

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*Historic Preservation: Federal Laws and Regulations Related
to Hurricane Recovery and Reconstruction*

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Abstract. This report summarizes relevant federal laws and regulations related to historic preservation and the exceptions to these laws and regulations. In addition, FEMA's Environmental, Historic Preservation, and Cultural Resources Program is outlined.

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Historic Preservation: Federal Laws and Regulations Related to Hurricane Recovery and Reconstruction

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Summary

Various federal laws and related regulations provide guidance for the preservation of historic properties, objects, historic areas, and battlefields. While many of these laws and regulations impose specific responsibilities for the preservation and maintenance of historic properties and objects, there are often exceptions to these obligations. These exceptions may be implemented in order to deal with emergency and/or natural disaster situations. In the aftermath of Hurricanes Katrina and Rita and the destruction experienced in the Gulf Region, these preservation laws and their exceptions may provide some guidance for the recovery and reconstruction of hurricane-impacted areas. This report summarizes relevant federal laws and regulations related to historic preservation and the exceptions to these laws and regulations. In addition, FEMA's Environmental, Historic Preservation, and Cultural Resources Program is outlined.

Federal Historic Preservation Laws and Regulations That May be Relevant to Hurricane Recovery and Reconstruction¹

Federal Dam Construction.² Federal law requires the preservation of "historical and archeological data (including relics and specimens)" that might be lost or destroyed through flooding, relocation of roads, terrain alterations, and other construction-related activities.³ The law requires that when such data or objects are threatened by federal construction projects, there is to be undertaken the survey, recovery, preservation, and

¹ This report does not consider state or local laws, ordinances, or regulations that may affect historic properties and objects and that may be relevant in the hurricane recovery and reconstruction efforts.

² 16 U.S.C. §§ 469 to 469c-2.

³ *Id.* § 469.

protection of such data.⁴ Specifically, a survey is to be undertaken by the Secretary of the Interior where “scientific, prehistorical, historical, or archeological data” may be lost or destroyed by any federal or federally assisted licensed project, activity, or program.⁵ However, an exception to these survey and recovery requirements exists in cases of “emergency projects.”

(b) Emergency projects

No survey or recovery work shall be required pursuant to this section which, in the determination of the head of the responsible agency, would impede Federal or federally assisted or licensed projects or activities undertaken in connection with any emergency, including projects or activities undertaken in anticipation of, or as a result of, a natural disaster.⁶

American Battlefield Protection Program.⁷ The American Battlefield Protection Act of 1996⁸ provides assistance and funding for the preservation of sites where significant historic battles occurred.⁹ The act does not impose specific duties or responsibilities on individuals or public entities for the preservation of battle sites, but provides technical and financial assistance for the maintenance, interpretation, and protection of such sites.

Loan Insurance Program for Preservation of Property Included on the National Register.¹⁰ The Secretary of the Interior is authorized to maintain a program which, upon the application of a private lender, will insure loans made by such lender to finance any project for the preservation of a property which is included on the National Register of Historic Places.¹¹ There are various loan qualifications¹² and other requirements.¹³

⁴ *Id.* § 469a-1.

⁵ *Id.* § 469a-2(a).

⁶ *Id.* § 469a-2(b).

⁷ Significant battles occurred in the Gulf Region during the War of 1812 and during the Civil War.

⁸ 16 U.S.C. § 469k.

⁹ *Id.* § 469k(c).

¹⁰ 16 U.S.C. § 470d (a).

¹¹ The National Register of Historic Places is the nation’s official list of cultural resources worthy of preservation. It was authorized under the National Historic Preservation Act of 1966. The National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archeological resources. Properties listed in the National Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture. The National Register is administered by the National Park Service, a part of the U.S. Department of the Interior. See [<http://www.natonalregisterofhistroicplaces.com>].

¹² 16 U.S.C. § 470d (b).

¹³ The loan insurance program does not have specific statutory provisions for dealing with
(continued...)

Effect of Federal undertakings upon Property Listed in the National Register.¹⁴ The head of any federal agency having jurisdiction over any federally assisted project is required to assess the impact that such federal project will have on “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”¹⁵ The federal agency head is required to afford the Advisory Council on Historic Preservation an opportunity to comment on such undertakings. The purpose of this review process is to minimize the potential impact of federal projects on historic properties, neighborhoods, and landscapes.

Regulations promulgated by the Advisory Council on Historic Preservation provide for agency responses to emergency situations.¹⁶ Federal agencies are encouraged to develop procedures for taking historic properties into account during operations in response to a disaster or emergency declared by the President.¹⁷ Provision is also made when agencies have not developed such procedures.¹⁸ However, the federal agencies are not necessarily relieved from their oversight responsibilities during their responses to emergency situations.

Historic Properties Owned or Controlled by Federal Agencies.¹⁹ Federal statutes outline the responsibilities of the federal agencies in dealing with the identification, evaluation, nomination of properties to the National Register of Historic Places,²⁰ and the protection of such properties.²¹ Provision is made for the waiver of these responsibilities in the event of a natural disaster or of a threat to national security.

Waiver of provisions in the event of natural disaster or imminent threat to national security

The Secretary [of the Interior] shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.²²

Such regulations have been promulgated for the waiver of federal agency responsibilities.²³ The regulations define a “Major Natural Disaster.”

¹³ (...continued)
emergency or disaster conditions.

¹⁴ 16 U.S.C. § 470f. See note 11.

¹⁵ *Id.*

¹⁶ 36 C.F.R. § 800.12,

¹⁷ *Id.* § 800.12(a).

¹⁸ *Id.* § 800.12(b).

¹⁹ 16 U.S.C. § 470h-2.

²⁰ See note 11.

²¹ 16 U.S.C. § 470h-2.

²² *Id.* § 470h-2(j).

²³ 36 C.F.R. § 78.

Major Natural Disaster means any hurricane, tornado, storm, flood, high water, tidal wave, earthquake, volcanic explosion, or other catastrophe, in any part of the United States which, in the determination of a Federal Agency Head, causes damage of sufficient severity and magnitude such that an emergency action is necessary to the preservation of human life or property, and that such emergency action would be impeded if the Federal Agency were to concurrently meet its historic preservation responsibilities under section 110 of the National Historic Preservation Act, as amended.²⁴

The regulations provide for the agency's decision to waive responsibilities²⁵ and notice requirements.²⁶ Provision is made for a review of the agency's decision by the Secretary of the Interior.²⁷

Other Federal Regulations. Other federal regulations have been promulgated by the National Park Service, an agency of the Department of the Interior, which permit the removal of sites and properties from certain designations, if the site or property has been substantially altered, as by a natural disaster.

36 C.F.R. § 60.156. Provides for the removal of properties from the National Register of Historic Places. Grounds for the removal of such properties are set out as well as the procedure for the removal of such properties from the Register.

36 C.F.R. § 62.8(a)(ii). Provides for the removal of natural landmark designation. The regulations provide for criteria for the removal of the property and the process by which the property is removed from the registry.

36 C.F.R. § 65.9. Provides for the withdrawal of a National Historic Landmark designation. Justifications are provided for the withdrawal of the property and procedures are set out for its withdrawal from such designation.

FEMA Programs Related to Historic Preservation

The Federal Emergency Management Agency (FEMA) is a former independent agency that became part of the new Department of Homeland Security in March 2003. FEMA is responsible for responding to, planning for, recovering from, and mitigating against disasters.²⁸

FEMA has organized an Environmental and Historic Preservation and Cultural Resources Program ("Program").²⁹ The goal of this program is to integrate the consideration of historic properties and cultural resources into FEMA's mission of

²⁴ *Id.* § 78.2.

²⁵ *Id.* § 78.3.

²⁶ *Id.* § 78.4

²⁷ *Id.* § 78.5.

²⁸ See [<http://www.fema.gov/about/history.shtm>].

²⁹ See [http://www.fema.gov/ehp/ehp_katrina.shtm].

response, recovery, and mitigation. The Program has devised a three step model — based on FEMA’s mission — to assist in the recovery from Hurricane Katrina.³⁰

Respond and Salvage. In dealing with hurricane clean up, it is essential to consider emergency response and salvage activities that will help to protect precious collections and significant records and to save damaged objects.

Recover. A list of resources to assist in the hurricane recovery has been prepared and is on the website.³¹

Mitigate. A list of programs and other resources has been prepared to assist communities recovering from hurricane damage to address the specific needs of historic properties and cultural resources.³²

Other Considerations

This report has outlined the basic laws and regulations, some of which provide exemptions or exceptions to federal historic preservation requirements in situations involving natural disasters.³³

The *National Park Service (NPS)* of the Department of the Interior (DOI) has been closely involved in responding to hurricane damage to national parks. The NPS dispatched incident management teams (IMTs) to respond to damage at the Everglades National Park, the Gulf Islands National Seashore, and at various parks and historic sites in the impacted areas³⁴ The role of the teams is to assess the health and welfare of the NPS employees, assess damage to the parks, and begin recovery to make the parks operational.³⁵ Various NPS employees have been called out in support of FEMA, the DOI, and other agencies involved in recovery operations.³⁶

Before public or private entities begin substantial salvage and/or reconstruction efforts on historic sites, they may also wish to consult the following entities:

State Historic Preservation Officer (SHPO). The SHPO is the state historic preservation office, a state agency created by the National Historic Preservation Act. It

³⁰ Presumably, this same program would be applicable to the recovery from Hurricane Rita.

³¹ See [http://www.fema.gov/ehp/ehp_katrina.shtm].

³² *Id.*

³³ The Department of the Interior (Office of Executive Secretariat, Office of Congressional and Legislative Affairs, Office of the Solicitor, and Office of Environmental Policy and Compliance) has reported that at the current time, neither the Secretary nor any agency within the Department has received a request for exemption from federal preservation statutes or regulations — in the aftermath of Hurricanes Katrina and Rita.

³⁴ See NPS website “National Park Service Incident Management Teams Respond to Areas Devastated by Hurricane Katrina” at [<http://data2.itc.nps.gov/release/Detail.cfm?ID=610>].

³⁵ *Id.*

³⁶ *Id.* The website contains an assessment of damage to NPS sites and staff deployed to the area.

identifies, evaluates, registers, and protects each state's historic properties. In addition, SHPO refers to the officer in charge who coordinates preservation in his/her state and serves as a liaison between state and federal preservation activities. Every state has a SHPO — the office and the officer. Often times, the SHPO serves in an advisory capacity to communities and to private property owners on issues concerning historic properties.³⁷

Advisory Council on Historic Preservation (ACHP). The ACHP is an independent federal agency that promotes the preservation, enhancement, and productive uses of America's historic resources, and advises the President and Congress on national historic preservation policy.

FEMA's Historic Preservation and Cultural Resources Program.³⁸

Local Historical Groups and Private Historical Foundations. These groups may be able to provide assistance and advice. They may have specialized knowledge of local culture and history. For example, the website of the Mississippi Heritage Trust has extensive resources dealing with hurricane damage, recovery, and related issues.³⁹

National Trust for Historic Preservation. The National Trust for Historic Preservation is a private nonprofit membership organization whose goals are to save historic places and to revitalize American communities.⁴⁰ The National Trust has established a web "disaster assistance package" to assist in the Gulf Coast Recovery.⁴¹

³⁷ A listing of all state SHPOs is available at [http://grants.cr.nps.gov/shpos/shpo_search.cfm].

³⁸ See discussion above.

³⁹ See [<http://www.mississippiheritage.com/HurricaneKatrina.html>].

⁴⁰ See [http://www.nationaltrust.org/hurricane/disaster_assistance_package.pdf].

⁴¹ *Id.*