State of Texas shall be administered in accordance with the following Stipulations to satisfy FEMA's Section 106 and Section 110 responsibilities for all resulting Undertakings, and effectively integrate historic preservation compliance considerations into the delivery of FEMA assistance. FEMA will not authorize implementation of an individual Undertaking in Texas until Section 106 review is completed pursuant to this Agreement.

## STIPULATIONS

To the extent of its legal authority, and in coordination with the other Signatories, FEMA shall ensure that the following measures are implemented:

### I. GENERAL

#### A. Applicability

1. The execution of this Agreement supersedes the terms of the 2014 Agreement which expired September 11, 2021, but remained effective for Declarations made prior to its expiration in order to minimize delays in delivery of FEMA assistance.
2. For FEMA Undertakings that also are within the jurisdiction of the Federal Communications Commission (FCC) and within the scope of its Section 106 Programmatic Agreements for communication facilities, FEMA defers Section 106 review in accordance with the ACHP Program Comment, as amended on July 31, 2020 (Program Comment to Avoid Duplicative Reviews for Wireless Communications Facilities Construction and Modification | Advisory Council on Historic Preservation (achp.gov)). The approval of funding for the FEMA Undertaking shall be conditioned upon the compliance of the Subrecipient with the FCC's applicable Section 106 review, including any required consultation with Tribes. FEMA shall notify the SHPO/THPO when it applies the ACHP Program Comment to an Undertaking. FEMA remains responsible for any FEMA Undertakings it determines are outside the jurisdiction of FCC.
3. FEMA will assess proposed Undertakings that are in Section 106 review on the date of execution of this Agreement. FEMA may complete this review pursuant to the ongoing process; for an Undertaking that has been completely reviewed, FEMA will review any change in scope of work pursuant to this Agreement, unless an existing Memorandum of Agreement (MOA) or Secondary Programmatic Agreement (Secondary Agreement) requires otherwise.
4. In the event of a Stafford Act major disaster or emergency declaration (Declaration), State, Tribal and local governments may lack the capability to perform or to contract for emergency work, and instead request that the work be accomplished by a Federal agency. FEMA may perform this work directly, or through a mission assignment (MA), may direct appropriate Federal agencies to perform the work pursuant to Titles IV and V of the Stafford Act and 44 CFR Part 206. This Agreement shall apply to such Federal assistance undertaken by or directed by FEMA.
5. FEMA may utilize this Agreement to fulfill its Section 106 responsibilities and those of other Federal agencies that designate FEMA as the lead Federal agency pursuant to 36 CFR § 800.2(a)(2) with appropriate notification to the other Signatories and the ACHP regarding Undertakings that fall within the scope of this

Agreement. When FEMA is not designated as the lead Federal agency, all Federal agencies, including FEMA, remain individually responsible for their compliance with Section 106. This provision does not prevent FEMA from recognizing another Federal agency as lead Federal agency for specific Undertakings as appropriate.

6. If another Federal program or Federal agency has concluded Section 106 consultation review and approved an Undertaking within the past five (5) years, FEMA has no further requirement for Section 106 review provided that FEMA:
  - a. confirms that the scope and effect [as defined by 36 CFR § 800.16(i)] of its Undertaking are the same as that of the Undertaking reviewed by the previous agency, and SHPO or Tribal consultation and concurrence is documented.
  - b. determines that the previous agency complied with Section 106 appropriately; and,
  - c. adopts the findings and determinations of the previous agency

FEMA shall document these findings to the project file in order to confirm that the requirements of Section 106 have been satisfied. Should FEMA, in consultation with SHPO determine that the previous Section 106 review was insufficient or involved interagency disagreements about eligibility, effect, and/or treatment measures, FEMA shall conduct additional Section 106 consultation in accordance with the terms of this Agreement.

7. With the written concurrence of the Signatories, other Federal agencies providing financial assistance for the type of activities covered under the terms of this Agreement, as outlined in Appendix A, may satisfy their Section 106 responsibilities for such activities by accepting and complying in writing with the terms of this Agreement.
  - a. Other Federal Agencies may include States, Tribes, and units of local government who have assumed environmental responsibilities of the U.S. Department of Housing and Urban Development, and acting as the Responsible Entity pursuant to 24 CFR Part 58, are responsible for environmental review, decision-making and action.
  - b. In such situations, the other Federal Agency shall notify the Signatories in writing of its intent to use this Agreement to achieve compliance with its Section 106 requirements and consult with the Signatories regarding its Section 106 compliance responsibilities. Resumes of staff who meet the Secretary's Professional Qualification Standard(s) and will review Tier II projects in accordance with Appendix B of this Agreement shall be provided to FEMA and the SHPO/THPO.

8. FEMA has determined that the following types of activities have limited or no potential to affect historic properties and FEMA has no further Section 106 responsibilities with regards to them, pursuant to 36 CFR § 800.3(a)(1):
  - a. Pursuant to 44 CFR § 206.110(m), assistance to individuals and households provided under 44 CFR Part 206, Subpart D and Section 408 of the Stafford Act, including funding for owner-occupied home repair, content replacement, personal property, transportation and healthcare expenses, is exempt from the provisions of Section 106. For ground disturbing activities, and construction related to 44 CFR §§ 206.117(b)(1)(ii) (temporary housing), 206.117(b)(3) (replacement housing), 206.117(b)(4) (permanent housing construction), 206.117(c)(1)(vi) (privately-owned access routes) and rental units (multi-family repair), FEMA will conduct Section 106 review.
  - b. Administrative actions such as personnel actions, travel, procurement of services, supplies (including vehicles and equipment) for the support of day-to-day and emergency operational activities, and the temporary storage of goods provided storage occurs within existing facilities or on previously disturbed soils.
  - c. Preparation, revision, and adoption of regulations, directives, manuals, and other guidance documents.
  - d. Granting of variances, and actions to enforce Federal, State, Tribal, or local codes, standards or regulations.
  - e. Monitoring, data gathering, and reporting in support of emergency and disaster planning, response and recovery, and hazard activities.
  - f. Research and development of hazard warning systems, hazard mitigation plans, codes and standards, and education/public awareness programs.
  - g. Assistance provided for planning, studies, design and engineering costs that involve no commitment of resources other than staffing and associated funding.
  - h. Assistance provided for training, management and administration, exercises, and mobile/portable equipment purchases; with the exception of potential ground-disturbing activities and modification of existing structures.
  - i. Community Disaster Loans for funding to perform governmental functions for any eligible jurisdiction in a designated disaster area that has suffered a substantial loss of tax and other revenue pursuant to Section 417 of the Stafford Act.
  - j. Acquisition or lease of existing facilities where planned uses conform to past use or local land use requirements.

- k. Funding the administrative action of acquiring properties in buyout projects, including the real estate transaction, but excluding demolition.
  - l. Reimbursement of a Subrecipient's insurance deductible when the deductible is the total FEMA eligible cost for the project.
  - m. Labor, equipment and materials used to provide security in the Declaration area, including lease, rental, purchase or repair of equipment or vehicles and payment for staff and contract labor.
  - n. Application of pesticides or other forms of vector control to reduce adverse public health effects, including aerial and truck-mounted spraying.
  - o. Unemployment assistance pursuant to Section 410 of the Stafford Act.
  - p. Distribution of food coupons pursuant to Section 412 of the Stafford Act.
  - q. Legal services pursuant to Section 415 of the Stafford Act.
  - r. Crisis counseling pursuant to Section 412 of the Stafford Act.
9. Any FEMA Programs authorized by the United States Congress in the future may be included in this Agreement in accordance with Stipulation IV.A, Amendments. Any change in the FEMA name, Programs, or organizational structure will not affect this Agreement.

## **B. Roles and Responsibilities of the Signatories**

### **1. FEMA**

- a. FEMA shall use Federal, Tribal, State, Subrecipient, or contractor staff whose qualifications meet the Secretary's *Professional Qualifications* set forth in the Federal Register at 48 Fed. Reg. 44716-01 (September 29, 1983), as amended (Qualified), in applying Second Tier Programmatic Allowances listed in Appendix B, completing identification and evaluation of historic properties, and making determinations of effects. FEMA shall review any National Register eligibility determination and make its own findings of effect resulting from the performance of these activities prior to submitting such determinations to the SHPO and participating Tribe(s). For any work conducted on non-federal public land, FEMA shall use Federal, Tribal, State, Subrecipient, or contractor staff who meet the professional qualifications set forth in 13 Texas Administrative Code § 26.4.
- i. FEMA acknowledges that Tribes possess special expertise in assessing the National Register eligibility of properties with religious and cultural significance to them. Tribal leaders, and as appropriate, their representatives,

shall decide who meets qualifications/standards as defined by their Tribes for review of Undertakings affecting properties with religious and cultural significance to them.

- b. FEMA alone shall conduct all Section 106 consultation with Tribe(s). In accordance with 36 CFR § 800.2(c)(3), FEMA may authorize TDEM, or a Subrecipient through TDEM, to initiate the Section 106 process with the SHPO and other consulting parties, assist in identifying other consulting parties with a demonstrated interest in the Undertaking, and prepare any necessary analyses and documentation, but FEMA shall remain responsible for determinations of National Register eligibility and findings of effect recommended by the authorized party. FEMA shall follow the process set forth in Stipulation I.B.1(a), FEMA Roles and Responsibilities, and notify the SHPO in writing when a Recipient or Subrecipient has been authorized to initiate consultation on FEMA's behalf.
- c. Will make every effort to have *Qualified* FEMA staff coordinating directly with SHPO in accordance with 36 CFR §§ 800.4 (b-c) before following through with Stipulation I.B.1.b.
- d. Will ensure that documentation provided for review pursuant to this Agreement is consistent with the applicable SHPO guidelines for project submittal found at <http://www.thc.state.tx.us/project-review/what-send-project-review>, such as, but not limited to:
  - i. Architectural documentation of standing structures;
  - ii. For fieldwork: Council of Texas Archeologist's Standards and Guidelines, including Archeological Survey Standards for Texas and Guidelines for CRM Reports. Any work conducted on non-federal public land must comply with the Antiquities Code of Texas (9 Natural Resources Code § 191) and applicable rules in 13 Texas Administrative Code, Chapters 26 and 28; and
  - iii. For publications: The Secretary of the Interior's Standards and Guidelines for Historic Preservation, at <https://www.nps.gov/tps/standards.htm>
- e. Prior to authorizing the release of funds for individual Undertakings requiring grant conditions pursuant to this Agreement, FEMA shall inform TDEM of all stipulations and conditions and ensure that they are understood so they can be adequately conveyed to the Subrecipient. FEMA shall work in partnership with TDEM to provide Subrecipients with guidance on in-kind repair pursuant to The Secretary of the Interior's Standards for the Treatment of Historic Properties 2017 (Secretary's Standards), 36 CFR Part 68, or the most updated version, and techniques to avoid or minimize adverse effects to historic properties.

- f. Will provide the Signatories and the ACHP with an Annual Report about this Agreement for the previous calendar year, by March 31 of each year that the Agreement is in effect, unless all Signatories concur in an extension. The Report will summarize the Undertakings reviewed, and actions taken to implement the Agreement; will provide example projects, including their scopes of work; and will recommend any actions or revisions to be considered during the next calendar year. TDEM will assist FEMA in preparing this Report.
- g. Will confer annually and as necessary with the signatories to this Agreement within ninety (90) days after issuance of the annual report, to review the report and/or discuss issues and concerns in greater detail. TDEM will assist FEMA in initiating this discussion; which may be conducted by telephone, meeting, electronically, or other appropriate method of communication.
- h. Shall notify the SHPO and affected Tribe(s), as soon as practicable, following a Declaration to provide specific points of contact and other pertinent information about the Declaration.
- i. May convene an initial scoping meeting with the signatories and other interested parties as soon as practicable after each Declaration to address Declaration-specific issues and procedures.
- j. Shall ensure that all documentation resulting from Undertakings reviewed pursuant to this Agreement is consistent with applicable SHPO guidelines and the confidentiality provisions of 36 CFR § 800.11(c).

## 2. SHPO

- a. Will participate in an initial scoping meeting for a Declaration.
- b. Will participate in the review of Undertakings pursuant to this Agreement, including all actions FEMA authorizes another party to carry out on its behalf in accordance with Stipulation II.C.
- c. Will provide FEMA with access to available information about historic properties in the disaster area, and guidance on related research to the best of SHPO's ability, including:
  - i. Records of designated historic properties (including those listed in the National Register and with state-level designation of Recorded Texas Historic Landmark and State Antiquities Landmark (buildings only)) via the Texas Historic Sites Atlas at <https://atlas.thc.tx.gov>; restricted archeological site information to qualified professionals via the Texas Archeological Sites Atlas; and information on significant underwater remote-sensing targets (with the potential to represent submerged cultural resources) that have

required avoidance margins is available from the THC Marine Archeology Program;

- ii. Historic Properties (including any known historic streets, roads or intersections) listed in or previously determined eligible for the National Register by the SHPO or Keeper of the National Register;
- iii. Properties recorded in the THC standing structures and archeological survey site files;
- iv. Unevaluated or under-evaluated historic properties in the Disaster area; and
- v. Geographic areas:
  - I). where sufficient cultural resource surveys have been conducted, and the survey results;
  - II). where there are not likely to be Historic Properties; and
  - III). where surveys have been conducted, but a high potential for unidentified or under-evaluated historic properties remains.
- d. Identify SHPO staff or consultants to assist FEMA with its Section 106 responsibilities, and identify, in coordination with FEMA, specific activities that SHPO may perform at FEMA's request.
- e. May delegate any of its responsibilities under this Agreement to a liaison(s) who is not a member of its staff to serve as a dedicated point of contact for consultation with FEMA. SHPO will consult with FEMA about the selection of the liaison(s); the scope of responsibilities delegated; and implementing procedures for the duties, actions, and decisions delegated. The delegation must be acceptable to FEMA, and formally documented. FEMA may provide funding for a liaison when applicable.
- f. Coordinate with FEMA to identify consulting parties, including any communities, organizations, or individuals that may have an interest in a specific Undertaking and its effects on historic properties.
- g. Will assist Subrecipients and other local jurisdictions in identifying debris staging, chipping, and disposal sites that will not affect Historic Properties.
- h. Participate in annual reviews convened by FEMA to review the effectiveness of this Agreement in Accordance with Stipulation I.B.1(i).



### 3. TDEM

- a. Will ensure that their Subrecipients understand and acknowledge conditions and potential requirements that may be placed upon Undertakings as a result of Section 106 consultation and the provisions of this Agreement. TDEM will provide information about applicable Federal preservation laws; and guidance about in-kind repairs, pursuant to the Secretary's *Standards*, as updated, and ensure that the Subrecipients understand and acknowledge any additional requirements placed on Undertakings as a result of Section 106 review, consultation, or other provisions of this Agreement; such as performing work in accordance with the U.S. Department of the Interior, National Park Service (NPS) *Preservation Briefs*.
- b. Will participate in an initial scoping meeting for a Declaration.
- c. Will ensure that documentation provided for review pursuant to this Agreement is consistent with applicable SHPO guidelines when FEMA is not coordinating directly with these parties in accordance with Stipulation I.B.1.d.
- d. Will ensure that its Subrecipients are made aware that in the event of an unexpected discovery involving an Undertaking that has affected a previously unidentified historic property or human remains, or affected a known historic property in an unanticipated manner, the Subrecipient will comply with Stipulation III.B, Unexpected Discoveries, Previously Unidentified Properties, or Unexpected Effects.
- e. Will ensure that in its Subrecipient agreements, any scope of work involving ground disturbance, and resultant contracts to execute said work, provide for the protection of and notification protocols for unexpected discoveries or unexpected effects to historic properties and human remains.
- f. Will ensure its Subrecipients understand and acknowledge conditions and potential requirements that may be placed upon Undertakings as a result of Section 106 consultation and the provisions of this Agreement.
- g. Will require, to the greatest extent possible, that a Subrecipient will not begin demolition, ground disturbing, or construction activities until an Undertaking is approved by FEMA; and otherwise, such activities will jeopardize Federal funding of the Undertaking.
- h. Will ensure that their Subrecipients understand that failure to comply with any project-specific conditions that have been placed on their grants could jeopardize FEMA funding.
- i. Will notify FEMA as soon as possible of any proposed change to the approved scope of work. TDEM shall direct its Subrecipient not to implement the changes

to the proposed scope of work until any additional review required by this Agreement is complete.

### **C. Tribal Consultation**

1. For FEMA Undertakings on Tribal lands or affecting properties of religious and cultural significance, and where no tribe-specific consultation agreements or protocols are in place, FEMA shall consult with affected Tribe(s) in accordance with 36 CFR Part 800. In determining the specific Tribe(s) affected, FEMA will first establish that it is a type of Undertaking with potential to affect historic properties with religious and cultural significance and may consult with the SHPO, Tribe(s), and access any other tools to identify geographic tribal interests.
2. To the extent permitted by Section 304 of the NHPA, Section 9(a) of the Archeological Resources Protection Act (ARPA) (16 U.S.C. §470aa – 470mm), and any other applicable laws, FEMA shall ensure it withholds information protected by such laws from public disclosure.
3. FEMA shall invite affected Tribe(s) to participate in the initial scoping meeting within their geographic area of interest for each Declaration.
4. The Absentee Shawnee Tribe of Oklahoma, Alabama-Coushatta Tribe of Texas, Apache Tribe of Oklahoma, Caddo Nation, Choctaw Nation of Oklahoma, Comanche Nation, Delaware Nation, Fort Sill Apache Tribe of Oklahoma, Jena Band of Choctaw Indians, Jicarilla Apache Nation, Kialegee Tribal Town, Kickapoo Traditional Tribe of Texas, Kiowa Tribe, Mescalero Apache Tribe, Muscogee (Creek) Nation, Osage Nation, Quapaw Nation, Thlopthlocco Tribal Town, Tonkawa Tribe of Indians of Oklahoma, United Keetoowah Band of Cherokee Indians, Wichita and Affiliated Tribes and Ysleta del Sur Pueblo are federally recognized Indian Tribes. Nothing in this Agreement shall be construed to be a waiver, in whole or in part, of the sovereign immunity of the listed Tribes.

### **D. Public Participation**

2. FEMA recognizes that the views of the public are essential to informed decision making throughout the Section 106 consultation process. FEMA shall notify the public of proposed Undertakings in a manner that reflects the nature, complexity, and effect(s) of the Undertaking, the likely public interest given FEMA's specific involvement, and any confidentiality concerns of affected Tribe(s) private individuals and businesses. FEMA may consult with TDEM, Subrecipient, and SHPO, to determine if there are individuals or organizations with a demonstrated interest in historic properties that should be made aware of an Undertaking. If such parties are identified or identify themselves to FEMA, FEMA shall provide them with information regarding the Undertaking and its effect on historic properties, consistent with the confidentiality provisions of 36 CFR § 800.11(c).

3. In accordance with the outreach strategy developed for an Undertaking in consultation with the SHPO for involving the public, FEMA shall identify the appropriate stages for seeking public input during the Section 106 consultation process.
4. FEMA shall consider all views provided by the public regarding an Undertaking and will consider all written requests of individuals and organizations to participate as consulting parties, and in consultation with the SHPO determine which should be consulting parties. FEMA will invite any individual or organization that will assume a specific role or responsibility outlined in a Section 106 agreement document to participate as a signatory party.
5. FEMA may also provide public notices and the opportunity for public comment or participation in an Undertaking through the public participation process of the National Environmental Policy Act (NEPA) and its implementing policies set forth in DHS Directive No. 023-01, *Implementation of the National Environmental Policy Act* (Oct. 31, 2014); DHS Instruction No. 023-01-001-01, *Implementation of the National Environmental Policy Act* (Nov. 6, 2014); FEMA Directive No. 108-1, *Environmental Planning and Historic Preservation Responsibilities and Program Requirements* (Oct. 10, 2018); FEMA Instruction No. 108-1-1, *Instruction on Implementation of the Environmental Planning and Historic Preservation Responsibilities and Program Requirements* (Oct. 10, 2018); and/or Executive Orders 11988 and 11990 relating to floodplains and wetlands as set out in 44 CFR Part 9, and Executive Order 12898, *Environmental Justice*, provided such notices specifically reference Section 106 as a basis for public involvement.
6. Should a member of the public object in writing to implementation of the Agreement's terms, FEMA will notify the other signatories in writing and take the objection into consideration. FEMA shall consult with the objecting party and, if that party so requests, the other Signatories, for not more than 30 days. In reaching its decision regarding the objection, FEMA shall take into consideration all comments from these parties. Within 15 days after closure of this consultation period, FEMA shall provide the other parties with its final decision in writing.

#### **E. Timeframes and Communications**

1. All time designations shall be in calendar days unless otherwise stipulated. If any signatory does not object to FEMA's determination related to an Undertaking within an agreed upon timeframe, FEMA may proceed to the next step in the consultation process as described in Stipulation II, Project Review.
2. Due to the varied nature of Undertakings, the individual response times to FEMA's requests for comment/concurrence may vary. These response times are contingent upon FEMA ensuring that its findings and determinations are made by Qualified staff and supported by documentation as required by 36 CFR § 800.11(d) and 36 CFR § 800.11(e), and consistent with FEMA guidance.

- a. For Emergency Undertakings, as outlined in Stipulation II.B.2(c)(i), Expedited Review of Emergency Undertakings, the SHPO and participating Tribes shall respond to any FEMA request for comments within seven (7) days after receipt, unless FEMA determines the nature of the emergency action warrants a shorter time period.
  - b. For Undertakings associated with the Individual Assistance (IA) and Public Assistance (PA) programs, the response time for each request for concurrence shall be a maximum of fifteen (15) days.
  - c. For the Hazard Mitigation Grant Program (HMGP) and all non-disaster programs, the response time for each request for concurrence shall be a maximum of thirty (30) days.
3. The Signatories may send and accept official notices, comments, requests for further information and documentation, and other communications required by this Agreement by e-mail.
  4. FEMA will maintain a record of contact information for the Signatories. A Signatory may update this information by notification to FEMA without amending the Agreement. The Signatory will notify the Region VI Environmental Officer within thirty 30 days after an update, whereupon FEMA will notify the other Signatories of the update.

## **II. PROJECT REVIEW**

### **A. Programmatic Allowances**

1. If FEMA determines an Undertaking as a whole conforms to one or more allowances in Appendix B of this Agreement, FEMA shall complete the Section 106 review process by documenting this determination in the project file, without SHPO review or notification.
2. If the Undertaking involves a National Historic Landmark (NHL), FEMA shall notify the SHPO, and the NPS Program Manager of the Intermountain Regional Office that the Undertaking conforms to one or more allowances. FEMA will provide information about the proposed scope of work for the Undertaking and the allowance(s) enabling FEMA's determination.
3. If the Undertaking involves a State Antiquities Landmark (SAL) (designated per the Antiquities Code of Texas, Title 9, Chapter 191, Texas Natural Resource Code), Recorded Texas Historic Landmark (RTHL) (per Section 442.006, Texas Government Code), or any current or former county courthouse (per Section 442.008, Texas Government Code), FEMA shall notify the SHPO that the Undertaking conforms to one or more allowances. FEMA will provide information about the

proposed scope of work for the Undertaking and the allowance(s) enabling FEMA's determination.

4. If FEMA determines any portion of an Undertaking's scope of work does not conform to one or more allowances listed in Appendix B, FEMA shall conduct Section 106 review for the entire Undertaking in accordance with Stipulation II.B, Expedited Review for Emergency Undertakings, or Stipulation II.C, Standard Project Review.
5. Allowances may be revised and new allowances may be added to this Agreement in accordance with Stipulation IV.A., Amendments.

## **B. Expedited Review for Emergency Undertakings**

### **1. Determine Expedited Review**

- a. As part of the Declaration process, FEMA shall define the time interval during which the disaster causing incident occurs (the incident period, as defined in 44 CFR § 206.32(f)). FEMA may approve Federal assistance and/or funding for emergency work (as defined in 44 CFR § 206.201(b)) that occurs during the incident period, including work already completed, in response to an immediate threat to human health and safety or property. Pursuant to 36 CFR § 800.12(d), FEMA may conduct expedited review of emergency Undertakings for 30 days from the beginning of the incident period.
- b. Should FEMA determine that it is necessary to extend the expedited review period beyond the initial 30 days, FEMA will, in 30-day increments, as needed, notify the ACHP, SHPO, TDEM, and participating Tribe(s).

### **2. Conduct Expedited Reviews**

- a. If the emergency Undertaking is an immediate rescue and salvage operation conducted in response to an event to preserve life and property, FEMA has no Section 106 consultation responsibilities in accordance with 36 CFR § 800.12(d); or
- b. If the emergency Undertaking meets one or more of the Allowances in Appendix B of this Agreement, FEMA shall complete the Section 106 review process pursuant to Stipulation II.A., Programmatic Allowances.
- c. If FEMA determines that the emergency Undertaking may adversely affect a historic property during this expedited review period:
  - i. To the extent practicable FEMA may propose treatment measures that would address adverse effects during implementation, and request the comments of the SHPO and participating Tribe(s) within 7 days of receipt of

this information unless FEMA determines the nature of the emergency warrants a shorter time period.

- ii. FEMA may provide this information through written requests, telephone conversations, meetings, or electronic media. In all cases, FEMA shall clarify that an “expedited Undertaking review” is being requested.
- iii. FEMA shall take into account any timely comments provided by SHPO and/or participating Tribe(s) in making a decision on how to proceed.
- iv. Should the SHPO and participating (Tribe(s) not comment within 7 days, FEMA may fund the emergency Undertaking based on the available information. This will complete the Section 106 consultation for the Undertaking.
- v. FEMA will notify the SHPO and participating Tribe(s) of the final decision, indicating how any comments received were considered in reaching that decision.

### **C. Standard Project Review**

For Undertakings not exempt from further Section 106 review, FEMA shall ensure that the following standard project review steps are implemented. In the interest of streamlining, FEMA may combine some or all of these steps during consultation.

1. Consulting Parties: FEMA shall consult as appropriate with the SHPO to identify any other parties that meet the criteria to be consulting parties and invite them to participate in the Section 106 consultation process. FEMA may invite others to participate as consulting parties as the Section 106 consultation proceeds. FEMA shall invite any individual or organization that will assume a specific role or responsibility outlined in an MOA or Programmatic Agreement to participate as an invited Signatory to the agreement.
2. Area of Potential Effects (APE): For standing structures not adjacent to or located within the boundaries of a National Register or eligible district, qualified staff shall define the APE as the individual structure when the proposed Undertaking is limited to the repair or rehabilitation (as defined in 36 CFR § 68.3(b)). For all other Undertakings, Qualified staff shall determine the APE in consultation with the SHPO. FEMA may consider information provided by other parties, such as local governments and the public, when establishing the APE.
3. Identification and Evaluation: Qualified staff shall determine, in consultation with the SHPO and participating Tribe(s) if the APE contains historic properties, including archaeological sites or properties of religious or cultural significance, that are listed in or potentially eligible for the National Register. This may include the review of

documentation provided by the State, Subrecipient, local governments, and the public, in coordination with the SHPO.

- a. Level of Effort: FEMA shall make a reasonable and good faith effort to identify historic properties in accordance with 36 CFR § 800.4(b)(1). FEMA may consult with the SHPO to determine the level of effort and methodology necessary to identify and define the limits of these properties. For historic properties of religious and cultural significance to affected Tribe(s), FEMA shall consult with the affected Tribe(s) to determine geographical areas containing historic properties of Tribal religious and cultural significance that may be affected by an Undertaking in order to determine the necessary level of effort to identify and evaluate or avoid any such historic properties.
  - b. National Historic Landmarks: When FEMA determines an Undertaking has the potential to affect an NHL, FEMA shall notify the Secretary through the NPS NHL Program Manager of the Intermountain Regional Office in addition to the SHPO, affected Tribe(s) and other consulting parties. The purpose of this notification is to ensure early coordination for the Undertaking which FEMA later may determine adversely affects the NHL as outlined in Stipulation II.C.6.
  - c. Determinations of Eligibility: FEMA shall review or determine National Register eligibility based on identification and evaluation efforts, and consult with SHPO and participating Tribe(s) regarding these determinations. Should the SHPO or participating Tribe(s) disagree with the determination of eligibility, FEMA shall either:
    - i. Elect to consult further with the objecting party until the objection is resolved;
    - ii. Treat the property as eligible for the National Register; or
    - iii. Obtain a determination of eligibility from the Keeper of the National Register in accordance with 36 CFR § 63.2(d)-(e) and 36 CFR § 800.4(c)(2).
4. Findings of No Historic Properties Affected: FEMA shall make a finding of “no historic properties affected” under the following circumstances:
- a. If no historic properties are present in the APE;
  - b. The Undertaking is designed to avoid historic properties, including archaeological sites or properties of religious or cultural significance to participating Tribe(s); or
  - c. The Undertaking does not affect the character defining features of a historic property.
  - d. FEMA shall notify the SHPO, participating Tribe(s), and any other consulting parties of this finding and provide supporting documentation in accordance with

36 CFR § 800.11(d). Unless the SHPO or participating Tribe(s) objects to the finding within the timeframe outlined in Stipulation I.D., Timeframes and Communications, FEMA shall complete the Section 106 review.

- e. If the SHPO or participating Tribe(s) objects to a finding of “no historic properties affected,” FEMA shall consult with the objecting party to resolve the disagreement.
  - i. If the objection is resolved, FEMA either may proceed with the Undertaking in accordance with the resolution or reconsider effects on the historic property by applying the criteria of adverse effect pursuant to Stipulation II.C.5, Application of the Criteria of Adverse Effect, below.
  - ii. If FEMA is unable to resolve the disagreement, it will forward the finding and supporting documentation to the ACHP and request that the ACHP review FEMA’s finding in accordance with 36 CFR § 800.4(d)(1)(iv)(A) through 36 CFR § 800.4(d)(1)(iv)(C). FEMA will consider the ACHP’s recommendation in making its final determination. If FEMA’s final determination is to reaffirm its “no historic properties affected” finding, the Section 106 review of the Undertaking will have concluded. Otherwise, FEMA will proceed to Stipulation II.C.5., below.

5. Application of the Criteria of Adverse Effect: If FEMA finds an Undertaking may affect historic properties in the APE, including properties of religious or cultural significance to affected Tribe(s), FEMA shall apply the criteria of adverse effect to historic properties within the APE(s), taking into account the views of the consulting parties and public concerning effects in accordance with 36 CFR § 800.5(a).

- a. If FEMA determines that an Undertaking does not meet the adverse effect criteria FEMA shall propose a finding of “no adverse effect” in accordance with 36 CFR § 800.5(b).
  - i. FEMA shall notify the SHPO, participating Tribe(s), and all other consulting parties of its finding and provide supporting documentation pursuant to 36 CFR §800.11(e).
  - ii. Unless a consulting party objects within the applicable timeframe outlined in Stipulation I.D. Timeframes and Communications, FEMA will proceed with its “no adverse effect” determination and complete the Section 106 review.
  - iii. If a consulting party objects to a finding of “no adverse effect,” FEMA will consult with the objecting party to resolve the disagreement.
    - A) If the objection is resolved, FEMA shall proceed with the Undertaking in accordance with the resolution, or



- B) If the objection cannot be resolved, FEMA shall request that the ACHP review the findings in accordance with 36 CFR § 800.5(c)(3)(i)-(ii) and submit the required supporting documentation. FEMA shall consider the ACHP's comments in making its final determination.
- b. If FEMA finds the Undertaking may adversely affect historic properties, FEMA shall request through TDEM that the Subrecipient revise the scope of work to substantially conform to the Standards for standing structures, or avoid or minimize adverse effects for National Register listed or eligible archaeological properties.
  - i. If the Subrecipient modifies the scope of work to avoid the adverse effect, FEMA shall notify the SHPO and consulting parties, and provide supporting documentation. Unless the SHPO or another consulting party makes a timely objection in accordance with the applicable timeframe outlined in Stipulation I.E. Timeframes and Communications, FEMA shall proceed with its "no adverse effect" determination, including any conditions, and complete the Section 106 review.
  - ii. If an Undertaking is not modified to avoid the adverse effect(s), FEMA shall initiate consultation to resolve the adverse effect(s) in accordance with Stipulation II.C.6. Resolution of Adverse Effects.
- 6. Resolution of Adverse Effects: If FEMA determines that an Undertaking may adversely affect a historic property, it shall resolve the effects of the Undertaking in consultation with SHPO, TDEM, the Subrecipient, participating Tribe(s), the ACHP, if participating, and other consulting parties, by one of the following methods depending on the severity of the adverse effect(s) as well as determination of the historic property's significance on a local, state, or national level. When FEMA determines an Undertaking will adversely affect an NHL, FEMA shall notify and invite the Secretary and ACHP to participate in consultation in accordance with 36 CFR § 800.10. When the ACHP participates in consultation related to an NHL, the ACHP shall report the outcome of the consultation to the Secretary and the FEMA Administrator.
  - a. Abbreviated Consultation Process: After taking into consideration the significance of the historic properties affected, the severity of the adverse effect(s), and avoidance or minimization of the adverse effect(s), FEMA may propose in writing to the consulting parties to resolve the adverse effects of the Undertaking through the application of one or more Treatment Measures outlined in Appendix C as negotiated with the SHPO, TDEM, the Subrecipient, participating Tribe(s), and other consulting parties. The use of these Treatment Measures will not require the execution of a Memorandum of Agreement (MOA) or Programmatic Agreement.
    - i. In consultation with the SHPO, TDEM, Subrecipient, participating Tribe(s), and other consulting parties, FEMA shall propose in writing the implementation of a specific Treatment Measure, or combination of Treatment

Measures with the intent of expediting the resolution of adverse effects and provide documentation as required by 36 CFR § 800.11(e) and subject to the confidentiality provisions of 36 CFR § 800.11(c). Unless a consulting party or the ACHP objects within fifteen (15) days of receipt of FEMA's proposal, FEMA shall proceed with the use of Treatment Measures and will complete the Section 106 review.

- ii. If any of the consulting parties or the ACHP objects within the 15 day review and comment period to the resolution of adverse effects through the application of the Abbreviated Consultation Process, FEMA shall resolve the adverse effect(s) using procedures outlined below in Stipulation II.C.6(b), Memorandum of Agreement (MOA) or Stipulation II.C.6(c). Programmatic Agreement.
  - iii. Because funding and implementation details of Treatment Measures for specific Undertakings may vary by program, FEMA shall provide written notice to the consulting parties within sixty (60) days of the completion of the Treatment Measures. This written notice will serve as confirmation that the Treatment Measures for a specific Undertaking have been implemented. FEMA also shall include information pertaining to the completion of Treatment Measures in the annual report pursuant to Stipulation I.B.1(d), FEMA Roles and Responsibilities.
- b. Memorandum of Agreement: FEMA shall provide the ACHP with an adverse effect notice in accordance with 36 CFR § 800.6(a)(1) if it has not already provided such under the Abbreviated Consultation Process of this Agreement, if a consulting party or the ACHP objects in accordance with Stipulation II.C.6(a)(ii), or if FEMA, in consultation with the SHPO, TDEM, the Subrecipient, participating Tribe(s), and other consulting parties, has determined that an MOA would be more appropriate to resolve the adverse effect(s). In consultation with the other consulting parties, including the ACHP (if participating), FEMA shall develop an MOA in accordance with 36 CFR § 800.6(c) to agree upon treatment measures to avoid, minimize, and/or mitigate adverse effects on historic properties. The MOA may also include treatment measures that serve an equal or greater public benefit in promoting the preservation of historic properties in lieu of more traditional treatment measures.
- c. Programmatic Agreement: Should the execution of an MOA be inappropriate given the similar nature of effects on historic properties, the inability to determine effects prior to approval of an Undertaking, or where other circumstances warrant, FEMA, the SHPO, participating Tribe(s), the ACHP, if participating, and any other consulting party may consult to develop a Programmatic Agreement in accordance with 36 CFR § 800.14(b) to identify programmatic conditions or treatment measures to govern the resolution of potential or anticipated adverse effects from certain complex project situations for an Undertaking or for multiple but similar Undertakings by a single Subrecipient.

- d. Objections: Should any signatory, consulting party, or member of the public object within the timeframes established by this Agreement to any plans, specifications, or actions pursuant to resolving an adverse effect, FEMA shall consult further with the objecting party to seek resolution. If FEMA determines the objection cannot be resolved, FEMA shall address in accordance with Stipulation IV.B., Dispute Resolution.

#### **D. Debris Operations**

Operations include staging, collecting, storing, chipping, burning, burying, or disposing of debris.

1. A Subrecipient may provide available information about emergency debris operations to SHPO for review and comment.
  - a. This information will include: the location of each site of activity, planned or completed debris operations, and any additional information required on the most current THC debris form.
  - b. The Subrecipient will provide this information by the most expeditious, reasonable, and appropriate means possible: in writing, by facsimile, or electronically.
2. SHPO will comment within 7 days after receipt of sufficient information.
  - a. SHPO may approve an Undertaking and notify FEMA if it determines that the Undertaking will not adversely affect a known Historic Property or a property that is at least 45 years old or meets the Allowances, Appendix B. The SHPO may request that a Subrecipient modify the scope of work, if feasible, to avoid adverse effects on Historic Properties. TDEM will ensure that its Subrecipient implements any agreed upon modifications before proceeding.
  - b. Should SHPO make a “no historic properties affected” or “no adverse effect” determination, FEMA may request sufficient documentation of determination from the SHPO when an Subrecipient cannot provide it.”
3. Should FEMA concur with the determination, it will document it in the project file and may fund the Undertaking. Otherwise, FEMA may consult with SHPO for not more than 7 days to resolve any objection, or will review the Undertaking pursuant to Stipulation II.C., Standard Project Review.
4. The SHPO will review debris operations only after it receives notification of a Disaster declaration from FEMA as stated in Stipulation I.B.1(k).

5. TDEM will provide information to its Subrecipients about this review process through the Debris Management briefing, Grant Management training, Applicant Briefings and other appropriate methods.

### **III. OTHER CONSIDERATIONS**

- A. Changes to an Approved Scope of Work: TDEM is required to notify FEMA and will require its Subrecipients to notify it immediately when a Subrecipient proposes changes to an approved scope of work for an Undertaking.
  1. If FEMA determines that all new project elements conform to one or more allowances in Appendix B of this Agreement, FEMA shall complete the Section 106 review process for the new project elements by documenting this determination in the project file, without SHPO review or notification.
  2. If FEMA determines any new project elements do not conform to one or more allowances listed in Appendix B of this Agreement, FEMA shall conduct Section 106 review for the new project elements in accordance with Stipulation II.B, Expedited Review for Emergency Undertakings, or Stipulation II.C, Standard Project Review.
- B. Unexpected Discoveries, Previously Unidentified Properties, or Unexpected Effects:
  1. Upon notification by a Subrecipient of an unexpected discovery, or if it appears that an Undertaking has affected a previously unidentified property or affected a known historic property in an unanticipated manner, in accordance with Stipulation I.B.3(d), TDEM Roles and Responsibilities, TDEM shall immediately notify FEMA and require the Subrecipient to:
    - a. Stop construction activities within 100 feet of the discovery. Stop activities within 300 feet for burials or funerary objects.
    - b. Take all reasonable measures to avoid or minimize harm to the property until FEMA has completed consultation with the SHPO, participating Tribe(s), and any other consulting parties. Upon notification by TDEM of a discovery, FEMA shall immediately notify the SHPO, participating Tribe(s), and other consulting parties that may have an interest in the discovery, previously unidentified property or unexpected effects, and consult to evaluate the discovery for National Register eligibility and/or the effects of the undertaking on historic properties.
    - c. If human remains are discovered, notify the local law enforcement office and coroner/medical examiner in accordance with applicable State statute(s), and protect the remains from any harm. Discoveries of human remains on Federal or Tribal lands shall be subject to the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. §3001-3013, 18 U.S.C. § 1170); \_8

Texas Health and Safety Code § 711–715; 13 Texas Administrative Code § 22; and ARPA, as applicable.

d. Assist FEMA in completing the following actions, as required:

- i. FEMA shall consult with the SHPO, participating Tribe(s), and other consulting parties in accordance with the consultation process outlined in Stipulation II, Project Review, to develop a mutually agreeable action plan with timeframes to identify the discovery or previously unidentified property, take into account the effects of the Undertaking, resolve adverse effects if necessary, and ensure compliance with applicable Federal, State, and local statutes.
- ii. FEMA shall coordinate with TDEM and the Subrecipient regarding any needed modification to the scope of work for the Undertaking necessary to implement recommendations of the consultation and facilitate proceeding with the Undertaking.
- iii. In cases where discovered human remains are determined to be Native American, FEMA shall consult with the appropriate Tribal representatives and SHPO. In addition, FEMA shall follow the guidelines outlined in the ACHP's *Policy Statement Regarding the Treatment of Burial Sites, Human Remains, and Funerary Objects* (2007) and any state-specific policies that may be in force.

C. Curation

1. In cases where archaeological survey and testing are conducted on private land, any recovered collections remain the property of the land owner. In such instances, FEMA and TDEM, in coordination with the SHPO, and affected Tribe(s), shall encourage land owners to donate the collection(s) to an appropriate public or Tribal entity. In cases where the property owner wishes to transfer ownership of the collection(s) to a public or Tribal entity, and in the case of artifacts recovered from public lands, FEMA and TDEM shall ensure that recovered artifacts and related documentation are curated in a suitable repository as agreed to by FEMA, SHPO, and affected Tribe(s), and following applicable State or Tribal guidelines.
2. When an Undertaking will adversely affect a National Register listed or eligible archaeological site, FEMA may treat the adverse effect by providing for the recovery of significant information through archaeological data recovery. FEMA shall consult with the SHPO, participating Tribe(s), and other consulting parties to prepare a research design (data recovery plan), including a specific plan for curation. This plan will incorporate any relevant curation provisions contained in the SHPO's Guidelines for conducting archaeological studies, ACHP's *Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites* published in the Federal Register (64 Federal Register 27085-27087 (May 18, 1999)), or other provisions agreed to by the consulting

parties. No excavation should be initiated before FEMA's acceptance and approval of the curation plan.

- a. As stipulated in the curation plan, artifacts, as well as field and laboratory records sufficient to document the collection, shall be curated at a facility, preferably in-state, that meets the standards of, and in accordance with the provisions of 36 CFR Part 79, "Curation of Federally Owned and Administered Archaeological Collections," and applicable State or Tribal requirements.

D. Review of Undertakings Initiated Before Initiation or Completion of Section 106 Review

1. In accordance with Section 110(k) of the NHPA, FEMA shall not grant assistance to a Subrecipient who, with intent to avoid the requirements of this Agreement or Section 106 of the NHPA, has intentionally significantly and adversely affected a historic property to which the assistance would relate, or having legal power to prevent it, allowed an adverse effect to occur. However, if after consultation with the SHPO, appropriate Tribes(s), and ACHP, FEMA determines that extraordinary circumstances justify granting assistance despite the adverse effect created or permitted by the Subrecipient, FEMA shall complete consultation for the Undertaking pursuant to the terms of this Agreement.
2. FEMA shall specifically advise TDEM and shall require that TDEM advise its Subrecipients in writing that they may jeopardize Federal funding if work is performed without all required local, State, and Federal licenses, permits, or approvals, including the completion of the Section 106 process. FEMA also shall document this requirement in its Record of Environmental Consideration, as applicable, as well as all project approval documents specifying the project scope and limits, and containing all conditions and caveats.
3. In circumstances where FEMA determines a Subrecipient has initiated an Undertaking without willful intent to avoid the requirements of this Agreement or Section 106 of NHPA, FEMA shall proceed as follows:
  - a. Determine if the Undertaking is of a type for which FEMA has no further Section 106 responsibilities, namely:
    - i. An Undertaking listed in Stipulation I.A.8; or
    - ii. An immediate rescue and salvage operation in accordance with 36 CFR § 800.12(d); or
    - iii. A Programmatic Allowance as described under Stipulation II.A.
  - b. In any such cases listed in Stipulation III.D.3.a., above, FEMA shall document this determination in the project files, and consider the Undertaking Section 106 compliant.

- c. If FEMA determines the Undertaking would have required Section 106 review, FEMA shall coordinate with the SHPO and appropriate Tribe(s) to determine if consultation is feasible.
  - i. If after coordination with the SHPO and appropriate Tribe(s), FEMA determines that consultation is feasible, FEMA shall review the Undertaking in accordance with Stipulation II.C, Standard Project Review.
  - ii. If after coordination with the SHPO and appropriate Tribe(s), FEMA determines that review is infeasible, FEMA shall document the outcome to the Section 106 review process, and inform the Federal Preservation Officer (FPO) of the outcome, and the applicable FEMA program shall take the outcome into account before making a decision whether to fund the Undertaking. FEMA shall provide written notification of its funding decision to the SHPO, appropriate Tribe(s) and the ACHP.

#### **IV. IMPLEMENTATION OF AGREEMENT**

##### **A. Amendments**

- 1. If any Signatory to the Agreement determines that an amendment to the terms of this Agreement must be made, the Signatories shall consult for no more than 30 days to seek amendment of the Agreement.
- 2. An amendment to this Agreement, exclusive of the appendices, shall be effective only when it has been signed by the Signatories.
- 3. Appendix A (FEMA Programs), Appendix B (Programmatic Allowances), Appendix C (Treatment Measures), and Appendix D (Other Federal Agency Accepting Terms of Agreement) may be amended at the request of FEMA or another Signatory party in the following manner:
  - a. FEMA, on its own behalf or on behalf of another Signatory, shall notify all Signatory parties to this Agreement of the intent to modify the current Appendix or Appendices and shall provide a draft of the updated Appendix or Appendices to all Signatory parties.
  - b. If no Signatory party objects in writing within 30 days of receipt of FEMA's proposed modification, FEMA shall date and sign the amended Appendix and provide a copy of the amended Appendix to all Signatories.

##### **B. Dispute Resolution**

- 1. Should a Signatory object in writing within an applicable timeframe to a plan, specification, determination, or action produced pursuant to this Agreement, FEMA will consult with that party by the most expeditious and appropriate means possible.

Should FEMA object in writing, it will consult with the other Signatories, as appropriate, to resolve its objection.

2. Should FEMA resolve the objection within 14 days, the disputed action may proceed accordingly.
3. Should FEMA determine that the objection will not be resolved within 30 days; FEMA will forward all relevant documentation to ACHP, including FEMA's proposed resolution. Within 30 days after receipt, ACHP will:
  - a. Concur in FEMA's resolution; or
  - b. Provide FEMA with recommendations, which FEMA will take into account in resolving the objection; or
  - c. Notify FEMA that it will comment in accordance with 36 CFR § 800.7(c), and proceed to do so. FEMA will take these comments into account in accordance with 36 CFR § 800.7(c)(4).
4. FEMA shall take into account any ACHP recommendations or comments, and any comments from the other Signatories, in reaching a final decision regarding the objection. FEMA shall provide in writing to the ACHP and Signatories a summary of its final decision before authorizing any disputed action to proceed.
5. Should ACHP not respond within 30 days, FEMA may assume ACHP has no comment and proceed with its proposed resolution to the objection after providing the ACHP and Signatories a written summary of its final decision.
6. Any ACHP response will pertain only to the subject in dispute, and the Signatories will continue to fulfill all actions of this Agreement that are not subject to dispute.
7. The Subrecipient may continue activities unrelated to the objection while it is being resolved.
8. Any objection about National Register eligibility that is not resolved pursuant to this Stipulation will be resolved in accordance with 36 CFR § 800.4(c)(2).

#### C. Severability and Termination

1. Severability: Should a provision of this Agreement be deemed contrary to, or in violation of, an applicable U.S., State, or tribal law or regulation, that provision will be deemed null and void, and all other provisions of the Agreement will remain in effect.
2. Termination of the Agreement: FEMA, SHPO, or TDEM may terminate this Agreement by providing a 30-day written notice to all other Signatories, provided that the Signatories consult during this period to seek an amendment or other action that



would prevent termination. Should the Agreement be terminated, FEMA will comply with 36 CFR §§ 800.3 through 800.7, or § 800.14.

3. Termination by Subsequent Agreement or Alternate Procedures: This Agreement may be terminated without consultation by execution of a subsequent Agreement that explicitly terminates or supersedes it, or by FEMA's implementation of Alternate Procedures pursuant to 36 CFR § 800.14(a).
4. A participating Tribe organization may notify the other Signatories that it is fully withdrawing from participation in the Agreement. Following such a withdrawal, FEMA shall review undertakings that may affect historic properties of religious and cultural significance to the Tribe, and Undertakings that occur on the Tribal lands of the relevant Tribe, in accordance with 36 CFR §§ 800.3 through 800.7, 36 CFR § 800.8(c), or an applicable alternative under 36 CFR § 800.14. Withdrawal from this Agreement by a Tribe does not terminate the Agreement. At any time that this Agreement remains in effect, a Tribe that has withdrawn from the Agreement may notify FEMA, the Recipient(s), and SHPO in writing that it has rescinded its notice withdrawing from participation in the Agreement.

#### D. Duration and Extension

1. Duration: This Agreement shall remain in effect from the date of execution for a period not to exceed 7 years unless otherwise extended pursuant to Stipulation IV.D.2 below, or terminated pursuant to Stipulation IV.C.2 or IV.C.3, Severability and Termination. The Agreement shall remain in effect for Declarations made prior to expiration of the Agreement in order to minimize delays in delivery of FEMA assistance.
2. Extension: The Signatories may collectively agree to extend this Agreement to cover additional calendar years, or portions thereof, through an amendment per Stipulation IV.A., provided that the original Agreement has not expired.

#### E. Execution and Implementation

1. This Agreement may be executed in counterparts, with a separate page for each signatory, and shall become effective on the date of the final signature of FEMA, TDEM, and SHPO.
2. FEMA shall ensure that each signatory party is provided with a complete copy of the Agreement, including an original set of signatures.
3. Execution and implementation of this Agreement evidence that FEMA has afforded ACHP a reasonable opportunity to comment on FEMA's administration of all referenced Programs, and that FEMA has satisfied its Section 106 responsibilities for all individual Undertakings of its Programs.

**TEXAS PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY;  
THE TEXAS HISTORICAL COMMISSION;  
THE TEXAS DIVISION OF EMERGENCY MANAGEMENT; and  
PARTICIPATING TRIBES**

**FEDERAL EMERGENCY MANAGEMENT AGENCY**

By: **KEVIN R JAYNES** Digitally signed by KEVIN R JAYNES  
Date: 2022.03.10 08:11:10 -06'00'

Date: \_\_\_\_\_

Kevin Jaynes  
Regional Environmental Officer  
Federal Emergency Management Agency - Region VI

By: **GEORGE A ROBINSON** Digitally signed by GEORGE A ROBINSON  
Date: 2022.03.10 21:04:33 -06'00'

Date: \_\_\_\_\_

George A. Robinson  
Regional Administrator  
Federal Emergency Management Agency - Region VI

**TEXAS PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY;  
THE TEXAS HISTORICAL COMMISSION;  
THE TEXAS DIVISION OF EMERGENCY MANAGEMENT; and  
PARTICIPATING TRIBES**

**TEXAS HISTORICAL COMMISSION**

By: Mark Wolfe

Mark Wolfe  
State Historic Preservation Officer  
Texas Historical Commission

Date: 3/15/22

**TEXAS PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY;  
THE TEXAS HISTORICAL COMMISSION;  
THE TEXAS DIVISION OF EMERGENCY MANAGEMENT; and  
PARTICIPATING TRIBES**

**TEXAS DIVISION OF EMERGENCY MANAGEMENT**

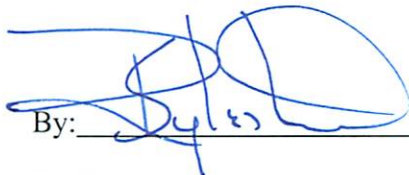
By: \_\_\_\_\_

W. Nim Kidd  
Chief  
Texas Division of Emergency Management

Date: 3/16/22

**TEXAS PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY;  
THE TEXAS HISTORICAL COMMISSION;  
THE TEXAS DIVISION OF EMERGENCY MANAGEMENT; and  
PARTICIPATING TRIBES**

**ALABAMA-COUSHATA TRIBE OF TEXAS**

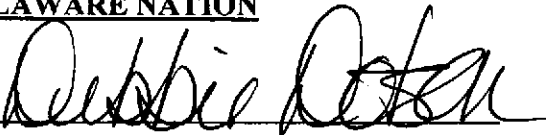
By:  \_\_\_\_\_


Ricky Sylestine  
Tribal Council Chairman  
Alabama-Coushatta Tribe of Texas

Date: 4-29-2022

**TEXAS PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY;  
THE TEXAS HISTORICAL COMMISSION;  
THE TEXAS DIVISION OF EMERGENCY MANAGEMENT; and  
PARTICIPATING TRIBES**

**DELAWARE NATION**

By: 

Date: 

Deborah Dotson  
President  
Delaware Nation, Oklahoma

## Appendix A

### FEMA Program Summaries

This Appendix may be amended in accordance with Stipulation IV.A, Amendments.

#### **Disaster Programs**

The following programs are authorized under Titles IV and V of the Stafford Act.

##### *Advance of Nonfederal Share*

The Stafford Act and its implementing regulations authorize FEMA to advance or loan to a state, tribal government, local government, or Subrecipient the portion of PA for which the state or tribal government is responsible pursuant to the cost-sharing provisions of the Stafford Act.

##### *Community Disaster Loan Program*

The Stafford Act authorizes FEMA to make community disaster loans to help local governments that have incurred significant revenue losses due to a presidentially declared major disaster if necessary for a local government to perform its governmental functions.

##### *Fire Management Assistance Grant Program (FMAG)*

The FMAG is available to State, Tribal, and local governments for the mitigation, management, and control of fires on publicly or privately owned lands.

##### *Hazard Mitigation Grant Program (HMGP)*

The HMGP provides grants to States, Territories, Tribes, local governments, and private nonprofit organizations to implement long-term hazard mitigation measures after a Declaration.

##### *Individual Assistance Programs (IA)*

The Stafford Act authorizes a wide variety of direct and financial assistance to individual and households affected by a Declaration, and FEMA has implemented these authorities under the umbrella of its Individual Assistance Program, which include crisis counseling (Section 416); disaster legal services (Section 415); unemployment assistance (Section 410); food coupons (Section 412); case management (Section 426); and funeral services, minor home repairs, and temporary housing assistance (Section 408). It should be noted that other Federal agencies provide disaster assistance programs, services, and activities to individuals as well, including the U.S. Small Business Administration, U.S. Department of Agriculture, and U.S. Department of Labor, but these other assistance programs are not subject to the terms of this Agreement.

##### *Public Assistance Program (PA)*

The Stafford Act authorizes federal assistance for state, territorial, tribal, and local governments and certain private non-profit entities to respond to emergencies and to respond to and recover from major disasters. FEMA has administratively combined these authorities under the umbrella of its Public Assistance Program. The Public Assistance Program provides a broad range of

assistance. First, it provides direct services and financial assistance for emergency assistance, such as emergency evacuation, sheltering, and debris removal. Second, it provides financial assistance for the permanent restoration of disaster-damaged facilities. Third, it includes emergency transportation and emergency communications assistance.

### **Resilience Programs – Mitigation**

#### *Community Assistance Program – State Services Support Elements (CAP-SSSE)*

The CAP-SSSE Program provides financial assistance to states to provide technical assistance to communities in the National Flood Insurance Program (NFIP) and to evaluate community performance in implementing NFIP floodplain management activities.

#### *Cooperating Technical Partners Program (CTP)*

The CTP Program provides financial assistance to states, local and Tribal governments, institutions of higher education, and other organizations to build upon and enhance the existing capabilities of these entities to increase local involvement in, and ownership of flood hazard identification, flood map maintenance, risk assessment, and risk communication to encourage responsible floodplain management and support their jurisdictional responsibilities as participating members of the NFIP.

#### *Flood Mitigation Assistance Program (FMA)*

The FMA Program provides grants to States, Territories, Tribal entities, and local governments for planning and carrying out activities designed to reduce the risk of flood damage to structures covered under contracts for flood insurance under the National Flood Insurance Program (NFIP).

#### *National Earthquake Hazard Reduction Program (NEHRP)*

The NEHRP provides financial assistance to certain organizations to mitigate earthquake losses in the United States through basic and directed research and implementation activities.

#### *National Public Infrastructure Pre-Disaster Hazard Mitigation Program (aka Building Resilient Infrastructure and Communities BRIC)*

Authorized by Section 1234 of the Disaster Recovery Reform Act, this Program is funded as a six (6) percent set aside from disaster expenses, to allow for a greater investment in a broad range of eligible mitigation activities before a disaster. Guiding principles of the BRIC program are supporting communities through capability- and capacity-building; encouraging and enabling innovation; promoting partnerships; enabling large projects; maintaining flexibility; and providing consistency.

### **Resilience Programs – Preparedness**

#### *Assistance to Firefighters Grant Program (AFG)*

The AFG program provides funding for purchase of equipment and retrofit or construction of fire stations to improve first responder capabilities.



#### *Emergency Management Performance Grants (EMPG)*

The purpose of the EMPG is to provide Federal funds to states to assist state, local, territorial, and tribal governments in preparing for all hazards emergency preparedness capabilities.

#### *Homeland Security Grant Program (HSGP)*

The HSGP plays an important role in the implementation of the National Preparedness System by providing funding to states and urban areas to prevent, protect against, mitigate, respond to, and recover from acts of terrorism and other threats.. HSGP is comprised of three interconnected grant programs.: (1) the State Homeland Security Program (SHSP), (2) the Urban Areas Security Initiative (UASI), and (3) the Operation Stonegarden (OPSG). Together, these grant programs and other future projects that may be included under the HSGP fund a range of preparedness activities, including planning, organization, equipment purchase, training, exercises, management, and administration.

#### *State Homeland Security Program (SHSP)*

The SHSP supports state, tribal, territorial, and local preparedness activities that address high priority preparedness gaps across all core capabilities that support terrorism preparedness.

#### *Urban Areas Security Initiative (UASI) Program*

The UASI program assists high-threat, high-density Urban Areas in efforts to build, sustain, and deliver the capabilities necessary to prevent, protect against, mitigate, respond to, and recover from acts of terrorism.

#### *Operation Stonegarden (OPSG)*

The OPSG Program supports enhanced cooperation and coordination among Customs and Border Protection (CBP), United States Border Patrol (USBP), and Federal, state, local, tribal, and territorial law enforcement agencies. The OPSG Program provides funding to support joint efforts to secure the United States' borders along routes of ingress from international borders to include travel corridors in states bordering Mexico and Canada, as well as states and territories with international water borders.

#### *Intercity Bus Security Grant Program (IBSGP)*

The IBSGP provides funding to to strengthen the Nation's critical infrastructure against risks associated with potential terrorist attacks. IBSGP provides funding for critical infrastructure hardening and other physical security enhancements to support transit operators serving the Nation's highest-risk metropolitan areas.

#### *Intercity Passenger Rail – Amtrak (IPR) Program*

Provides funds to protect critical surface transportation infrastructure and the traveling public from acts of terrorism and increase the resilience of the Amtrak rail system.

#### *Integrated Public Alert and Warning System (IPAWS)*

The Integrated Public Alert and Warning System (IPAWS) was established by Executive Order 13407 in 2006. In the event of a national emergency, the President may use IPAWS to send a message to the American people quickly and simultaneously through multiple communications pathways. FEMA has identified several radio transmission sites across the nation with significantly powerful signals for this purpose, and FEMA is responsible for upgrading, maintaining, and managing the agency installed and owned auxiliary fuel systems at each of these radio transmission sites.

#### *National Dam Safety Program (NDSP)*

The NDSP provides financial assistance to states to strengthen their dam safety programs, to include activities such as dam safety training, increasing dam inspections, increasing the submission and testing of emergency action plans, coordinating with state preparedness officials, identification of dams to be repaired or removed, and conducting dam safety awareness workshops. NDSP also administers the Rehabilitation of High Hazard Potential Dams Grant Program which provides technical, planning, design, and construction assistance in the form of grants for rehabilitation of eligible high hazard potential dams.

#### *Nonprofit Security Grant Program (NSGP)*

NSGP provides funding in order to integrate the preparedness activities of nonprofit organizations that are at high risk of a terrorist attack with broader state and local preparedness efforts.

#### *Port Security Grant Program (PSGP)*

The PSGP provides funding to port authorities, facility operators, and State and local agencies for activities associated with implementing Area Maritime Security Plans (AMSPs), facility security plans and other port-wide risk management efforts. PSGP funds are intended to improve port-wide maritime security risk management; enhance maritime domain awareness; support maritime security training and exercises; and maintain or reestablish maritime security mitigation protocols that support port recovery and resiliency capabilities with a focus on weapons of mass destruction, cybersecurity, and attacks on soft targets.

#### *Staffing for Adequate Fire and Emergency Response Grant Program (SAFER)*

The SAFER Program provides financial assistance to fire departments and volunteer firefighter interest organizations to help them increase or maintain the number of training front line firefighters available in their communities.

#### *Transit Security Grant Program (TSGP)*

The TSGP provides funds to eligible public transportation systems (which include intra-city bus, ferries and all forms of passenger rail) for the protection of critical transportation infrastructure and the travelling public from acts of terrorism and to increase the resilience of transit infrastructure.

*Tribal Homeland Security Grant Program (THSGP)*

THSGP provides funding directly to eligible tribes to support the building, sustainment, and delivery of core capabilities to enable Tribes to strengthen their capacity to prevent, protect against, mitigate, respond to, and recover from potential terrorist attacks.

## Appendix B

### Programmatic Allowances

This list of Allowances enumerates FEMA funded activities that, based on FEMA experience, have no effect or limited effect on historic properties if implemented as specified in this Appendix and will not require review by the SHPO and participating Tribe(s).

The allowances consist of two tiers – First Tier and Second Tier. Staff may apply First Tier allowances without meeting any professional historic preservation qualification standards, while only staff meeting the applicable SOI Professional Qualifications Standards in accordance with Stipulation I.B(1)(a) of this Agreement may apply Second Tier allowances.

When referenced in the allowances, “in-kind” shall mean that it is either the same or a similar material, and the result shall match all physical and visual aspects, including form, color, texture, finish, dimension, pattern, and workmanship. The National Park Service (NPS) *Preservation Briefs* provide guidance on preserving, rehabilitating and restoring historic buildings. The Briefs can be found at <http://www.nps.gov/tps/how-to-preserve/briefs.htm>. The in-kind repair provided for in both First and Second Tier allowances in Appendix B should be limited to pre-existing architectural features and physical components of buildings and structures.

When referenced in the allowances, “previously disturbed soils” shall refer to soils that have been impacted in the recent past as a result of human activity included but not limited to levelling, grading, filling, clearing, agricultural activities, construction, placement of gravel or concrete, or other mechanical activities that have a known depth of impact. These activities can be identified and documented via review of aerial photography and soils data. Exclusions include natural erosion processes, bioturbation (animal or vegetative), or other disturbances that cannot be definitively identified and agreed upon by SOI Archaeological staff.

For the purposes of these Allowances, “minor upgrades” refer to upgrading or replacement in a manner that substantially conforms to preexisting design, function, and location. This may include a change in materials when not associated with a historic property.

Per Stipulation II.A., when FEMA proposes to perform work that falls within the Programmatic Allowances below, but that will affect a property that is a State Antiquities Landmark (SAL), Recorded Texas Historic Landmark (RTHL), or any current or former county courthouse, FEMA must notify SHPO of the work. For any work conducted on non-federal public land, FEMA shall comply with the notification requirements of the Antiquities Code of Texas per 13 Texas Administrative Code § 26.7.

## **I. First Tier Allowances**

**A. GROUND DISTURBING ACTIVITIES AND SITE MODIFICATION**, when proposed activities described below substantially conform to the original footprint and/or are performed in previously disturbed soils, including the area where the activity is staged.

### **1. Debris and Snow Removal**

- a. Debris removal and collection, including removal of uprooted trees, limbs and branches from public rights of way and public areas, as well as the transport and disposal of such waste to existing licensed waste facilities or landfills. This includes non-hazardous debris staging, reduction, and disposal areas at licensed transfer stations, or existing hard-topped or graveled surfaces (e.g. parking lots, roads, athletic courts) but not the creation of new or temporary access roads. *This Allowance does not include the removal of standing trees.*
- b. Removal of debris from private property provided that buildings are not affected, heavy equipment is limited to existing rights-of-way, ground disturbance is minimal and in-ground elements, such as driveways, walkways or swimming pools, are left in place. *This Allowance does not apply to removal of intact or partially standing structures or to the removal of partially buried modern materials. If heavy equipment will be used on the property, refer to the second tier of allowances for Debris and Snow Removal II.A.1.b.*
- c. Chipping and disposal of woody debris by broadcasting within existing rights-of-way.
- d. Sediment removal from man-made drainage facilities, including retention/detention basins, ponds, ditches, and canals, in order to restore the facility to its pre-disaster condition. The sediment may be used to repair eroded banks or disposed of at an existing licensed or permitted spoil site.
- e. Dewatering flooded developed areas by pumping.

### **2. Temporary Structures and Housing**

- a. Staging, Installation and removal of temporary structures for use as school classrooms, offices, or temporary shelters for essential public service agencies, such as police, fire, rescue and medical care, as well as temporary housing for disaster personnel and survivors at the following types of locations:

- i. Single units on private residential sites when all utilities are installed above ground or tie into pre-existing utility lines.
  - ii. Existing RV/Mobile Home Parks and campgrounds with pre-existing utility hookups.
  - iii. Paved areas, such as parking lots and paved areas at such facilities as conference centers, shopping malls, airports, industrial port facilities business parks, and military bases when all utilities are installed above ground or tie into pre-existing utility lines.
  - iv. Sites that have been previously cleared and prepared for planned construction, such as land being developed for public housing, office buildings, city parks, ball fields, schools, etc. when all utilities are installed above-ground or tie into pre-existing utility lines.
  - v. Areas previously filled to depths of at least six feet so that subsurface utilities can be installed.
- b. Temporary repair to single family, residential properties to ensure safe shelter with access to essential electrical supply, HVAC, hot water, natural gas and potable water, and protection from elements such as weatherproofing, and securing broken doors and windows.

### **3. Temporary Removeable Barriers and Bollards**

- a. Installation of temporary removable barriers.
- b. In-kind repairs, installation, or replacement, and minor upgrades/mitigation of bollards and associated protective barriers when in previously disturbed areas.

### **4. Borrow material**

- a. Borrow material if from a commercial source, or a stock tank berm, dug-outs, or reclaimed ditch provided the original surface of the ground is not impacted by the removal method.

## **B. BUILDINGS AND STRUCTURES**

- 1. Repair or retrofit of buildings less than 45 years old.

2. Use of portable de-humidification systems and mold remediation in buildings over 45 years, provided no changes are made to the character-defining features.
3. Removal of water, soil, muck, mud, or sewage by physical or mechanical means.
4. Repair, replacement or installation of grab bars and other such minor interior modifications required for compliance with the Americans with Disabilities Act (ADA). *This allowance does not include permanent modifications such as changes to door widths or installation of ramps.*
5. Installation of security bars over windows on rear elevations.
6. Installation of exterior security features and early warning devices on existing light poles or other permanent utilities.
7. Attic insulation with proper ventilation, provided that insulation is fiberglass batt or loose fill only (not spray foam).
8. Under-floor insulation in basements or crawl spaces, provided that insulation is fiberglass batt or loose fill only (not spray foam).
9. Repair of existing wheelchair ramps.

C. **TRANSPORTATION FACILITIES**, when proposed activities described below substantially conform to the original footprint and/or performed in previously disturbed soils, including any staging areas.

#### **1. Roads and Roadways**

- a. Paving and repair of roads to pre-disaster geometric design standards and conditions using in-kind materials, shoulders medians, clearances, curbs, and side slopes. This allowance does not include improvement to existing roadways and appurtenances.
- b. Construction of temporary emergency access roads in previously disturbed soils to allow for passage of emergency vehicles.
- c. Repairs to road slips and landslides that do not require grading of undisturbed soils on the up-hill side of the slip.
- d. Re-establishment, armoring and/or upgrading of existing roadway ditches.

- e. In-kind repair or replacement of traffic control devices such as traffic signs and signals, delineators, pavement markings, traffic surveillance systems.
- f. Installation and removal of temporary traffic control devices, including pre-formed concrete barriers and fencings.
- g. In-kind repair or replacement of roadway safety elements such as barriers, guardrails, and impact-attenuation devices. In the case of guardrails, the addition of safety end treatments is permitted.

## **2. Airports**

- a. In-kind repair or replacement of existing runway surfaces and features (e.g. asphalt, concrete, gravel, and dirt) and associated air transportation safety components and systems (e.g. lighting bars, beacons, signage and weather sensors).

## **3. Rail Systems**

- a. In-kind repair or replacement of safety components.
- b. In-kind repair or replacement of existing track system and passenger loading areas provided the alignment of the rail right-of-way and any historic rail appurtenances (i.e. water towers, siding, etc.) are not modified.



## **II. Second Tier Allowances**

Only staff meeting the applicable SOI Professional Qualifications Standards in accordance with Stipulation I.B(1)(a) of this Agreement may apply Second Tier allowances.

- A. GROUND DISTURBING ACTIVITIES AND SITE WORK**, when proposed activities described below substantially conform to the original footprint and/or are performed in previously disturbed soils, including the area where the activity is staged.

### **1. Debris and Snow Removal**

- a. Debris removal and collection, including the transport and disposal of such waste to existing licensed waste facilities or landfills, including the temporary establishment and expansion of non-hazardous debris staging, reduction, and disposal areas at licensed transfer stations, or existing hard-topped or graveled surfaces (e.g. parking lots, roads, athletic courts) but not the creation of new or temporary access roads. *This Allowance does not include areas with archeological sites that may be eligible for the National Register of Historic Places.*
- b. Removal of debris from private property provided that buildings are not affected, ground disturbance is minimal and in-ground elements, such as driveways, walkways or swimming pools, are left in place. *This Allowance does not apply when heavy equipment is not limited to existing rights-of-way or in-ground elements are removed in areas with archeological sites that may be eligible for the National Register of Historic Places.*
- c. Removal of standing or uprooted trees, including root balls, when the tree is located within medians, parkways, parking lots etc., except when the trees are located within a designated historic district, historic roadway or significant archeological sites.

### **2. Footings, Foundations, Retaining Walls, Slopes, and Slope Stabilization Systems**

- a. In-kind, in place repair, replacement, and reinforcement of footings, foundations, retaining walls, slopes, and slope stabilization systems (e.g. gabion baskets, crib walls, soldier pile and lag walls) if related ground disturbing activities are within the boundary of previously disturbed soils.
- b. Installation of perimeter drainage (e.g. French drains) when performed in previously disturbed soils.

### **3. Recreation and Landscaping**

- a. In-kind repairs or replacement of recreational facilities and features (e.g. playgrounds, campgrounds, fire pits, picnic tables, dump stations and utility hook-ups, swimming pools, athletic fields and signage, batting cages, basketball courts, swing sets, pathways, simple wooden/wire stream crossings). *When the facilities are not listed or eligible historic properties and the elements are not character-defining features.*
- b. In-kind repair or replacements, and minor upgrades to landscaping elements (e.g., fencing, sidewalks, free standing walls, paving, planters, irrigation systems, lighting elements, signs, flag poles, ramps, steps) *when landscape elements are not part of, or associated with listed or eligible historic properties.*
- c. Repair or replacement of existing driveways, parking areas and walkways with materials of similar appearance in a manner that does not disturb historic landscape materials or features.

#### **4. Piers, Docks, Boardwalks, Boat Ramps, and Dune Crossovers**

- a. In-kind repair or replacement and minor upgrades to existing piers, docks, boardwalks, boat ramps and dune crossovers in areas of previously disturbed soils *when existing piers, docks, boardwalks, boat ramps and dune crossovers are not historic properties.*

#### **5. Canals, Channels and Waterways**

- a. Dredging of regularly dredged and maintained canals and channels, natural and manmade.

#### **6. Cemeteries**

- a. Removal of woody debris such as branches and limbs, from cemeteries, provided that heavy equipment and other machinery are not operated or staged on areas potentially containing human remains. *This Allowance does not include the removal of standing trees.*

### **B. BUILDINGS AND STRUCTURES**

#### **1. Interior Work: Floors, Walls, Stairs, Ceilings and Trim**

- a. Replacement of utilitarian flooring (e.g. low pile commercial carpet, vinyl plank, engineered hardwood plank, non-historic ceramic tiles, etc.) in non-historic properties. This allowance does not apply to

original and character-defining flooring of a National Register listed and/or eligible resource.

- b. In-kind repair and selective replacement of walls, stairs, ceilings, and/or trim, limited to damaged areas only. The allowance does not apply to decorative finishes, including murals, glazed paint, gold leaf, or ornamental plaster and /or any other character defining interior feature of a National Register listed and/or eligible resource.
- c. Cleaning of flooring with weak, non-acidic household products, provided the cleaning is restricted to damaged areas and does not affect adjacent materials. This allowance does not apply to character defining flooring of a National Register listed and/or eligible resource.
- d. Interior cleaning of surfaces using a weak, non-acidic solution of household bleach and water solutions, mold remediation, or dry vacuuming for mold removal. The allowance applies to interior finishes, including plaster and wallboard, provided the cleaning is restricted to damaged areas and does not affect adjacent materials.
- e. Non-destructive or concealed testing for hazardous materials (e.g., lead paint, asbestos) or for assessment of hidden damages.
- f. Repair or replacement of suspended or glued ceiling tiles. In public spaces that are at least 45 years old, tiles that are original to the space shall be replaced with tiles of the same dimensions and similar texture and pattern.
- g. Replacement of damaged wood gymnasium floors with in-kind materials.
- h. Replacement of damaged or hazardous vinyl or asbestos floor tile with contemporary tile of the same dimensions and similar texture and pattern.
- i. Installation of restroom improvements for handicapped access, provided the work is contained within the existing restroom.
- j. Interior repairs to pre-disaster condition of single or multifamily residential buildings; excluding character-defining features, structural repairs (e.g. foundation, frame), or other elements requiring architectural or engineering services.
- k. Replacement of surfaces that contain hazardous materials (e.g. lead paint), with a similar product that is up to building codes and standards.

- l. Abatement of lead and asbestos in unfinished basements and historically unfinished upper floors and attics
- m. Use of portable de-humidification systems provided no changes are made to character- defining features (specifically for mold remediation).

## **2. Building Contents**

- a. Repair or replacement of building contents including furniture, movable partitions, computers, cabinetry, supplies, and equipment and any other moveable items which are not character defining features of a historic property.

## **3. Utilities and Mechanical, Electrical, and Security Systems**

- a. In-kind repair or replacement, or limited upgrading of interior utility systems, including mechanical (e.g., heating, ventilation, air conditioning), electrical, and plumbing systems. This allowance does not provide for the installation of new exposed ductwork. Exposed fixtures, grilles, etc. that are at least 45 years old will be repaired in kind if possible.
- b. Elevation of heating, ventilation, and air conditioning system (HVAC) and mechanical equipment as long as it is placed or located where it is not highly visible from the street (e.g. setback from the building façade on a secondary elevation).
- c. Installation or replacement of interior fire detection, fire suppression, or security alarm systems. The allowance does not apply to surface mounted wiring, conduits, piping, etc., unless previously existing, and is provided that installation of the system hardware does not damage or cause the removal of character-defining architectural features and can be easily removed in the future.
- d. Installation of communication and exterior light fixtures and surveillance security systems, such as cameras, closed-circuit television, alarm systems, and public address systems, provided that installation of the system hardware does not damage or cause the removal of character defining architectural features and can be easily removed in the future.
- e. Installation of building access security devices, such as card readers, enhanced locks, door alarms, and security scanners (e.g., metal detectors), provided the device does not damage or cause the removal

of character-defining architectural features and can be removed in the future without impacts to significant architectural features.

- f. Installation of mechanical equipment within existing mechanical closets, chases, and unfinished attics or basements when ducts are not visible in occupied spaces of the building and access to the ducts does not require demolition of walls or ceilings in occupied spaces of the building.
- g. New exposed ductwork, air handler units and electric conduit in unfinished basements and historically-unfinished upper floors, and attics.
- h. In-kind repair, replacement, or limited upgrading of escalators, elevators, and/or other mechanical conveyance systems.
- i. Installation of exterior security features and early warning devices on exiting light poles or other permanent utilities. New wiring will be sub-surface to the greatest extent possible or where exposed will be enclosed in conduit that is painted to match the existing surface.

#### **4. Windows and Doors**

- a. In-kind repair or selective replacement of damaged or severely deteriorated windows and window frames, shutters, storm shutters, doors and door frames, and associated hardware, where profiles, elevations, details and materials match those of the originals. All work will be performed in accordance with *Preservation Brief 9: The Repair of Historic Wooden Windows* or *Preservation Brief 13: The Repair and Thermal Upgrading of Historic Steel Windows*.
- b. In-kind replacement of window panes. Clear plate, double, laminated or triple insulating glazing can be used, provided it does not result in altering the existing window material, tint, form, muntin profiles, or number of divided lights. This allowance does not apply to the replacement of existing intact archaic or decorative glass, except that clear film may be applied to any glass.
- c. Replacement of exterior, utilitarian, non-character-defining metal doors and frames leading into non character-defining spaces with metal blast resistant doors and frames.
- d. Installation of interior storm windows or doors on residential buildings, in a manner that does not harm or obscure the historic

windows or trim. Installation of exterior storm or wood screen doors on rear façade only.

## **5. Exterior Walls, Cornices, Porches, and Foundations**

- a. In-kind repainting and cleaning of previously treated (painted, epoxied, etc.) surfaces, provided that destructive surface preparation treatments are not used, such as water blasting, sandblasting, power sanding and chemical cleaning.
- b. In-kind repair of walls, porches, foundations, columns, cornices, siding, balustrades, stairs, dormers, brackets, trim, and their ancillary components or in-kind replacement of severely deteriorated or missing or lost features, as long as the replacement pieces match the original in detail and material. Any ground disturbance will be limited to previously disturbed soils.
- c. In-kind repair or replacement of signs or awnings.
- d. Installation of temporary stabilization bracing or shoring, provided such work does not result in additional damage.
- e. Anchoring of walls to floor systems, provided the anchors are embedded and concealed from exterior view.
- f. In-kind repair of concrete and masonry walls, columns, parapets, chimneys, or cornices or limited in-kind replacement of damaged components including comparable brick, and mortar that matches the color, texture, strength, content, rake, and joint width. *Hydraulic or Portland cement mortar may be used only if a laboratory analysis confirms its historic use.*
- g. Bracing and reinforcing of walls, chimneys and fireplaces, provided the bracing and reinforcing are either concealed from exterior view or reversible in the future.
- h. Strengthening of foundations and the addition of foundation bolts, provided that visible new work is in-kind, including mortar that matches the color, content, strength, rake, and joint width where occurring. *Hydraulic or Portland cement mortar may be used only if a laboratory analysis confirms its historic use.*
- i. Repairs to and in-kind replacement of elements of curtain wall assemblies or exterior cladding that is hung on the building structure, usually from floor to floor, and when the color, size reflectivity,

materials, and visual patterns are unaltered. *This Allowance only applies to those features that are less than 45 years old.*

- j. Repair or replacement of metal utilitarian structures (e.g. pump houses, storage buildings) less than 45 years old, when performed in previously disturbed soils.

## **6. Roofing**

- a. Installation of scaffolding, polyethylene sheeting, or tarps, provided such work will not result in additional damage or irreversible alterations to character defining features.
- b. In-kind repair, replacement, or strengthening of roofing, rafters, fascia, soffits, gutters, verge boards, leader boxes, downspouts, or other damaged roof system components.
- c. Replacement of roofing materials with the same color, shape, and pattern, including replacement of three-tab asphalt shingles with dimensioned architectural shingles; cement asbestos shingles with fiberglass, composition, or asphalt shingles; asbestos panels with fiberglass, cement, or metal panels; or untreated wood shingles and shakes with fire resistant wood shingles and shakes.
- d. Repairs to flat roof cladding, including changes in roofing materials, where the repairs are not visible from the ground level.

## **7. Weatherproofing and Insulation**

- a. Caulking and weather-stripping to complement the color of adjacent surfaces or sealant materials.
- b. In-kind repair or replacement of insulation systems, provided that existing interior plaster, woodwork, exterior siding, or exterior architectural detail is not altered. *This Allowance does not apply to spray foam insulation.*

## **8. Structural Retrofits**

- a. Installation of the following retrofits/upgrades, provided that such upgrades are not visible on the exterior: attic bracing, cross bracing on pier and post foundations; fasteners; collar ties; gussets; tie downs; strapping and anchoring of mechanical, electrical, and plumbing equipment; concealed anchoring of furniture; installation of plywood diaphragms beneath first floor joists, above top floor ceiling rafters, and on roofs; and automatic gas shut off valves.

- b. Replacement or repair of lightning rods.
- c. Installation of new wheelchair ramp on the front or other entrance of a structure visible from a public right-of-way, in a manner that does not remove, compromise or damage the existing historic materials or features and would be completely reversible without damage to historic fabric. *This Allowance only applies to residential structures.*
- d. Installation of new wheelchair ramp on side or rear entrance of a structure, when not visible from any public right-of-way. *This Allowance only applies to residential structures.*

## **9. Safe Rooms**

- a. Installation of individual safe rooms within the property limits of a residence where the installation would occur within the existing building or structure or in previously disturbed soils. *This Allowance does not apply to rooms attached to or abutting a residence or highly visible from a public right-of-way.*
- b. Modifications to buildings that are less than 45 years old, or modifications that are not visible on the exterior or in public interior spaces of buildings that are at least 45 years old, for community safe rooms.

## **10. Elevation, Demolition, and Reconstruction**

- a. Activities related to the elevation, demolition and/or reconstruction of buildings or structures less than 45 years of age so long as the proposed activities substantially conform to the original footprint and/or are performed in previously disturbed soils including any staging area, and the buildings or structures are not located within or adjacent to a National Register listed or eligible historic district.

## **11. Flood Proofing and Secondary Elevations**

- a. Activities related to flood proofing and minor upgrades on secondary elevations provided that installation does not damage or cause loss of character-defining features, as defined by FEMA SOI qualified staff, and can be removed in the future without causing damage. Minor upgrades may include replacement of exterior utilitarian, non-character-defining doors or windows with new compatible or in-kind doors or windows, and the addition of new elements (such as storm panels or flood panels) to exterior doors, windows, or other openings excluding the main façade. The National Park Service (NPS)



publication *Flood Adaptation for Rehabilitating Historic Buildings* provides guidance about how to adapt historic buildings to be more resilient to flooding risk in a manner that will preserve their historic character.

## **12. Buildings/Structures Previously Determined Ineligible**

- a. Repair, retrofitting, or renovation of buildings/structures that have been previously determined ineligible for listing in the National Register within the last five (5) years providing the undertaking does not include exterior modifications to a building/structure located within the APE of a historic resource listed or eligible for listing in the National Register.

C. **TRANSPORTATION FACILITIES**, when proposed activities described below substantially conform to the original footprint and/or performed in previously disturbed soils, including the area where the activity is staged.

### **1. Roads and Roadways**

- a. Repair of roads to pre-disaster geometric design standards and conditions using in-kind materials, shoulders, medians, clearances, curbs, and side slopes. This allowance permits minor improvement to meet current code and standards or hazard mitigation measures, such as those designed to harden exposed surfaces, including the application of gravel armoring to side slopes and ditches.
- b. In kind repair to historic paving materials for roads and walkways.
- c. In-kind repair or replacement of culvert systems and arches beneath roads or within associated drainage systems, including provision of headwalls, riprap (including riprap beyond the original footprint) and any modest increase in capacity for the purposes of hazard mitigation or to meet current codes and standards, provided that the work substantially conforms to the existing footprint, or falls within the footprint of the washed out location, and does not involve an increase in roadway width. *For stone or brick culverts or arches beneath roadways, this allowance only applies to in-kind repair.*
- d. In-kind repair or replacement of road lighting systems, including period lighting fixture styles.
- e. In-kind repair or replacement of road appurtenances such as curbs, berms, fences, and sidewalks.

- f. Stabilization of hazardous slopes within transportation rights-of-way. Stabilization methods include the installation of retaining walls and systems such as gabion baskets, crib walls, and soldier pile and lag walls. Work will not exceed the limits of the previously disturbed rights-of-way and will not take place within the boundary of any historic property or district listed or eligible for listing in the National Register. This allowance applies to additions, only.
- g. Removal, replacement and/or installation of flap-gates or flood gates, and bar screeners provided that activities are confined to the existing footprint or does not require new or additional areas to be excavated to construct said features. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

## **2. Bridges**

- a. Installation of a temporary (Bailey-type) bridge over an existing structure or at a previously disturbed location, such as a former bridge location, to allow passage of emergency vehicles.
- b. In-kind repair or replacement of bridge components (e.g. abutments, wing walls, piers, decks, and fenders) in previously disturbed soils.
- c. Major repair or replacement of bridges that are less than 45 years old and are not located on significant archeological sites, where construction and staging is limited to the existing rights-of-way.
- d. Replacement of a stream crossing type (i.e. culvert to bridge) provided no additional ground disturbance is required. This allowance applies to pedestrian and foot bridges and allows for a change in design, but not a change in the original footprint.

**D. UTILITIES, COMMUNICATIONS SYSTEMS AND TOWERS**, when proposed activities described below substantially conform to the original footprint and/or performed in previously disturbed soils, including the area where the activity is staged.

### **1. General**

- a. In-kind repair or in-kind replacement, or minor upgrading of utilities within the existing footprint. If the project substantially conforms to the existing footprint and no known eligible or unassessed site is within the footprint and area of project activities, the Allowance may still be applied.

- b. Installation of new utilities and associated features within existing rights-of-way provided the activities are not within a National Register listed or eligible historic district.
- c. Directional boring of new/replacement service line and related appurtenances involving boring or silt trenches within previously disturbed soils of rights-of-way or utility corridors.
- d. In-kind repair or replacement, or minor upgrades of water towers provided activities take place within previously disturbed soils. Ground-level facilities may be added or expanded in previously disturbed areas. This allowance does not apply to historic-age water towers.
- e. Repair or replacement of utility lines (e.g. sewer, gas, and water) located within the property boundary of the structure, when performed in previously disturbed soils.
- f. Repair or replacement of septic tank, drain field, and well pump in previously disturbed soils.

## **2. Generators and Utilities**

- a. In-kind repair or replacement, or minor upgrades, elevation, and/or installation of generators, HVAC systems, and similar equipment provided activities occur within previously disturbed soils and any roof mounted equipment is not visible from the ground level. *This includes any related trenching within previously disturbed soils, except when in close proximity to a known archaeological site.*

## **3. Communication Equipment/Systems and Towers**

- a. Acquisition, installation, or operation of communication and security equipment/systems that use existing distribution systems, facilities, or existing infrastructure right-of-way.
- b. The collocation of communication and security equipment on existing towers and buildings/structures less than 45 years of age, provided that the work does not increase existing tower height or footprint by more than 10% and occurs within previously disturbed soils.
- c. Enhancement, repair or replacement of existing communication towers and antenna structures provided the work does not increase existing tower height or footprint by more than 10% and occurs within previously disturbed soils.

- d. Installation of new temporary (not to exceed 12 months) communications towers and antenna structures provided that the work does not require modification of buildings/structures older than 45 years and occurs within previously disturbed soils.
- e. Installation of new communication towers, less than 200 feet tall, in previously developed urban complexes when the work does not require modification of buildings/structures older than 45 years, occurs within previously disturbed soils and is not within 500 feet of the boundaries of a historic property.

**E. WATER RESOURCE MANAGEMENT AND CONTROLS**, when proposed in-kind activities below substantially conform to the original footprint and/or are performed in previously disturbed soils, including the area where the activity is staged. This applies to all Section E allowances, listed below.

**1. Canal Systems**

- a. In-kind repairs or replacement to canal systems, irrigation districts, or drainage districts and associated *elements when existing canal systems are not historic properties.*

**2. Breakwaters, Seawalls, Revetments, and Berms**

- a. In-kind repair or replacement of breakwaters, seawalls, and revetments, provided the work occurs in previously disturbed soils *when existing breakwaters, seawalls, and revetments are not historic properties.*

**3. Dams, Levees, and Floodwalls**

- a. In-kind repair or replacement of dams, levees, floodwalls and related features, including spillways, tide gates, and fuse plugs, provided the work occurs in previously disturbed soils *when existing dams, levees and floodwalls are not historic.*

**4. Fish Hatcheries**

- a. In-kind repair or replacement of fish hatcheries and fish ladders.

**5. Waste-Water Treatment Lagoon Systems**

- a. In-kind repair or replacement, or minor upgrades of waste-water treatment lagoon systems.

## **6. Foundations and Retaining Walls**

- a. In-kind, installation, in place repair, replacement, and reinforcement of footings, foundations, retaining walls, soldier piles, sheet piling, and shore stabilization systems if related ground disturbing activities are within the boundary of previously disturbed soils and routinely dredged and maintained channels when proposed activities substantially conform to the existing footprint and no known eligible or unassessed site or shipwreck is within the footprint and area of project activities. This Allowance does not apply to a project, including staging areas, on a known eligible or unassessed archaeological site or shipwreck.

## Appendix C

### Treatment Measures

When avoidance or minimization of adverse effects is not appropriate, the following Treatment Measures are suggested for the resolution of Adverse Effects:

If Undertakings result or will result in adverse effects, FEMA, TDEM, the Subrecipient, and SHPO, may develop a treatment measure plan that includes one or more of the following Treatment Measures, depending on the nature of historic properties affected and the severity of adverse effects. This Appendix may be amended in accordance with Stipulation IV.A.3 of this Agreement, Amendments.

#### I. Treatment Measures

##### A. Recordation

- I. Digital Photography Package:** Prior to project implementation, the designated responsible party shall oversee the successful delivery of a digital photography package prepared by staff or contractors meeting the Professional Qualifications for Architectural History, History, Architecture, or Historic Architecture, as appropriate. The digital photography package will meet the standards cited in the NPS' *National Register of Historic Places Photographic Policy March 2010 or subsequent revisions* [https://www.nps.gov/subjects/nationalregister/upload/Photo\\_Policy\\_update\\_2013\\_05\\_15\\_508.pdf](https://www.nps.gov/subjects/nationalregister/upload/Photo_Policy_update_2013_05_15_508.pdf)
  - a. The digital photography package shall include a comprehensive collection of photographs of both interior and exterior views showing representative spaces and details of significant architectural features and typical building materials. Exterior photographs shall include full oblique and contextual images of each elevation. Exterior views shall be keyed to a site plan while interior views shall be keyed to a floor plan of the building/structure. The photographs shall be indexed according to the date photographed, site number, site name, site address, direction, frame number, subject matter and photographer's name recorded on the reverse side in pencil.
  - b. The digital photography package shall include printed color copies of the digital photographs (on appropriate paper, per *NPS Photographic Policy*), a CD/DVD of the digital photographs (per *NPS Photographic Policy*), a completed state architectural inventory form, and a written site history of the historic property.
  - c. The designated responsible party shall submit the digital photography package to the SHPO for review and approval. Once approved by the

SHPO, the designated responsible party shall submit a copy of the approved documentation to a state or local historical society, archive, and/or library for permanent retention.

2. 35mm Black and White Photography Package: Prior to project implementation, the designated responsible party shall oversee the successful delivery of a 35 mm black and white film photography package prepared by staff or contractors meeting the Professional Qualifications for Architectural History, History, Architecture, or Historic Architecture, as appropriate.
  - a. The 35 mm black and white film photography package shall include a comprehensive collection of photographs of both interior and exterior views showing representative spaces and details of significant architectural features and typical building materials. Exterior photographs shall include full oblique and contextual images of each elevation. Exterior views shall be keyed to a site plan while interior views shall be keyed to a floor plan of the building/structure. The photographs shall be indexed according to the date photographed, site number, site name, site address, direction, frame number, subject matter and photographer's name recorded on the reverse side in pencil.
  - b. The 35 mm black and white film photography package shall include one (1) full set of 35mm black and white photographs printed on fiber-based paper, the corresponding 35mm film negatives in acid free sleeves, a completed state architectural inventory form, and a written site history of the historic property.
  - c. The designated responsible party shall submit the 35 mm black and white film photography package the SHPO for review and approval. Once approved by the SHPO, the designated responsible party shall submit a copy of the approved documentation to a state or local historical society, archive, and/or library for permanent retention.
3. Large Format Photography Package: Prior to project implementation, the designated responsible party shall oversee the successful delivery of a large format photography package prepared by staff or contractors meeting the Professional Qualifications for Architectural History, History, Architecture, or Historic Architecture, as appropriate.
  - a. The large format photography package shall include a comprehensive collection of photographs of both interior and exterior views showing representative spaces and details of significant architectural features and typical building materials. Exterior photographs shall include full oblique and contextual images of each elevation. Exterior views shall be keyed to a site plan while interior views shall be keyed to a floor plan of the building/structure. The photographs shall be indexed according

to the date photographed, site number, site name, site address, direction, frame number, subject matter and photographer's name recorded on the reverse side in pencil.

- b. The large format film photography package shall include one (1) full set of 4x5 or 5x7-inch photographs printed on fiber-based paper, the corresponding 4x5 or 5x7-inch negatives in acid free sleeves, a completed state architectural inventory form, and a written site history of the historic property.
- c. The designated responsible party shall submit the large format film photography package to the SHPO for review and approval. Once approved by the SHPO, the designated responsible party shall submit copies of the approved documentation to a local historical society, archive, and/or local library for permanent retention.

#### B. Design Review by the SHPO

- 1. Prior to project implementation, including any demolition, ground disturbing, or construction activities, the Subrecipient shall submit to the SHPO for review and comment plans, drawings, and specifications which will, to the greatest extent possible, preserve the basic character of a building, including: design, scale, massing, fenestration patterns, orientation, and materials. Primary emphasis will be given to the major, visible street elevations. Significant contributing features (e.g., windows, doors, porches, or trim) will be repaired or replaced either in kind, or with substantially in kind materials that match all visual aspects of the historic features. Aesthetic camouflaging treatments such as paints, veneers, texture compounds, other surface treatments, sympathetic infill panels, or landscaping features will be incorporated to the greatest extent possible. Construction bid documents (drawings and specifications) will be provided for SHPO review, comment, and approval. SHPO shall provide comments and recommendations within thirty (30) days of receipt.

#### C. Public Interpretation

- 1. Prior to project implementation, FEMA, TDEM, and the Subrecipient shall work with the SHPO to design an educational interpretive plan. The plan may include signs, displays, educational pamphlets, websites, workshops and other similar mechanisms to educate the public on historic properties within the local community, state, or region. Once an interpretive plan has been agreed to by the parties, SHPO and the designated responsible party shall continue to consult throughout implementation of the plan until all agreed upon actions have been completed by the designated responsible party.



#### D. Historical Context Statements and Narratives

1. Prior to project implementation, FEMA, TDEM, and the Subrecipient shall work with the SHPO to determine the topic and framework of a historic context statement or narrative the designated responsible party shall be responsible for completing. The statement or narrative may focus on an individual property, a historic district, a set of related properties, or relevant themes as identified in the statewide preservation plan. Once the topic of the historic context statement or narrative has been agreed to, the designated responsible party shall continue to coordinate with the SHPO through the drafting of the document and delivery of a final product. The SHPO shall have final approval over the end product. The designated responsible party shall use staff or contractors that meet the Secretary's Professional Qualifications for the appropriate discipline.

#### E. Oral History Documentation

1. Prior to project implementation, FEMA, TDEM, and the Subrecipient shall work with the SHPO to identify oral history documentation needs and agree upon a topic and list of interview candidates. Once the parameters of the oral history project have been agreed upon, the designated responsible party shall continue to coordinate with the SHPO through the data collection, drafting of the document, and delivery of a final product. The SHPO shall have final approval over the end product. The designated responsible party shall use staff or contractors that meet the Secretary's Professional Qualifications for the appropriate discipline.

#### F. Historic Property Inventory

1. Prior to project implementation, FEMA, TDEM and the Subrecipient shall work with the SHPO to establish the appropriate level of effort to accomplish a historic property inventory. Efforts may be directed toward the resurvey of previously designated historic properties and/or districts which have undergone change or lack sufficient documentation, or the survey of new historic properties and/or districts that lack formal designation. Once the boundaries of the survey area have been agreed upon, the designated responsible party shall continue to coordinate with the SHPO through the data collection process. The designated responsible party shall use SHPO standards for the survey of historic properties and SHPO forms as appropriate. The designated responsible party shall prepare a draft inventory report, according to SHPO templates and guidelines, and work with the SHPO until a final property inventory is approved. The designated responsible party shall use staff or contractors that meet the Secretary's Professional Qualifications for the appropriate discipline. All data collected or developed as part of the inventory or survey (GIS data layers, printed maps, database of built historic properties, etc.) will be made available to all consulting parties.

#### G. National Register and National Historic Landmark Nominations

1. Prior to project implementation, FEMA, TDEM and the Subrecipient shall work with the SHPO to identify the individual properties that would benefit from a completed National Register or National Historic Landmark nomination form. Once the parties have agreed to a property, the designated responsible party shall continue to coordinate with the SHPO through the drafting of the nomination form. The SHPO shall provide adequate guidance to the designated responsible party during the preparation of the nomination form and shall formally submit the final nomination to the Keeper for inclusion in the National Register. The designated responsible party shall make revisions as requested by the State Board of Review or the Keeper. The designated responsible party shall use staff or contractors that meet the Secretary's Professional Qualifications for the appropriate discipline.

#### H. Geo-References of Historic Maps and Aerial Photographs

1. Prior to project implementation, FEMA, TDEM and the Subrecipient shall work with the SHPO to identify the historic maps and/or aerial photographs for scanning and geo-referencing. Once a list of maps and/or aerial photographs have been agreed upon, the designated responsible party shall continue to coordinate with the SHPO through the scanning and geo-referencing process and shall submit drafts of paper maps and electronic files to the SHPO for review. The SHPO shall have final approval on the quality of the documentation provided by the designated responsible party. The final deliverable shall include a paper copy of each scanned image, a geo-referenced copy of each scanned image, and the metadata relating to both the original creation of the paper maps and the digitization process.

#### I. Archaeological Data Recovery Plan

1. Prior to project implementation, FEMA will coordinate with [relevant partners] to develop an appropriate data recovery plan for archaeological sites that have been adversely affected by the Undertaking. The Data Recovery Plan will be tailored to the specific Undertaking and may integrate multiple forms of data collection as appropriate for the affected resource.

APPENDIX F

LOUISIANA ELEVATIONS PROGRAMMATIC AGREEMENT

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS  
FOR THE ELEVATION OF BUILDINGS AND STRUCTURES IN  
LOUISIANA**

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**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS  
FOR THE ELEVATION OF BUILDINGS AND STRUCTURES IN  
LOUISIANA**

**WHEREAS**, the mission of the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security (DHS) is helping people before, during, and after a disaster; and

**WHEREAS**, FEMA makes assistance available to States, Territories, Commonwealths, communities, Federally recognized Indian Tribes (Tribes) and other eligible entities through programs (Programs), pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296 (2002) (codified as amended at 6 U.S.C. § 101 *et seq.*); Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (1974) (codified as amended at 42 U.S.C. § 5121 *et seq.*, (Stafford Act); the National Flood Insurance Act of 1968, Pub. L. No. 90-448 (1968) (as amended); the National Flood Insurance Reform Act of 1994, Pub. L. No. 103-325 (1994) (as amended); the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295 (2006) (as amended); the Sandy Recovery Improvement Act, Pub. L. No. 113-2 (2013); Disaster Recovery Reform Act of 2018 as part of the Federal Aviation Administration Reauthorization Act of 2018. Pub. L. No. 115-254 (2018); implementing regulations contained in Title 44 of the Code of Federal Regulations (CFR), Executive Order 13407 (2006), and such other acts, executive orders, implementing regulations, or Congressionally authorized programs as are enacted from time to time; and

**WHEREAS**, FEMA has determined that implementing its Programs may result in Undertakings [as defined by 54 U.S.C. § 300320 and 36 CFR § 800.16(y)] that may affect properties listed in or eligible for listing in the National Register of Historic Places (National Register) pursuant to 36 CFR Part 60 (historic properties), and FEMA has consulted with the Louisiana State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act (NHPA), Pub. L. No. 89-665 (1966) (codified as amended at 54 U.S.C. § 306108), and the regulations implementing Section 106 of the NHPA (Section 106) at 36 CFR Part 800 and the *Programmatic Agreement among the Federal Emergency Management Agency, the Louisiana State Historic Preservation Officer, the Governor’s Office of Homeland Security and Emergency Preparedness and Participating Tribes, dated December 21, 2016, as amended (2016 Statewide PA)*, which was developed in accordance with FEMA’s the Prototype Programmatic Agreement

**WHEREAS**, in order to implement its Programs, FEMA will provide assistance to the State of Louisiana and/or Tribes (Recipient(s)) that may provide monies and other assistance to eligible Subrecipients, and as such, the Governor’s Office of Homeland Security and Emergency Preparedness (GOHSEP) that is typically responsible for administering funds provided under these Programs, has participated in this consultation, and FEMA has invited GOHSEP to execute this Elevations PA as an Invited Signatory; and

**WHEREAS**, in accordance with Stipulation II.C.6.c of the 2016 Statewide PA FEMA notified the SHPO, Tribes and other Consulting Parties of its intent to develop a Programmatic Agreement for the elevations of buildings and structures 45 years and older in Louisiana (Elevations PA) by inviting them to participate in meetings on January 7, 2020 and February 4, 2020; and

**WHEREAS**, the Caddo Nation (CN), Chitimacha Tribe of Louisiana (CTL), Choctaw Nation of Oklahoma (CNO), Coushatta Tribe of Louisiana (CT), Eastern Shawnee Tribe of Oklahoma (ESTOO), Jena Band of Choctaw Indians (JBCI), Kialegee Tribal Town (KTT), Muscogee Creek Nation of Oklahoma (MCN), Osage Nation (ON), Poarch Band of Choctaw Indians (PBCI), Quapaw Tribe of Oklahoma (QTO), Seminole Tribe of Florida (STF) and Tunica-Biloxi Tribe of Louisiana (TBTL) have assumed the responsibilities of SHPO in its/their Tribal lands through appointment of a Tribal Historic Preservation Officer (THPO) in accordance with Section 101 of NHPA, and FEMA shall consult with the THPO in lieu of SHPO for undertakings occurring on or affecting its/their Tribal lands; and

**WHEREAS**, FEMA has invited Alabama-Coushatta Tribe of Texas (ACTT); CN; CTL; CNO; CT; ESA; JBCI; KTT; Mississippi Band of Choctaw Indians (MBCI); MCN; ON; PBCI; QTO; Seminole Nation of Oklahoma (SNO); STF; and TBTL, to participate in the development of this Elevations PA; and

**WHEREAS**, a Tribe shall notify FEMA of its interest in participating in the implementation of this Elevations PA and FEMA will invite each Tribe that notifies FEMA of its interest to execute this Elevations PA as an Invited Signatory; and

**WHEREAS**, in accordance with Stipulation II.C.6.c of the 2016 Statewide PA FEMA notified the ACHP of its intent to develop an Elevations PA (letter dated January 17, 2020); the ACHP requested more information (email dated January 22, 2020), FEMA provided additional information (letter dated January 30, 2020), and ACHP responded (letter dated March 5, 2020), advising their participation is not needed; and

**WHEREAS**, FEMA invited Subrecipients who have submitted applications for elevations, Certified Local Government (CLG) Coordinators within the jurisdictions of invited Subrecipients, the Office of Community Development, and, the Louisiana Housing Corporation to participate in the development of this Elevations PA and sign on as Consulting Parties; and

**WHEREAS**, FEMA provided information to the public regarding the Undertaking on the Louisiana Department of Culture, Recreation and Tourism (CRT) website (<http://www.crt.state.la.us/culturalassets/fema106/>) for a 30-day comment period between February 24 and March 24, 2020, and published a notice in *The Advocate*, *Houma Courier*, *Calcasieu American Press*, and *St. Tammany Farmer* directing readers to the CRT website for more information and inviting the public to post electronic comments to the CRT website or mail/email comments directly to FEMA; and

**WHEREAS**, FEMA requested that Consulting Parties provide the same information on their websites, journal of records, distribution lists, or other outreach measures; and

**WHEREAS**, FEMA received one comment via email advocating for the preservation of historic buildings including making exceptions for elevation efforts to preserve historic buildings; and

**WHEREAS;** the City of New Orleans, City of Lake Charles, City of Gretna, The City of Slidell, Louisiana Housing Corporation and Office of Community Development requested consulting party status and are invited by FEMA to participate in this consultation and sign this Elevations PA as Concurring Parties; and

**NOW, THEREFORE;** FEMA, SHPO and GOHSEP agree that the Undertakings will be reviewed in accordance with the following Stipulations to take into account the effects of the undertakings on historic properties and to satisfy FEMA's Section 106 responsibilities for the undertakings.

## **STIPULATIONS**

To the extent of its legal authority, and in coordination with other Signatories, FEMA shall ensure the following measures are implemented:

### **I. GENERAL**

#### **A. Applicability**

1. This Elevations PA supplements the 2016 Statewide PA and all provisions within the 2016 Statewide PA remain applicable except as provided herein.
2. The Undertakings subject to this Elevations PA are limited to elevation of buildings and structures 45 years old and older (or exceptionally significant per National Park Service Criteria Consideration G-properties that have achieved significance within the last fifty years) at the time of application to FEMA under any grant program.
3. A scope change amendment submitted for buildings or structures that have become 45 years old or older after the original grant is obligated will be subject to the provisions of this Elevations PA.
4. Ground Disturbing Activities related to Elevations will be reviewed in accordance with the 2016 Statewide PA, Programmatic Allowance II.B.11 and II.C, Standard Project Review.
5. The document is applicable to FEMA's responsibilities under Section 106 of the NHPA for undertakings outlined in I.A.2 and does not take the place of any local design or permitting requirements. The review of buildings and structures under the provisions of this Elevations PA may run concurrently, before or after any local design requirements.

#### **B. Roles and Responsibilities of the Signatories**

1. FEMA:
  - a) FEMA shall ensure federal, tribal, state, Recipient, Subrecipient, or contractor staff meet the Secretary of the Interior's (SOI) Professional Qualifications set Standards forth in the Federal Register at 48 Fed. Reg. 44716-01 (September 29, 1983), as amended (Qualified) in completing the project review stipulations of this Elevations PA.

- b) FEMA shall provide attachments B and C of this Elevations PA to the Recipient and Subrecipient for each Undertaking that meets the applicability criteria set forth in Stipulation I.
- c) Prior to authorizing the release of funds for individual Undertakings requiring grant conditions pursuant to this Elevations PA, FEMA shall inform Recipient(s) of all stipulations and conditions and ensure that they are understood so they can be adequately conveyed to the Subrecipient.
- d) Funding eligibility shall be conditional on compliance with stipulated requirements under this Elevations PA.
- e) FEMA shall provide Signatories, Invited Signatories, and Concurring Parties with an annual report per Stipulation VI of this Elevations PA each year this Elevations PA is in effect.
- f) FEMA shall defer to the 2016 Statewide PA to review Undertakings or apply procedures that are not stipulated under this Elevations PA or are otherwise silent.

2. SHPO:

- a) The SHPO shall review National Register eligibility determinations via the Louisiana Historic Resource's Elevation (LHRE) Form and effect determinations in accordance with Stipulation II.E and respond within timeframes provided in this Elevations PA.
- b) The SHPO will place the final LHRE Forms on the Louisiana Cultural Resources Map.
- c) The SHPO will review the design drawings for buildings and structures listed in or eligible for listing in the National Register and provide comments within the timeframes provided in this Elevations PA.
- d) The SHPO will notify CLG representatives if a design review is required for one of the buildings or structures within their local historic district
- e) SHPO will accept recordation material as described within the treatment measures stipulation of this Elevations PA.

3. Recipient(s):

- a) Recipient(s) shall ensure that their Subrecipients understand and acknowledge conditions and potential requirements that may be placed upon their grant as a result of the provisions of this Elevations PA and assist in providing the documents that may result from these conditions.
- b) The Recipient shall ensure the Subrecipient receives the Elevation Considerations checklist for structures and buildings listed in or eligible for listing in the National Register (Attachment B of this Elevations PA) and request the Subrecipient provide information to document the Undertaking meets any or all the considerations.



- c) Recipient(s) shall ensure that their Subrecipients are made aware that in the event of unexpected discovery involving an Undertaking that has affected a previously unidentified historic property or human remains or affected a known historic property in an unanticipated manner, the Subrecipient will comply with Stipulation III. B of the 2016 Statewide PA.
- d) Recipient(s) shall notify FEMA as soon as possible of any proposed change to the approved scope of work. Recipient(s) shall direct their Subrecipient not to implement the changes to the proposed scope of work until any additional review required by this Elevations PA is complete.

#### 4. Consulting and Concurring Parties

- a) Consulting Parties that do not sign this Elevations PA will not have a defined role in its implementation. Such Consulting Parties will retain all the rights and responsibilities that members of the public or Subrecipients have in the Section 106 review process and may work with any Signatory, Invited Signatory, or Concurring Party to express views or comments on the implementation of this PA.
- b) If a Concurring Party does not provide comments during the time frames provided for review, FEMA and Signatories may proceed to the next step in the review process without taking additional steps to seek comments from such party.

#### C. Timeframes and Communications

- 1. FEMA will recognize a Consulting Party as a Signatory, Invited Signatory, or a Concurring Party starting on the date the Consulting Party signs this Elevations PA and provides FEMA with a record of its signature.
- 2. The Parties may send and accept official notices, comments, requests for further information and documentation, and other communications required by this Elevations PA by e-mail. If the size of an e-mail message is unusually large or an e-mail is returned to a sender, the sender will contact the recipient(s) and determine alternative methods to deliver the information.
- 3. Time sensitive information that is not sent by e-mail should be sent by overnight mail, courier, or be hand-delivered and the time frame for its review will be measured from the date the delivery is signed for by the recipient.
- 4. All references to time periods in this Elevations PA are in calendar days. If a review period included in this Elevations PA ends on a Saturday, Sunday, or Federal holiday, the review period will be extended until the next business day. Any electronic communication forwarding plans or other documents for review under the terms of this Elevations PA sent after 4:00 pm Central Standard Time (CST) will be deemed to have been received by the reviewing party on the next business day. E-mail comments on any plans or documents submitted for review shall be deemed timely if received at any time on the last day of a review period. Responses sent by mail will be accepted as timely if postmarked by the last day allowed for the review.

5. The failure of any Party to comment during the time frames set out in this Elevations PA may, at FEMA's sole discretion, be treated by FEMA as concurrence, and FEMA may proceed to the next step in the review process without taking additional steps to seek comments from that party.
6. Contact information is included in Attachment A of this Elevations PA. Parties shall immediately inform FEMA of any changes in the name, address, e-mail address or phone number of their respective points-of-contact. FEMA will forward this information to the Parties by e-mail or annual report.

## **II. PROJECT REVIEW**

### **A. Programmatic Allowances**

1. FEMA will determine if the scope of work meets the allowances outlined in Appendix B of the 2016 Statewide PA, specifically allowance II.B.11
2. If the proposed activities do not substantially conform to the existing footprint, or immediately adjacent to the existing footprint, or if after a review of the Louisiana Division of Archaeology Cultural Resource map (LDACR), the area falls within one-thousand (1,000)-feet of a known eligible or unassessed archaeological site, FEMA will consult in accordance with the 2016 Statewide PA per allowance II.B.11 of the 2016 Statewide PA regarding ground disturbing activities.
3. If allowance II.B.11, of the 2016 Statewide PA regarding buildings or structures less than 45-years of age, does not apply, FEMA will determine if the building or structure is eligible for the National Register using the process outlined herein under Stipulation II.C, Identification of Historic Properties, within this Elevations PA.

### **B. Area of Potential Effects (APE)**

1. The APE for elevations will include the footprint of the building or structure, staging and access areas where ground disturbance will take place and adjacent buildings, structures, landscape features and/or objects within the viewshed of the building or structure proposed for elevation.

### **C. Identification of Historic Properties**

1. FEMA shall conduct identification and evaluation of historic properties using SOI qualified staff. FEMA may authorize Recipient(s), or Subrecipients through Recipient(s) to identify and evaluate historic properties in accordance with Stipulation I.B.1(a) of the 2016 Statewide PA.
2. FEMA or authorized Recipient(s) and Subrecipient(s) will conduct identification of Historic Properties within the APE by consulting the National Register database maintained by the Louisiana Division of Historic Preservation (LDHP). Properties should be checked to determine if they are listed in the National Register or located within a listed or eligible National Register district or within a CLG.

3. The Recipient shall ensure the top portion of a LHRE Form (Attachment C) is completed and include clear pre-construction pictures in the photograph section of the LHRE Form for each building 45 years old or older. Photographs must be digital and at least 300 dpi. Faxed or scanned images are not acceptable. The LHRE Form shall be submitted to FEMA with the project application.
4. SOI qualified staff shall fill out the remaining portion of the LHRE Form to include a determination of eligibility for the National Register. FEMA will submit the LHRE Form to SHPO for review. Unless the SHPO objects to the finding within 15 days, FEMA will assume concurrence.
5. If SHPO objects to the finding, Parties will resolve the disagreement in accordance with Stipulation V of this Elevations PA.
6. For properties determined ineligible for the National Register, FEMA shall document a determination of no historic properties affected if the ground disturbance portion meets the elevation allowance II.B.11 in the 2016 Statewide PA. This does not preclude any local design review or permit requirements.
7. If the Undertaking does not meet the ground disturbance portion of the elevation allowance II.B.11 in the 2016 Statewide PA, FEMA will consult in accordance with the 2016 PA.
8. For properties determined eligible or listed in the National Register, FEMA will condition the project with the provisions outlined in Stipulations II.D and E below and provide the Elevation Considerations checklist, provided in Attachment B, to the Recipient.

#### D. Assess Effects on Historic Properties

1. FEMA will request the information necessary to determine if the proposed undertaking incorporates the elevation considerations from the Recipient. This information must be provided to FEMA for review prior to construction beginning. The information will include a completed Elevation Consideration checklist (attachment B) from the Subrecipient and any documentation they can provide to demonstrate the elevation will meet all of the considerations such as, but not limited to, a statement from an elevation contractor or other professional, or photographs to show adjacent buildings.
2. If FEMA determines the undertaking incorporates all of the elevation considerations, FEMA shall document a finding of no adverse effect in the file and conditionally approve the project with the condition the Subrecipient photographically record the structure or building post-elevation and submit a final LHRE Form in accordance with Stipulation II.E.2(f).
3. If FEMA determines the undertaking doesn't meet the elevation considerations outlined in Attachment B or the Subrecipient is unable to determine if the undertaking will meet the design considerations, FEMA will document that the undertaking may adversely affect historic properties and conditionally approve the project with the provisions outlined in Stipulations II.E.1 and 2 of this Elevations PA.

## E. Treatment Measures

### 1. FEMA will ensure the following provisions are met as part of grant requirements:

#### a) Design Review

- i. The Subrecipient must provide design drawings to include, but not limited to, a site plan, façade elevations, existing and proposed elevation heights, details on materials proposed, window and door openings, stair options, and elevator (if required) for the historic property. The design drawings should reflect the elevation considerations outlined in Attachment B of this PA. The design drawings shall be submitted to Recipient or FEMA, if the Tribe is the Recipient. FEMA will submit the design drawings to the SHPO for review and comment.
- ii. The SHPO will review and comment on the design drawings within 30 days from receipt for Hazard Mitigation Assistance and Non-disaster grants or 15 days for Public Assistance projects.
- iii. The SHPO will provide the design and their comments to the local CLG point of contact, if the building or structure is within a CLG historic district. This provision is to ensure the CLG is aware of the design review process required by this Elevations PA. A design review by the CLG is not required to fulfill the provisions of this Elevations PA.
- iv. If no comments are received, FEMA will determine the design has adequately minimized potential adverse effects and find that the project will have no adverse effects to historic properties. FEMA will notify the Recipient and Subrecipient of this finding and only require the completion of the LHRE Form, per Stipulation II.E.2(e) of this Elevations PA.
- v. FEMA will submit the comments to the Recipient and request the Subrecipient incorporate them into the design or provide justification of why they are unable to incorporate the comments. This justification should be submitted to FEMA, via the Recipient, prior to work beginning.
- vi. If the comments are unable to be incorporated, FEMA will submit the Subrecipient's justification to the SHPO for a 15-day review and comment period. If no further comments are received within the fifteen-day review period, the Subrecipient may move forward with the design as is. If further design revisions are requested, FEMA will submit them to the Subrecipient, via the recipient, and may request a meeting among the SHPO, FEMA, Recipient and Subrecipient to discuss the changes. If, through this process, an adverse effect is unavoidable, full recordation in accordance with Stipulation II.E.2 will be required.

### 2. Recordation

- a) The Subrecipient or Recipient, when a Tribe is the Recipient, is responsible for ensuring the historic property or properties are recorded prior to work beginning

for undertakings where SHPO's comments on the design may not be incorporated and adverse effects may not be avoided. The photographic recordation shall be accomplished by or under the supervision of a SOI Qualified staff in History, Architectural History, Architecture, or Historic Architecture. The digital photography and color photographs must comply with the "Best" category of requirements from the National Register Photo Policy Fact Sheet:

[https://www.nps.gov/subjects/nationalregister/upload/Photo\\_Policy\\_update\\_2013\\_05\\_15\\_508.pdf](https://www.nps.gov/subjects/nationalregister/upload/Photo_Policy_update_2013_05_15_508.pdf). Image files must be saved as both TIFF and JPEG files. Color images must be produced in RGB (Red/Green/Blue) color mode as 24-bit or 48-bit color files. In addition to the requirements specified by the latest National Register Photo Policy, photographs will be digitally labeled to state the address (street number, street name, city, and state); date of photograph; description of view, including direction of camera; and name of photographer/agency.

- b) The photographs shall include general exterior views of the historic property including all four facades and oblique views, if possible. The entire building or structure must be captured where possible. Views of the surrounding streetscape showing the immediately adjacent properties shall also be included.
- c) All pre-construction digital photographs shall be submitted to FEMA for selection of photographs to be included in the final recordation package. The recordation package shall include a photo log with descriptions of the historic property and digital copies of all photographs. The recordation package may include reproductions of historic photographs or historic plans/drawings, if available. FEMA will forward to the SHPO for a fifteen (15) day review period and will provide any comments back to the Subrecipient to be incorporated into the final recordation package.
- d) The Subrecipient is responsible for taking photographs after the elevation has been completed. The photographs should meet the same standards as and match the views selected for the pre-construction photographs.
- e) The Subrecipient will prepare a minimum of 2 digital archival quality copies of the recordation package materials and will forward 1 copy to the SHPO; one (1) copy to a local archive or library capable of permanent digital record storage. Documentation confirming that the recordation package materials have been archived as described in this Treatment Measure will be submitted to the Recipient and FEMA for inclusion in the project file.
- f) The Subrecipient will be responsible for submitting a final LHRE Form to the SHPO to include post-elevation photographs with the same or similar views as the pre-elevation photos. Documentation confirming that the Subrecipient submitted the LHRE Form to SHPO as described will be submitted to FEMA and Recipient for inclusion in the project file.

### **III. CHANGES TO THE SCOPE OF WORK**

- A. Recipient(s) shall notify FEMA and shall require a subrecipient to notify it immediately when a subrecipient proposes changes to an approved scope of work for an Undertaking.
1. If FEMA determines the change has no potential to affect the property, meets an Allowance, or the previous effect determination is still applicable, FEMA shall approve the change.
  2. If FEMA determines that the change can be modified to meet an Allowance, or a previously determined finding of effect is still applicable, FEMA shall conclude its Section 106 review responsibilities.
  3. If FEMA determines that the change does not meet an Allowance; may cause additional effects to the property; or changes a previously determined finding of effect, FEMA shall initiate a review in accordance with Stipulation II.C, Standard Project Review.

### **IV. DISCOVERIES AND UNEXPECTED EFFECTS**

- A. Unexpected Discoveries, Previously Unidentified Properties, or Unexpected Effects: Recipient(s) shall require its Subrecipient to notify it immediately of an unexpected discovery (including archaeological deposits found in tree root balls during removal), or if it appears that an Undertaking has affected a previously unidentified property, or affected a known historic property in an unanticipated manner, in accordance with Stipulation I.B.3(e), Recipient(s) Roles and Responsibilities. In addition, any Signatory may notify FEMA if it learns of an unexpected discovery, previously unidentified property, or unexpected effects. Following such notice, FEMA will, at the earliest possible time, notify the Recipient(s) and Subrecipient and request that Recipient(s) and subrecipient manage the unexpected discovery, previously unidentified property, or unexpected effects by following the steps set out below:
1. The Recipient(s) shall notify FEMA at the earliest possible time, but no later than twenty-four (24)-hours after Recipient(s) received notification regarding the discovery, previously unidentified property or unexpected effects and the steps that have been taken to secure the site.
  2. The Recipient(s) shall require its Subrecipient stop construction activities in the vicinity of the discovery or unexpected effects, restrict access to the affected area or deposits, and secure the area. The Recipient(s) shall inform Subrecipient that work in the APE will not be resumed until FEMA completes consultation to consider the effects of the Undertaking on the unexpected discovery or unexpected effects. Subrecipient may be instructed by FEMA and Recipient(s) that work can be resumed in areas beyond the extent of the unexpected discovery, archeological deposit identified by a SOI Qualified archaeologist, or unexpected effects as determined by FEMA.

3. The Subrecipient will document the unexpected discovery or effects in writing, if requested by the Recipient(s).
4. The Subrecipient shall take all reasonable measures to avoid or minimize harm to the property until FEMA has completed consultation with the SHPO, participating Tribe(s), and any other Consulting Parties, and the subrecipient has implemented any additional measures identified during FEMA's consultation.
5. The Subrecipient shall comply with the Louisiana Unmarked Human Burial Sites Preservation Act (R.S. 8:671 et seq.) if unmarked graves, indications of a burial, burials, human remains, or burial artifacts are discovered during the implementation of a FEMA funded undertaking on privately-owned lands or lands owned by a state or local governmental entity. Within seventy-two (72)-hours after the discovery, Subrecipient shall notify the local law enforcement office and the Louisiana Division of Archaeology (LDOA), within the Louisiana Department of Culture, Recreation and Tourism, Office of Cultural Development at 225-342-8170 to assess the nature and age of the human skeletal remains. If the appropriate local official determines that the human skeletal remains are not a crime scene and older than fifty (50)-years of age, LDOA has jurisdiction over the remains. In cases where the human remains are determined to be Native American, the LDOA shall notify and coordinate with Tribes as required by the state law. FEMA will assist LDOA, as requested, to consult with Tribes, Recipient(s), and Subrecipient, as appropriate.
6. Discoveries of unmarked graves, burials, human remains, or items of cultural patrimony on Federal or Tribal lands shall be subject to the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. §3001-3013, 18 U.S.C. § 1170) and the Archaeological Resources Protection Act of 1979 (ARPA)(16 U.S.C. §470aa – 470mm).
7. The Recipient(s) and its Subrecipient shall assist FEMA in completing the following actions, as required:
  - a) FEMA shall notify SHPO, participating Tribe(s), and other Parties that may have an interest in discovery of the previously unidentified property or unexpected effects at the earliest possible time, but no later than seventy-two (72)-hours after FEMA is notified by Recipient(s) or Signatory. FEMA shall consult with SHPO, participating Tribe(s), and other Consulting Parties in accordance with the consultation process outlined in Stipulation II, Project Review, to develop a mutually agreeable action plan with timeframes to identify the discovery or previously unidentified property and determine the National Register eligibility of any previously unidentified property; take into account the effects of the Undertaking on historic properties; resolve adverse effects if necessary; and ensure compliance with applicable Federal, State, and local statutes.
  - b) FEMA shall coordinate with Recipient(s) and Subrecipient regarding any needed modification to the scope of work for the Undertaking necessary to

implement recommendations of the consultation and facilitate proceeding with the Undertaking

- c) In cases where discovered human remains are determined to be Native American, FEMA shall consult with the appropriate Tribal representatives and SHPO. In addition, FEMA shall follow the guidelines outlined in the ACHP's Policy Statement Regarding the Treatment of Burial Sites, Human Remains, and Funerary Objects (2007) and any state-specific policies that may be in force.

## **V. DISPUTE RESOLUTION**

- A. Should any Party object to FEMA, within the timeframes provided by this Elevations PA, to any plans, specifications, or actions provided for review, FEMA will notify the Recipient and Subrecipient and consult further with the objecting Party, Recipient and Subrecipient, and others as appropriate to seek resolution.
- B. If FEMA determines that the dispute cannot be resolved, FEMA will forward a proposed resolution of the dispute and all relevant documentation to the ACHP. Within 15-days after receipt of the documentation, the ACHP will:
  - 1. Advise FEMA that it concurs with FEMA's resolution of the dispute; or
  - 2. Provide FEMA with recommendations, which FEMA will take into account in reaching a final decision regarding the dispute; or
  - 3. Notify FEMA that it will comment, pursuant to 36 CFR §800.7(c), and proceed to comment. Any comment provided will be considered by FEMA, in accordance with 36 CFR §800.7(c)(4), with reference to the subject of the dispute.
- C. If the ACHP does not provide FEMA with comments or recommendations within 15 days, FEMA may assume that the ACHP does not object to its recommended approach and it will proceed accordingly.
- D. Any comment or recommendation provided by the ACHP will be understood to pertain only to the subject of the dispute, and FEMA's responsibilities to fulfill all actions that are not subject of the dispute will remain unchanged. Section 106 reviews and implementation of previously reviewed Project Worksheets that are not the subject of a dispute can continue without interruption while a dispute is under review.

## **VI. REPORTING**

- A. FEMA shall provide information to Invited, Consulting, and Concurring Parties in conjunction with the annual report provided under the 2016 Statewide PA. If any Party requests a meeting to discuss the terms of this PA, FEMA will host a meeting.
- B. Recipients shall provide FEMA with information related to the status of treatment measures required as a result of implementing this Elevations PA by March 1st of each year.



## **VII. AMENDMENTS, TERMINATION, AND SEVERABILITY**

- A. Amendments shall be handled in accordance with Stipulation IV.A of the 2016 Statewide PA.
- B. Termination and Severability shall be handled in accordance with Stipulation IV.C of the 2016 Statewide PA.

## **VIII. DURATION**

- A. This Elevations PA shall remain in effect from the date of execution for a period not to exceed seven (7) years unless otherwise extended pursuant to Stipulation VIII.B, below, or terminated pursuant to Stipulation VII, Amendments, Termination, and Noncompliance, above. The Elevations PA shall remain in effect for Declarations made prior to expiration of the Agreement until a new Agreement is executed in order to minimize delays in delivery of FEMA assistance.
- B. The Signatories may collectively agree to extend this Elevations PA to cover additional calendar years, or portions thereof, through an amendment per Stipulation VII provided that the original Agreement has not expired

## **IX. EXECUTION AND IMPLEMENTATION**

This Elevations PA may be executed in counterparts, with a separate page for each Signatory, and shall become effective on the date the final signed copy is submitted to the ACHP.

THE FOLLOWING ATTACHMENTS ARE PART OF THIS ELEVATIONS PA DOCUMENT:

A: CONTACT INFORMATION

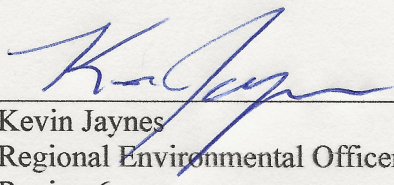
B: ELEVATION CONSIDERATIONS

C: LHRE FORM

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS  
FOR THE ELEVATION OF BUILDINGS AND STRUCTURES IN  
LOUISIANA**

**SIGNATORY PARTIES**

**FEDERAL EMERGENCY MANAGEMENT AGENCY**

 Date: 11/24/2020  
Kevin Jaynes  
Regional Environmental Officer  
Region 6

\_\_\_\_\_  
Date: \_\_\_\_\_  
George A. Robinson  
Regional Administrator  
Region 6

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS  
FOR THE ELEVATION OF BUILDINGS AND STRUCTURES IN  
LOUISIANA**

**LOUISIANA STATE HISTORIC PRESERVATION OFFICER**



Kristin P. Sanders  
State Historic Preservation Officer

Date: November 6, 2020

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS FOR THE ELEVATION OF BUILDINGS  
AND STRUCTURES IN LOUISIANA**

**GOVERNOR'S OFFICE OF HOMELAND SECURITY AND EMERGENCY  
PREPAREDNESS**




James B. Waskom  
Director

Date: 11/2/2020

Governor's Office of Homeland Security and Emergency Preparedness

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS  
FOR ELEVATIONS OF BUILDINGS AND STRUCTURES IN LOUISIANA**

**GRETNA CERTIFIED LOCAL GOVERNMENT**

  
\_\_\_\_\_  
Matthew Martinec  
Director of Planning and Major Projects  
City of Gretna, Louisiana

Date: 10/6/2020

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR’S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS FOR THE ELEVATION OF BUILDINGS  
AND STRUCTURES IN LOUISIANA**

**CITY OF NEW ORLEANS**

name		Date:
Title		
Organization		

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS FOR THE ELEVATION OF BUILDINGS  
AND STRUCTURES IN LOUISIANA**

**JEFFERSON PARISH**



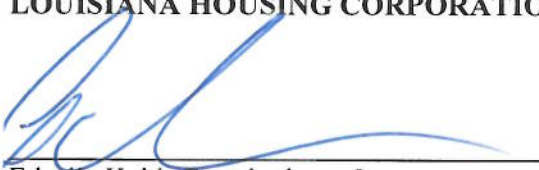
Michelle Gonzales  
Director Ecosystem and Coastal Management  
Jefferson Parish Government

Date: 10/6/2020



**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS FOR THE ELEVATION OF BUILDINGS  
AND STRUCTURES IN LOUISIANA**

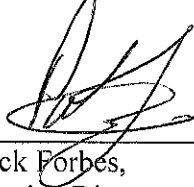
**LOUISIANA HOUSING CORPORATION**

  
\_\_\_\_\_  
Edselle Keith Cunningham, Jr.  
Executive Director  
Louisiana Housing Corporation

Date: October 12, 2020

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS FOR THE ELEVATION OF BUILDINGS  
AND STRUCTURES IN LOUISIANA**

**OFFICE OF COMMUNITY DEVELOPMENT**

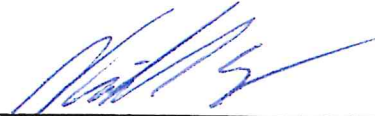


\_\_\_\_\_  
Patrick Forbes,  
Executive Director  
Office of Community Development

Date: 9.27.20

**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY,  
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER,  
AND THE GOVERNOR'S OFFICE OF HOMELAND SECURITY AND  
EMERGENCY PREPAREDNESS FOR THE ELEVATION OF BUILDINGS  
AND STRUCTURES IN LOUISIANA**

**CITY OF LAKE CHARLES**

  
name Nicholas E. HUNTER  
title MAYOR  
organization City of Lake Charles  
Louisiana

Date: Sept 21, 2020

APPROVED BY LEGAL DEPARTMENT CITY OF LAKE CHARLES	
Approval subject to signature, date and initials below regarding ordinance approval.	
By:	<u>Corey L. Rubin</u>
	Corey L. Rubin, Assistant City Attorney
Date:	<u>09/22/2020</u>
<input type="checkbox"/>	Authorization ordinance attached.
<input checked="" type="checkbox"/>	No ordinance approval required.

## **ATTACHMENT A**

### **Contact Information for Signatories, Invited Signatories and Concurring Parties**

#### **Federal Emergency Management Agency (FEMA) Region 6**

Kevin Jaynes  
Regional Environmental Officer  
800 North Loop, Federal Center  
Denton, TX 76209-3698  
PHONE: (940) 383-7224  
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George Robinson  
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FAX: (940) 898-5325  
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Tiffany Spann Winfield  
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PHONE: (504) 762-6800

#### **State Historic Preservation Officer (SHPO)**

Kristin Sanders  
State Historic Preservation Officer  
Department of Culture, Recreation & Tourism  
P.O. Box 44247  
Baton Rouge, LA 70804  
[ksanders@crt.la.gov](mailto:ksanders@crt.la.gov)

Nicole Hobson-Morris  
Executive Director  
Division of Historic Preservation  
Department of Culture, Recreation & Tourism  
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FAX: (225) 219-9772  
[nhmorris@crt.state.la.us](mailto:nhmorris@crt.state.la.us)

Dr. Charles “Chip” McGimsey  
State Archaeologist and Director  
Louisiana Division of Archaeology  
Department of Culture, Recreation & Tourism  
PHONE: (225) 219-4598  
FAX: (225) 342-4480  
[cmcgimsey@crt.la.gov](mailto:cmcgimsey@crt.la.gov)

**Governor’s Office of Homeland Security and Emergency Preparedness (GOHSEP)**

James B. Waskom  
Director  
7667 Independence Boulevard  
Baton Rouge, LA 70806  
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FAX: (225) 225-7501  
[james.waskom@la.gov](mailto:james.waskom@la.gov)

Ellen Ibert  
Senior Problem Resolution Officer (PRO) for  
Environmental & Historic Preservation (EHP) Concerns  
GOHSEP Technical Service Section  
7667 Independence Blvd.,  
Baton Rouge, La 70806  
Cubicle # 1015-370  
FEMA LIRO  
Main Street, Baton Rouge, LA  
(225) 334-7748 desk  
(337) 208-7602 cell

**Jefferson Parish**

Maggie Talley  
Director of Floodplain Management & Hazard Mitigation for Jefferson Parish  
1221 Elmwood Pk Blvd, Suite 310  
Jefferson, LA 70123  
[mtalley@jeffparish.net](mailto:mtalley@jeffparish.net)  
504-736-6541

**City of Lake Charles**

Lori Marinovich

Assistant Director Planning

City of Lake Charles

CLG and Special Districts

PO Box 900

326 Pujo Street (70601)

Lake Charles, LA 70602-0900

Lori Marinovich

lmarinovich@cityoflc.us

O: 337-491-1429

**Additional Contact Information here**

## ATTACHMENT B

### Elevation Considerations Checklist

This checklist is applicable to buildings and structures determined to either be eligible for or listed in the National Register of Historic Places (National Register) or within a listed or eligible National Register district. This determination must be made by a person meeting the Secretary of the Interior's (SOI's) Professional Qualification Standard(s) and the State Historic Preservation Officer (SHPO) must concur with the determination. A Louisiana Historic Resource Elevation (LHRE) form must be completed and submitted to FEMA for submittal to the SHPO to make this determination.

Structures not historic nor located within a listed or eligible NRHD will not require a design review and will not be guided by this Elevations Considerations document.

Property owners and their consultants should consult the following guidelines when developing the scope of work and design for elevation of historic structures.

The U.S. Department of Interior National Park Services; *Guidelines on Flood Adaptation for Rehabilitating Historic Buildings*.

<https://www.nps.gov/tps/standards/rehabilitation/flood-adaptation-guidelines.pdf>

The Louisiana Office of Cultural Development, Division of Historic Preservations; *Elevation Design Guidelines For Historic Buildings in the Louisiana GO Zone*.

<https://www.crt.state.la.us/cultural-development/historic-preservation/education/elevation-guidelines/index>

Structures Individually eligible for or listed on the National Register or contributing to a listed or eligible National Register district will not require a design review when all of the following conditions are met.

- ☐ Elevation will not require change to the building footprint, setback and orientation. The footprint is defined as the location of a building that occupies the land within the property boundary. The orientation is the direction that the building faces within the property boundary.
- ☐ Access to the property site will not change, e.g. walkways, driveways and **main property entrance**.
- ☐ Foundation type, structure, and materials will match the existing.
- ☐ Access to the structure will not change, e.g. historic entrances will be maintained.
- ☐ Landscaping or architectural screening, intended to visually screen a new residential base or sub-story and are used around the perimeter of the foundation and/or between piers (applicable for structures with pier foundations)
- ☐ Existing or historic porch, porch columns, stairs and railings are retained, with no additional columns.

- ☐ Construct replacement railings with traditional proportions or, if a taller rail is necessary to meet code, retain a horizontal rail at the traditional railing height.
- ☐ New stairs, railings, or ramps must match the style and features of the historic design, salvaging and reusing historic features to the extent possible. Construct new railings, where none previously existed, that are simple and non-decorative and/or match the house style and type.
- ☐ When no stairs are present new stairs will not be greater than a run of 4.
- ☐ Live trees that contribute to the historic character of the area or building are retained.
- ☐ Mechanical equipment such as heating or cooling systems, solar panels, or antennas, etc. do not cover historic features such as windows or doors and are shielded from the street view.
- ☐ Ramps should be installed on secondary elevations.
- ☐ Exterior elevators or lifts should be designed to be compatible with the historic character of the property and located on secondary elevations to avoid obscuring existing historic features such as windows.
- ☐ Historic fencing will be retained or reused, if present.
- ☐ Chimney(s) preserved, if present.
- ☐ Existing or historic exterior cladding is preserved and matched, if elevation is concealed by extending the existing outer wall.

#### **Non-contributing structures within a Historic District**

- ☐ Live trees that contribute to the historic character of the area or building are retained.
- ☐ Elevation will not require change to the building footprint, setback and orientation.
- ☐ Access to the property site will not change, e.g. walkways, driveways and property entrance.



**ATTACHMENT C**  
LHRE Form (next page)



# Louisiana Historic Resource Elevation Form

Louisiana Division of Historic Preservation  
Office of Cultural Development  
Department of Culture, Recreation and Tourism

*This form is to be used only for FEMA-funded elevation documentation and not for surveys. Please contact the SHPO for the proper survey form.*

Resource ID Number

---

Historic Name

Latitude (Decimal Degrees)

Address

Longitude (Decimal Degrees)

City

Parish

Certified Local Government (CLG) Status

Date Surveyed

[click here](#) for maps of CLG

## Items below completed by SOI qualified personnel

---

National Register Status

Construction Date (Estimated)

Type of Resource

Date of Alterations (Estimated)

Eligibility Criteria

Form

A-Event

B-Person

C-Design or Construction

D-Potential Information

Style

**Architectural Description and Comments:** Include details on windows, doors, foundation, roof, outbuildings, or any other architectural features of note. For bridges include sub-type, if known, and approximate length. (No character limit)

Direction facing

Insert Pre Facade Photo Here:

Direction facing

Insert Post Facade Photo Here:

Direction facing

Insert Pre Side Elevation Photo Here:

Direction facing

Insert Post Side Elevation Photo Here:

Direction facing

Insert Pre Side Elevation Photo Here:

Direction facing

Insert Post Side Elevation Photo Here:

Direction facing

Insert Pre Rear Photo Here:

Direction facing

Insert Post Rear Photo Here:

**FEMA Review**

**SHPO Concur**

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Scoggin, Bob. Interview with Sarah McGovern. Personal interview. Denton, December 9, 2022.



## BIOGRAPHY

Sarah K. McGovern has fourteen years of professional experience in regulatory environmental and historic preservation compliance, specializing in Section 106 of the National Historic Preservation Act (NHPA) and in coordination with the National Environmental Policy Act (NEPA). Sarah meets the Secretary of the Interior's Professional Qualification Standards in Architectural History and History. Through her experience in Section 106 and NEPA compliance, Sarah has identified and evaluated properties for National Register of Historic Places eligibility, determined the effects of Federal undertakings on historic properties, minimized or mitigated adverse effects through the development of Memorandum of Agreements and Programmatic Agreements, reviewed Environmental Impact Statements and Environmental Assessments under NEPA, and applied CATExes and other applicable environmental laws to Records of Environmental Considerations documents.