

National Association of Housing and Redevelopment Officials

# **Reforming Public Housing Disaster Relief Policy**

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Our nation's public housing inventory represents a 75-year investment by the federal government in affordable housing for some of the most vulnerable members of society. Local public housing agencies (PHAs) own and operate approximately 1.2 million units of federally subsidized public housing, housing that serves our nation's poorest families, as well as the elderly and disabled persons. The agencies that operate public housing and the families that call this housing home deserve a coherent federal strategy for bringing public housing units back online quickly following natural disasters and other emergencies.

In the aftermath of the 2005 hurricane season, many of NAHRO's member PHAs were frustrated by the resistance they encountered as they sought Federal Emergency Management Agency (FEMA) funding for the repair and replacement of damaged and destroyed public housing units. Specifically, although they are eligible to receive "essential assistance" from FEMA (for activities such as debris removal, demolition of unsafe structures, and other actions necessary to reduce immediate threats to life, property, and public health and safety), PHAs have been unable to access Section 406<sup>1</sup> funding for the reconstruction of public housing developments.

NAHRO has consistently argued that these PHAs' difficulties could be traced in part to a Memorandum of Understanding (MOU)<sup>2</sup> entered into by the U.S. Department of Housing and Urban Development (HUD) and FEMA in 2001. After working for nearly three years to draw attention to this issue, NAHRO's efforts began to pay dividends when the MOU became a major topic of discussion during a June 4, 2008 joint hearing of the House Financial Services and Homeland Security Committees convened to examine the roles and responsibilities of HUD and FEMA in responding to the ongoing affordable housing needs of the Gulf Coast region. The hearing exposed the need for Congressional intervention, and on June 18, 2008 the House of Representatives approved H.R. 6276, the Public Housing Disaster Relief Act of 2008. The Public Housing Disaster Relief Act of 2008 was later signed into law on July 30, 2008 as part of the Housing and Economic Recovery Act of 2008 (Pub. L. 110-289).

In this paper, NAHRO lays out the history of the MOU and its consequences for public housing disaster relief. NAHRO also reviews the range of options that were available to policymakers interested in addressing the problems posed by the MOU. Finally, NAHRO examines whether enactment of the Public Housing Disaster Relief Act of 2008 is sufficient to ensure the availability of resources to repair and rebuild public housing units following natural disasters and other emergencies.

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<sup>1</sup> Section 406 of the [Robert T. Stafford Disaster Relief and Emergency Assistance Act](#) (Pub. L. 100-707) governs the provision of FEMA funding for the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a Presidentially-declared disaster.

<sup>2</sup> "Coordination of HUD and FEMA Disaster Assistance to Public Housing Authorities (PHAs)." [http://www.fema.gov/government/grant/pa/9523\\_7b.shtm](http://www.fema.gov/government/grant/pa/9523_7b.shtm). March 19, 2001. U.S Department of Housing and Urban Development and Federal Emergency Management Agency.

## **The HUD-FEMA Memorandum of Understanding**

The MOU between HUD and FEMA concerning coordination of disaster assistance to PHAs went into effect on January 8, 2001 and was formally issued on March 19, 2001. For PHAs' disaster recovery costs not covered by insurance and essential assistance from FEMA, the MOU identifies the source of funding as "the capital public housing reserve authorized by section 9(k) of the United States Housing Act of 1937, authority, as amended (42 U.S.C. 1437g(k)), or similar statutory authority, subject to the availability of appropriations."

### *The Section 9(k) emergency reserve*

Section 9(k) of the U.S. Housing Act of 1937 (Pub. L. 93-383, 88 Stat. 653) was created by the Quality Housing and Work Responsibility Act of 1998<sup>3</sup> (QHWRA) and subsequently repealed by the Housing and Economic Recovery Act of 2008. QHWRA amended the 1937 Act to allow HUD, beginning "after fiscal year 1999," to set aside up to 2 percent of each fiscal year's Public Housing Capital Fund and Operating Fund appropriations to constitute an emergency reserve. In addition to the 2 percent set-aside, section 9(k) authorized HUD to set aside up to \$20 million each year for Operation Safe Home, a now-defunct HUD Inspector General-administered program to combat violent crime on or near the premises of public and federally assisted housing.

Under section 9(k), funds set aside for the emergency reserve could be used to provide assistance in connection with emergencies and other disasters as well as housing needs resulting from any settlement of litigation. Section 9(k) also authorized HUD to use the set-aside funds to provide assistance for "any eligible use under the Operating Fund or the Capital Fund" and for "tenant-based assistance in accordance with section 8." Under section 9(k), HUD was authorized to carry over up to \$25 million in unobligated amounts from the set-aside funds for use in connection with eligible emergency reserve activities during the succeeding fiscal year.

The emergency reserve authorized under section 9(k) was never operational. Beginning with the Fiscal Year (FY) 2000 VA/HUD Appropriations Act, Congress has consistently prohibited HUD from using Public Housing Capital and Operating Fund appropriations "for the purposes specified in section 9(k) of the United States Housing Act of 1937." Significantly, the FY 2000 VA/HUD Appropriations Act was signed into law on October 20, 1999, nearly 15 months before the effective date of the MOU and 20 months before the MOU was officially issued by HUD and FEMA.

### *The emergency capital needs set-aside*

In order to provide an alternative to the section 9(k) emergency reserve, Congress has since FY 2000 included a provision in the annual appropriations measure setting aside

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<sup>3</sup> The Quality Housing and Work Responsibility Act of 1998 was signed into law October 21, 1998 as Title V of the Fiscal Year 1999 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act (P.L. 105-276).

Public Housing Capital funding “for the Secretary to make grants...to public housing agencies for emergency capital needs resulting from unforeseen or unpreventable emergencies and natural disasters.” Congress funded the emergency capital needs set-aside at \$75 million for FY 2000, and funding for the set-aside has consistently declined over time (see chart below). Emergency capital needs funding cannot carry forward and may only be used to address disasters that occur in the fiscal year for which the dollars are appropriated.

The size of the emergency capital needs set-aside is insufficient to address the extensive costs associated with repairing or rebuilding public housing units in the aftermath of a major disaster. This was clearly the case in FY 2005, when approximately \$29 million was available for distribution under the emergency capital needs set-aside. In an October 2005 letter to NAHRO, HUD Assistant Secretary for Congressional and Intergovernmental Relations Steven B. Nesmith wrote that “the needs for public housing reconstruction funding will exceed the funding currently appropriated.” In fact, only two agencies were ultimately successful in securing emergency capital needs funding for costs associated with the 2005 hurricane season. Those agencies were the HUD-led Housing Authority of New Orleans, which received \$21.8 million, and the Biloxi Housing Authority, which received \$7 million.<sup>4</sup> Congress appropriated just \$18.5 million for the emergency capital needs set-aside for FY 2008.

<b>Comparison of Annual Emergency Capital Needs Appropriation to Maximum Funding Level of Emergency Reserve as Authorized by Section 9(k)</b>			
<i>Fiscal Year</i>	<i>Emergency Capital Needs Appropriation (\$ millions)</i>	<i>Maximum Emergency Reserve Authorized under Section 9(k)<sup>†</sup> (\$ millions)</i>	<i>Emergency Capital Needs Appropriation as Percentage of Maximum Emergency Reserve Level</i>
2000	\$75.0	\$120.8	62.1%
2001	\$75.0	\$124.8	60.1%
2002	\$75.0	\$126.8	59.2%
2003	\$50.0	\$126.6	39.5%
2004	\$40.0	\$126.2	31.7%
2005	\$30.0	\$101.2	29.7%
2006	\$17.0	\$121.3	14.0%
2007	\$16.8	\$126.1	13.3%
2008	\$18.5	\$132.8	13.9%

†The maximum emergency reserve authorized under section 9(k) for the applicable fiscal year is equal to 2% of the combined annual appropriation for the Public Housing Capital and Operating Funds.

*Note: Figures do not take into account the application of across-the-board cuts to federal appropriations in certain fiscal years.*

<sup>4</sup> “HUD Katrina Accomplishments - One Year Later.” <http://www.hud.gov/news/katrina05response.cfm>. September 8, 2006. U.S Department of Housing and Urban Development.

In addition to being inadequate to meet the needs for public housing reconstruction following major disasters, the annual emergency capital needs appropriation has always been substantially smaller than the level of resources that would have been available through the emergency reserve fund had Congress not prohibited HUD from using appropriated funding for purposes specified under section 9(k). As the above chart demonstrates, the disparity between the annual emergency capital needs appropriation and the maximum level of emergency reserve funding authorized by section 9(k) grew increasingly pronounced between FY 2002 and FY 2008.

### No recourse for PHAs under MOU

The MOU has proven to be problematic for several reasons. Most obviously, the MOU identified as the principal source of funding for repairing and rebuilding public housing units a reserve fund that was effectively nonexistent at the time the MOU was finalized. As mentioned above, the emergency reserve authorized by section 9(k) was never accessible to PHAs, and the decision by Congress to prohibit HUD from moving appropriated funds into the reserve preceded the MOU by over a year.

Because it failed to clarify public housing units' eligibility for Section 406 funding, the MOU also placed public housing units at a disadvantage compared to other forms of publicly-assisted housing. In a memorandum dated April 14, 2003,<sup>5</sup> FEMA assigned a policy number (9523.7) to the 2001 MOU. The 2003 memorandum provided additional clarification on the disaster assistance available to various types of publicly-assisted housing facilities. Specifically, the memorandum made clear that while public housing units are eligible for HUD disaster assistance, "publicly-subsidized housing facilities that were developed and financed from other sources, such as other HUD programs (e.g., Section 8, FHA Mortgage Insurance, etc.)...do not qualify for HUD disaster assistance" and "may apply directly to FEMA for public assistance grants under any category of work, including Section 406 permanent repairs."

The MOU failed to provide PHAs with guidance in the event that 9(k) emergency reserve funding is unavailable and any funding provided under a separate authorization has been exhausted or is insufficient. Recall that the MOU identified the source of funding for PHAs' disaster recovery costs not covered by insurance and essential assistance as the 9(k) emergency reserve "or similar statutory authority, *subject to the availability of appropriations*" (emphasis added). Although the MOU appeared to at least contemplate the possibility that appropriations would not always be available for the 9(k) reserve "or similar statutory authority," it failed to outline an alternative funding source for those fiscal years in which appropriations are unavailable or insufficient to meet disaster recovery needs.

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<sup>5</sup> "9523.7 Public Housing Authorities (PHAs)." [http://www.fema.gov/government/grant/pa/9523\\_7.shtm](http://www.fema.gov/government/grant/pa/9523_7.shtm). April 14, 2003. Federal Emergency Management Agency.

A key omission added to the confusion over whether an alternative path exists for PHAs to access disaster recovery funding, even if that path is not explicitly spelled out in the MOU. Whereas FEMA's 2003 memorandum clarified that other forms of assisted housing units are eligible to apply for and receive FEMA funding, including Section 406 funding, neither the MOU nor the 2003 memorandum specifically stated that PHAs are *ineligible* to receive FEMA funding for the permanent repair and reconstruction of disaster-damaged public housing units.

In his October 2005 letter to NAHRO, HUD Assistant Secretary Nesmith pointed out that "the MOU does not specifically rule out seeking FEMA assistance under Section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended." Indeed, FEMA has apparently admitted to paying for the repair and reconstruction of public housing units in the past. According to FEMA's 2003 memorandum, "although HUD has specific authority under Section 9(k) of the U.S. Housing Act of 1937, as amended, to provide funds for the repair of disaster-damaged PHA facilities, *FEMA has generally funded these costs in the past*" (emphasis added).

HUD, perceiving no legal barrier preventing PHAs from accessing FEMA assistance for reconstructing public housing units, developed a draft Memorandum of Agreement (MOA) to replace the MOU in 2007.<sup>6</sup> According to a HUD official, the proposed MOA "would have made it possible for public housing authorities to apply for FEMA assistance pursuant to section 406 of the Stafford Act as a last resort when funding from insurance proceeds and disaster grants from HUD were inadequate."<sup>7</sup>

FEMA never agreed to the MOA, choosing instead to argue that PHAs are statutorily ineligible to receive Stafford Act funding for the permanent repair and reconstruction of public housing units even if HUD funding for that purpose is unavailable or insufficient. During the June 4, 2008 joint hearing of the House Financial Services and Homeland Security Committees, Carlos J. Castillo, FEMA's Assistant Administrator of the Disaster Assistance Directorate, claimed that public housing developments would only qualify "to receive FEMA Section 406 assistance if such assistance did not fall under another agency's purview."<sup>8</sup> According to Castillo, because "section 9(k)...authorizes HUD to award grants to public housing in response to natural disasters," FEMA had concluded

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<sup>6</sup> Written statement of Jeffrey Riddel Director, Office of Capital Improvements, Public and Indian Housing U.S. Department of Housing and Urban Development before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, and the Subcommittee on Emergency Communications, Preparedness, and Response, Committee on Homeland Security, United States House of Representatives: Examining the Roles and Responsibilities of HUD and FEMA in Responding to the Affordable Housing Needs of Gulf Coast States following Emergencies and Natural Disasters." <http://www.hud.gov/offices/cir/test080604.cfm>. June 4, 2008.

<sup>7</sup> Ibid.

<sup>8</sup> "Written statement of Carlos J. Castillo, Disaster Assistance Directorate, Federal Emergency Management Agency, Department of Homeland Security, before the Subcommittee on Housing and Community Opportunity, Committee on Financial Services, and the Subcommittee on Emergency Communications, Preparedness, and Response, Committee on Homeland Security, United States House of Representatives: Examining the Roles and Responsibilities of HUD and FEMA in Responding to the Affordable Housing Needs of Gulf Coast States following Emergencies and Natural Disasters." [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/castillo060408.pdf](http://www.house.gov/apps/list/hearing/financialsvcs_dem/castillo060408.pdf). June 4, 2008.

that it could not provide Section 406 funding for this same purpose since doing so would constitute an illegal augmentation of appropriations.

## **Examining Possible Solutions**

The June 4, 2008 joint hearing exposed the need to revisit and redefine the roles and responsibilities of HUD and FEMA concerning the reconstruction of disaster-damaged public housing units. As mentioned above, renewed Congressional scrutiny of this issue eventually led to the passage of the Public Housing Disaster Relief Act of 2008. This legislative action was only one of several possible approaches to addressing the challenges created by the MOU, and additional action may be necessary to ensure that PHAs are finally able to access FEMA funding to restore public housing units following major disasters and emergencies. In this section, NAHRO explores some of the options that have been and continue to be available to policymakers interested in developing a coherent federal public housing disaster relief policy.

### **Option 1: Encourage adoption of the MOA by HUD and FEMA**

NAHRO has always maintained that the simplest solution to the problems posed by the MOU would have been the issuance of a revised agreement clearly outlining a process allowing PHAs to apply for FEMA Section 406 assistance to repair or rebuild public housing units whenever adequate funding is not available through the 9(k) reserve or the emergency capital needs set-aside for the applicable fiscal year. On October 5, 2005, NAHRO Executive Director Saul Ramirez transmitted a letter to then-HUD Secretary Jackson suggesting that, “inasmuch as no resources are available under section 9(k), the Department immediately seek FEMA funding for the repair, restoration and replacement of damaged or destroyed public housing in hurricane-impacted areas.” The letter went on to contend that, “to the extent any language contained in the MOU is deemed to present an impediment to the availability of FEMA assistance, it should be renegotiated to allow the use of FEMA assistance in an instance in which HUD has not supplied full funding for the repair, restoration or replacement of damaged public housing under section 9(k).”

Similarly, in a June 12, 2007 letter addressed to FEMA Administrator R. David Paulison and copied to then-HUD Secretary Alphonso Jackson, House Financial Services Chairman Barney Frank wrote that “it is critically important that the MOU be revised to clarify that public housing developments are eligible to receive Section 406 funding if HUD funds are unavailable.” Arguing that “it would seem appropriate as a matter of policy to allow local housing agencies to be eligible to receive FEMA funding under Section 406...in any instance in which the availability of section 9(k) emergency reserve funding is insufficient for those purposes,” Chairman Frank called on FEMA to “work with HUD in resolving this matter quickly and in a manner that clearly specifies an appropriate, accessible, and readily available funding source for the repair, restoration, and replacement of public housing units following major disasters.”

It is worth noting that FEMA built an automatic review date into the April 14, 2003 memorandum updating the MOU. That memorandum specified a review date “three

years from date of publication.” Although NAHRO believes the events of the 2005 hurricane season were themselves sufficient to inspire a review of the MOU, it appears that FEMA and HUD were supposed to revisit the policy on April 14, 2006 regardless of recent or current events. HUD transmitted the previously mentioned draft MOA to FEMA in September 2007, but FEMA chose not to accept the proposal.

Although it was never publicly released, the draft MOA outlined a step-by-step process for PHAs to follow to apply for and obtain Section 406 assistance for the costs to repair or rebuild public housing unit that are not otherwise covered through insurance proceeds, the 9(k) emergency reserve, or the emergency capital needs set-aside. Had FEMA accepted the draft MOA, Congressional intervention in the form of the repeal of section 9(k) would have been unnecessary.

*Option 2: Repeal section 9(k) and eliminate emergency capital needs funding*

Due to FEMA’s intransigence on this issue, including its insistence that providing PHAs with Section 406 assistance would constitute an illegal augmentation of appropriations, Congress chose to enact the Public Housing Disaster Relief Act of 2008. While the repeal of section 9(k) was clearly intended<sup>9</sup> to provide PHAs with immediate access to FEMA Section 406 assistance for the permanent repair and reconstruction of disaster-damaged public housing units, an additional obstacle may remain.

Testifying during the June 4, 2008 joint hearing, HUD's Director of the Office of Capital Improvements Jeffrey Riddel suggested that “one potential solution to disaster funding shortfalls for public housing authorities would be the permanent repeal or amendment of Section 9(k), with the additional stipulation that no funding be appropriated for natural disasters,” including the provision of emergency capital needs funding. However, as Riddel pointed out, this action would mean that “the responsibility and policy of funding recoveries of uninsured damages to public housing authorities following Presidentially-declared natural disasters would be placed on FEMA.” Note that while HUD’s draft MOA apparently contemplated the continued ability of emergency capital needs funding, HUD’s FY 2009 budget proposal does not include funding for the emergency capital needs set-aside.

The “potential solution” put forward by Riddel anticipates that FEMA could continue to employ the augmentation of appropriations argument due to the ongoing availability of emergency capital needs funding. In other words, if Congress were to repeal 9(k), as it

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<sup>9</sup> During the June 18, 2008 floor debate over H.R. 6276, the Public Housing Disaster Relief Act of 2008, Representative Don Cazayoux, the bill’s primary sponsor, made the following remarks: “The administration has called for the elimination of section 9(k) and the set aside disaster grants to eliminate this confusion and to make it possible for housing authorities to have access to section 406 of the Stafford Act through FEMA... It is my belief that repealing this section will cut some of the bureaucratic mess that has prevented public housing authorities from doing the work of reconstruction in the aftermath of Katrina and Rita... When this change is enacted into law, funds will become immediately available for public housing authorities struggling to rebuild affordable housing for Americans devastated by natural disasters whether in the gulf coast or in the heartland.” Representative Cazayoux (LA). "Public Housing Disaster Relief Act of 2008." *Congressional Record* 154:101 (June 18, 2008) p. H5530.

has now done, and also cease to appropriate funds for emergency capital needs, FEMA would no longer be able to cite a statutory basis to claim, as Castillo did during the June 4, 2008 joint hearing, that the permanent repair and reconstruction of disaster-damaged public housing developments “fall[s] under another agency's purview.”

*Option 3: Repeal section 9(k) and continue to provide emergency capital needs funding*

NAHRO believes that HUD should retain primary responsibility for assisting PHAs in recovering from natural disasters and other emergencies. It is a matter of common sense that the nation's housing agency should be the first stop for PHAs seeking the resources required to place public housing units back into use following disasters. Accordingly, NAHRO opposes the elimination of emergency capital needs funding.

The continued availability of at least a modest amount of emergency needs capital funding is also necessary to ensure that PHAs have access to the resources they need to respond to the kinds of smaller-scale disasters or emergencies that do not necessitate a Presidential disaster declaration. (FEMA Section 406 assistance can only be used to cover costs associated with a Presidentially-declared disaster.) For those fiscal years in which HUD emergency capital needs funding is exhausted or otherwise insufficient to meet PHAs' disaster recovery needs not covered through insurance proceeds, NAHRO contends that HUD should support PHAs' rebuilding efforts by facilitating access to FEMA Section 406 assistance as a funding source of last resort.

Following the repeal of section 9(k), the FY 2008 HUD appropriation law's set-aside for emergency capital needs will be, at least until October 1, 2008, the only operative statutory provision authorizing HUD to provide PHAs with funding to address capital needs arising from unforeseen or unpreventable emergencies and natural disasters. If Congress desires to provide continued HUD funding for public housing disaster relief and ensure that PHAs are able to access FEMA Section 406 assistance when necessary, then it should appropriate emergency capital needs funding in a way that does not allow for FEMA to argue that the provision of Section 406 assistance constitutes an illegal augmentation of appropriations.

**A Coherent Public Housing Disaster Relief Strategy**

By repealing section 9(k), Congress clearly intended to provide for PHAs' ability to access FEMA funding for the repair and reconstruction of public housing units following future natural disasters and other emergencies. To ensure that Congressional intent is realized in a manner that produces a coherent federal public housing disaster relief policy, NAHRO believes the following additional actions should be taken.

*1. Appropriate emergency capital needs funding using new language*

Whether FEMA would opt to cite the continued availability of emergency capital needs funding in order to withhold Section 406 assistance from PHAs is currently unknown. To avoid this possibility, and to ensure that HUD retains primary responsibility for

assisting in the recovery of public housing developments from disasters both large and small, Congress should continue to provide emergency capital needs funding in a way that preemptively deprives FEMA of the ability to withhold Section 406 assistance from PHAs in those fiscal years in which both insurance proceeds and HUD funds are insufficient to meet repair and reconstruction costs arising from unforeseen or unpreventable emergencies and natural disasters.

NAHRO suggests that the following language be used in future HUD appropriations bills to provide emergency capital needs funding:

“Provided further, That of the total amount provided under this heading, not to exceed [\$\$X,XXX,XXX] \$XX,XXX,XXX may be available for the Secretary of Housing and Urban Development to make grants, notwithstanding section XXX of this Act, to public housing agencies for emergency capital needs resulting from unforeseen or unpreventable emergencies and natural disasters occurring in fiscal year [XXXX] XXX. Nothing in this section shall be construed to prevent the Federal Emergency Management Agency from providing funding available under Section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act for the permanent repair and reconstruction of public housing developments following disasters.”

## 2. Encourage HUD and FEMA to enter into a revised agreement

With Section 9(k) now repealed, the outdated 2001 MOU is now more irrelevant than ever. The MOU also remains problematic in that its open-ended reference to “similar statutory authority” could be interpreted by FEMA as a reason to withhold Section 406 assistance from PHAs in order to avoid augmenting existing emergency capital needs appropriations. While NAHRO believes that its recommended appropriations language obviates concerns over a potential augmentation claim, PHAs would nevertheless benefit from the creation of a transparent and unambiguous roadmap to follow as they seek the resources needed to put public housing units back into use following disasters.

NAHRO suggests that all interested parties strongly encourage HUD and FEMA to replace as soon as possible the existing MOU with a new agreement that accounts for the enactment of the Public Housing Disaster Relief Act of 2008. This new agreement should reflect Congressional intent by clearly defining a process through which PHAs may apply for and receive FEMA Section 406 assistance for the costs to repair or rebuild public housing units that are not otherwise covered through insurance proceeds or the emergency capital needs set-aside, assuming Congress chooses to provide such funding on an ongoing basis.

Future natural disasters and emergencies necessitating the repair and reconstruction of public housing developments are inevitable. A revised interagency agreement that provides PHAs with access to FEMA Section 406 assistance while also accounting for the continued availability of emergency capital needs funding will be in the best interest of PHAs, the families they serve, and all those committed to preserving American taxpayers’ long-term investment in our nation’s public housing inventory.