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## White Paper

### Development of FEMA Alternate Procedures to Implement Section 106 of the National Historic Preservation Act

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#### **Purpose and Need**

The Federal Emergency Management Agency (FEMA), which now functions as part of the Department of Homeland Security (DHS), is proposing the development of Alternate Procedures to implement Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA). This initiative is being undertaken to better tailor the unique needs and mandate of this agency with the requirements of Section 106 of NHPA, which calls upon all Federal agencies to proactively consider the effects of their projects on historic properties.

The calamitous terrorist attacks of September 11, 2001, on New York City and the Pentagon, irrevocably transformed the United States and the world. As a result, President Bush created DHS to better protect our citizens from threats to our homeland– the largest and most significant transformation of the U.S. Government since 1947, when President Truman merged various branches of the U.S. Armed Forces to better coordinate the nation’s defense against military threats.

To ensure that FEMA, as part of DHS’s larger mission, will be able to carry out its core responsibilities to prepare the nation for all hazards and effectively manage Federal response and recovery efforts following any national incident, streamlining of regulatory responsibilities under other Federal laws is essential. One regulatory process that will greatly benefit from this streamlining involves the responsibilities set forth in Section 106 of NHPA for the identification, evaluation, and treatment of historic properties in communities across America affected by projects eligible for FEMA funding.

Even before September 11, 2001, Federal agencies were grappling with how to effectively integrate anti-terrorism and security measures and confidentiality concerns within the Federal historic preservation regulatory framework. The development of FEMA Alternate Procedures will provide an opportunity to address these challenges while at the same time facilitate improved discussions on emergency preparedness at the State and local level, enhance multi-jurisdictional coordination, and reduce the time currently required to allocate funding.

#### **Background and Issues Overview**

Under Section 106 of NHPA, Federal agencies, including FEMA, must take into account the effects of undertakings on properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). If historic properties listed, or eligible for listing, in the NRHP will be adversely affected by FEMA-funded projects, then FEMA must identify treatment measures to address these effects, and consult with the State Historic Preservation Officer or Tribal Historic Preservation Officer (SHPO/THPO), other identified consulting parties, and the Advisory Council on Historic Preservation (ACHP).

#### **FEMA’s Current Implementation of the Section 106 Process**

For the past nine years, FEMA has relied upon a series of State-specific Programmatic Agreements (Agreements), executed either in anticipation of or after declared disasters with the SHPO, State Emergency Management Agency (SEMA), and the ACHP, as its preferred mechanism to carry out review under Section 106’s implementing regulations, 36 CFR Part 800, “Protection of Historic

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Properties.” These Agreements have included a series of steps to “customize” Section 106 regulatory responsibilities to specific FEMA programs, most notably grants for the repair, restoration, and mitigation of public infrastructure. The Agreements have had two goals: 1) to expedite the review of the effects of FEMA undertakings on historic properties, and 2) to fully integrate the Section 106 process into the mechanics and delivery of FEMA programs.

FEMA has realized a series of tangible benefits from the use of the Agreements. Adoption of this form of agreement document has significantly reduced the number of projects requiring further Section 106 review, allowing FEMA staff to concentrate on project scopes of work with more significant historic preservation issues, which in turn has led to more time and personnel available in project formulation to reduce or eliminate project adverse effects. In addition, the Agreements have fostered earlier and closer coordination among FEMA and SHPO and SEMA staff, and have helped to educate sub-grantees about FEMA Section 106 responsibilities as well as their own role in the review process.

### **Impediments to FEMA’s Current Implementation of the Section 106 Process**

Despite the successes of these Agreements, several formidable deficiencies are apparent in their continued use. First, over the last two years, FEMA has found that the time it has taken to actually negotiate the Agreements has increased rather than decreased. Because these Agreements are often negotiated after disasters are declared, FEMA and respective SEMAs and SHPOs are occupied with other disaster-specific responsibilities, making timely completion of Agreement negotiation difficult. Even when the Agreements are negotiated in “peacetime,” the development and review of drafts are often laborious. Several SHPOs have indicated to FEMA that they are more comfortable with the standard Section 106 process since the regulations provide for review of FEMA programs on a project-by-project basis. Other deficiencies include the increasing size and complexity of the “streamlined process” described in each Agreement, the difficulty in tracking various changes to the Agreements, and the sometimes time-consuming process of determining ACHP involvement. Finally, since the Agreements largely apply to FEMA’s post-disaster recovery and mitigation programs, they often do not assist with Section 106 review of non-disaster FEMA grants for modifications to local fire houses and construction or modification of State Emergency Operations Centers.

### **Section 106 Program Alternatives Allowed Under 36 CFR Part 800.14**

Since 2001, when the ACHP recognized that its regulations may not perfectly fit the needs of each Federal agency’s program or programs, Federal agencies have been permitted to develop their own Procedures to implement the Section 106 process, which substitute for Subpart B of the ACHP’s regulations. This process is outlined in 36 CFR Part 800.14.

Obviously, the initial development of Alternate Procedures involves much more time and effort than the use of state-specific Programmatic Agreements. Prior to an agency adopting such Procedures, it must consult with interests at all levels of government (Federal, Tribal, State and local) as well as the historic preservation and emergency management communities. Federal agencies must also advertise and publish the draft Procedures in the *Federal Register* to obtain the public’s input into their development. Following notice of the final Alternate Procedures, an agency may then use them to substitute for the standard Section 106 compliance process.

At the present time, the US Army is the only Federal agency that has successfully developed Alternate Procedures for the implementation of Section 106 of the NHPA. While the Army’s Procedures may offer some useful approaches and protocols for consideration, FEMA’s Alternate Procedures will be distinctly different based on the unique mission and activities of the agency.

### **FEMA Preliminary Needs Assessment**

In order to better evaluate its current Section 106 compliance efforts and the potential benefits of developing specific agency-based Procedures to implement Section 106, FEMA tasked the URS Group,

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Inc, in the summer of 2002 to undertake a compliance analysis. The study, entitled *FEMA Alternate Procedures for Compliance with Section 106 of the National Historic Preservation Act – A Preliminary Needs Assessment*, was completed in January 2003.

URS conducted interviews with FEMA headquarters and regional staff directly responsible for overseeing FEMA's Section 106 compliance, as well as program managers who administer the delivery of FEMA funding to eligible applicants. Interviews were also conducted with key historic preservation agencies, such as the ACHP and the National Conference of SHPOs (NCSHPO), as well as with the Department of the Army. Both the NCSHPO and ACHP pointed to the Alternate Procedures recently developed by the US Army as a model to evaluate as part of FEMA's development of its own Section 106 Procedures.

While respondents acknowledged that aspects of FEMA's current State-by-State approach to Section 106 compliance was successful, there was strong desire for a national prototype for compliance that better addressed FEMA's unique responsibilities. Concerns identified in the needs assessment included the lack of qualified full-time staff meeting Secretary of the Interior Professional Qualification Standards, the absence of detailed guidance for the identification of consulting parties and public involvement, and as previously noted, the extensive time needed to negotiate and execute a State-specific Programmatic Agreement. At the same time, despite the laborious process to ratify Agreements, survey participants concurred that the Agreements were still superior to the standard review process set forth in 36 CFR Part 800. The Agreements were cited as particularly advantageous for their ability to exempt from further review FEMA funded scopes of work with little or no impact on historic properties, establish with SHPOs/THPOs the early scoping of issues and sharing of information, and reduce time frames for consultation.

In summary, the assessment captured a number of potential improvements to the current consultation process including:

- Providing for a more effective and efficient Section 106 compliance process that begins with FEMA's unique program mission, and tailors the process to the most critical aspects of program delivery;
- Creating an alternative to the standard project-by-project review between FEMA and other consulting parties;
- Increasing the number, type and level of competencies of its historic preservation staff (particularly to support the Section 106 review of non-disaster specific programs) and focusing the agency's available expertise on larger projects with increased benefit to individual communities, rather than using this expertise on small projects with limited benefits;
- Integrating more thoroughly the input of other critical partners (SHPOs/THPOs, SEMAs, local communities, etc.) into the historic preservation compliance process;
- Providing for new approaches to treatment measures that help achieve broader Tribal/State historic preservation goals (such as the development or enhancement of a Geographic Information System) that also improve FEMA's ability to carry out its Section 106 responsibilities in the future;
- Developing a monitoring mechanism to ensure that the Section 106 process is being correctly applied;
- Creating a process that applies to the entire array of FEMA programs, in all of the regions, and in each of the States while, at the same time, allowing for FEMA Regional and State flexibility.

The implementation of these improvements through Alternate Procedures clearly would benefit both FEMA and its stakeholders in numerous ways.

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### ***Benefits to FEMA***

While attention obviously has shifted from natural disasters to terrorism since September 11<sup>th</sup>, FEMA continues to maintain an all-hazards approach to emergency management. This philosophy recognizes that the same comprehensive framework of mitigation, preparedness, response, and recovery can be used to address the impacts of all types of disasters. Alternate Procedures provide an exceptional opportunity to systematically address all these activities and the programs within FEMA that support them. There has been marked improvement in recent years in the degree of dialogue and cooperation between Federal, State and local emergency management officials and their historic preservation counterparts. The development of Alternate Procedures should further enhance this relationship. FEMA has the opportunity to demonstrate that the adequate consideration of historic properties can be successfully integrated into all facets of the disaster management cycle. Ultimately, FEMA's goals are to improve disaster planning and increase the protection of historic properties. This, in turn, should minimize disaster damages to historic properties and thereby reduce FEMA projects resulting in adverse effects.

### ***Benefits to Critical State Agencies – State Historic Preservation Offices and State Emergency Management Agencies***

Adoption of Alternate Procedures should have immediate and beneficial effects on two important State agencies – SHPOs and SEMAs. The working relationship between SHPOs and SEMAs will be enhanced through increased communication and coordination. One important area that the procedures will address is the opportunity for enhanced training of State and local disaster program managers and administrators regarding the need to consider historic preservation issues when making damage assessments. SHPOs will also be better situated to receive recognition for the indispensable role they play in assisting communities following disasters. Both SHPOs and SEMAs also will benefit from more effectively coordinating historic preservation compliance activities for large-scale disasters including multi-State events as well as smaller ones limited to a town, city, or county.

### ***Benefits to Applicants for Assistance***

As FEMA's primary customer, local communities ultimately have the most to gain by adoption of FEMA Alternate Procedures. Alternate Procedures can act as a positive tool to influence how communities carry out their disaster management responsibilities. Too often, applicants for FEMA funding perceive Section 106 review as impeding the provision of this assistance. At the same time, historic properties are often little more than an afterthought when communities undertake disaster planning, and the significance of these resources is not valued until it's too late. Because the Procedures also will focus on better educating applicants within their State about funding requirements, applications will be more complete, and will more proactively consider historic properties. Through the adoption of standardized protocols for the identification, evaluation and treatment of historic properties, consideration of historic properties will be more readily integrated into FEMA-funded projects. And with applicants having a broader understanding of compliance requirements, the time required to obligate and expend approved project funds will be reduced.

### ***Benefits to the General Public***

In total, the general public will be the ultimate beneficiary from these procedures. The public will benefit by being involved in the development of policies and protocols at a State and Federal level. Alternate Procedures will provide a significant, systematized opportunity for Tribes, States, local communities, applicants, historic preservationists to all share past experiences, identify best practices, and recommend improvements to procedures to further improve Section 106 coordination.

Umbrella organizations such as NCSHPO and the National Association for Tribal Historic Preservation Officers (NATHPO), which represents Tribal Historic Preservation Officers, are important national organizations that will be involved in this process. National "grass roots" historic preservation

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organizations such as the National Trust for Historic Preservation will be actively involved in shaping the program. Their participation ensures that the general public's views and opinions are fully and actively considered and integrated into the final set of Alternate Procedures that are adopted.

### ***Benefits to Other Federal Agencies***

Adoption of Alternate Procedures should result in the improvement in the way other Federal agencies interface with FEMA in natural or man-made disasters. Because roles of all parties will be clarified, coordination protocols among agencies already will be established, thus expediting the delivery of funding for disaster recovery at a community level. At the same time, other agencies within DHS and agencies that work closely with FEMA in disaster environments, such as the U.S. Army Corps of Engineers and the Small Business Administration, may appreciate FEMA's implementation of these Procedures and consequently enhance their own methods of compliance. The ACHP will also achieve its broader technical assistance mission by actively working with FEMA to adopt and implement Alternate Procedures.

### **Conclusions and Future Course of Action**

FEMA, through its preparedness, response, recovery, and mitigation programs, provides Tribes, States and local governments with the necessary tools and resources to minimize disaster damage to life and property. FEMA has the opportunity to directly demonstrate that these tools can be fully integrated with the goals of historic preservation. Undoubtedly, once Alternate Procedures are adopted, FEMA must continue to play a central role in advancing their goals through formulation of policy and guidance, conducting training, and monitoring the performance of its staff as well as its State and local partners.

Based on the enthusiastic support within FEMA for the development of Section 106 Alternate Procedures voiced and encouragement by important external historic preservation interest groups, FEMA entered into an Interagency Agreement with the ACHP in the fall of 2003 as a demonstrated "first step" to develop Alternate Procedures. As part of the Interagency Agreement, the ACHP will assist FEMA in soliciting comments from SHPOs/THPOs and NCSHPO that have executed Agreements with FEMA to determine the successes and/or shortcomings of these Agreements. The ACHP will also assist FEMA in drafting questions that will become part of FEMA's *Federal Register* notice and will review comments submitted to FEMA in response to the *Federal Register* notice. In addition, FEMA intends to bring together historic preservation, tribal, emergency management, and public stakeholders in a series of meetings in 2004-05 to identify and discuss the major issue areas for Alternate Procedures. The process then of drafting the Alternate Procedures, and publishing them for comment in the *Federal Register*, is anticipated to take the balance of calendar year 2005.