



Quick Reference Guide

Preparing & Implementing State Department of Transportation Section 106 Delegation Programmatic Agreements for the Federal-Aid Highway Program

Prepared for

AASHTO Committee on Environment and Sustainability

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SPECIAL NOTE: This report IS NOT an official publication of the National Cooperative Highway Research Program, Transportation Research Board, National Research Council, or The National Academies.



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Protection of Historic Properties (36 CFR 800)¹ is the federal regulation that establishes the standard steps and process for how a federal agency complies with Section 106 of the National Historic Preservation Act (Section 106). This regulation also allows a federal agency to use a non-standard “program alternative,” as described in 36 CFR 800.14, to tailor their Section 106 compliance to an agency’s needs and programs. One of the program alternatives listed under 36 CFR 800.14 is the use of programmatic agreements (PAs). These agreements can be used to govern implementation of a particular federal agency program.

Many state Departments of Transportation (DOTs), along with the Federal Highway Administration (FHWA), State Historic Preservation Offices (SHPOs), and the Advisory Council on Historic Preservation (ACHP), have in place delegation PAs that address Section 106 compliance for the FHWA’s Federal-Aid Highway Program within a state. These PAs are referred to as delegation PAs because they delegate decision making that is normally the purview of the FHWA to a state DOT; that is, these PAs delegate federal decision making to a Section 106 consulting party² (a state DOT that is an applicant for federal funds). FHWA, however, remains legally responsible for Section 106 compliance (except in states where the state DOT has taken on National Environmental Policy Act [NEPA] assignment³). FHWA also retains legal responsibility for government-to-government consultation with federally recognized tribes.⁴

This document is a *quick reference guide* for preparing, updating, and implementing a delegation PA. This guide is based on NCRHP 25-25, Task 107, “Section 106 Delegation Programmatic Agreements: Review and Best Practices.”



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¹ 36 CFR § 800, Protection of Historic Properties (incorporating amendments effective August 5, 2004), <https://www.achp.gov/sites/default/files/regulations/2017-02/regs-rev04.pdf>.

² Advisory Council on Historic Preservation [ACHP], Initiating Section 106 (Washington, DC: ACHP, 2018), <https://www.achp.gov/protecting-historic-properties/section-106-process/initiating-section-106>.

³ See Federal Highway Administration, Environmental Review Toolkit (Washington, DC: U.S. Department of Transportation, 2018), <https://www.environment.fhwa.dot.gov/nepa/assignment.aspx>.

⁴ ACHP, ACHP Government-to-Government Consultation with Indian Tribes (Washington, DC: ACHP, 2018), <https://www.achp.gov/about/government-to-government>.

NCHRP Task 107:

- Reviewed and analyzed all active delegation PAs. This analysis examined the delegation of the steps and decisions in the Section 106 process (as listed in 36 CFR 800.4 to 800.6) to state DOTs.
- Examined cases in which, through a delegation PA, a state DOT can “screen” a project to determine if the project has no or low potential to affect historic properties, based on a set of conditions and/or project type. If a project meets these conditions or project type, no further Section 106 review is required (e.g., project does not require review by the SHPO).
- Sent questionnaires via email to state DOTs, SHPOs, FHWA division office staff, and key staff at the ACHP regarding their experiences in the development and implementation of delegation PAs. The purpose of these questionnaires was to provide insights into best practices and practical guidance for the preparation, modification, and application of state DOT Section 106 delegation PAs.

Successful practices and key findings showcased in the NCRHP Task 107 study are listed below.

THE VALUE OF DELEGATION PAs

Delegation PAs:

- Create a more efficient Section 106 review process:
 - They reduce the number of projects requiring outside consultation (e.g., reviews by SHPOs),
 - Reduce case-by-case Section 106 reviews, and
 - Focus agency efforts on those projects that may adversely affect historic properties and on complicated projects that need close attention.
- Save time by allowing the state DOT to screen projects that do not require further Section 106 review. These are projects that statewide experience has demonstrated have little or no potential to affect historic properties.
- Streamline and expedite project delivery schedules and decrease project costs.

Clarify the roles and responsibilities of FHWA division offices, the state DOTs, SHPOs, and other consulting parties in the Section 106 process.



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THINGS TO CONSIDER PRIOR TO PREPARING A NEW DELEGATION PA OR UPDATING AN EXISTING PA

- Articulate and clarify the goals of the PA. These goals have to be clear not only to the FHWA, state DOT, and ACHP, but also to the consulting parties (including tribes) and Local Public Agencies (LPAs), if involved. Obtain buy-in on these goals from senior agency leadership who will sign the agreement, and from agency management who will supervise the state DOT's cultural resources management staff responsible for implementing the PA's provisions.
- Define/outline the process for preparing or updating the PA.
- Create a realistic timeline for the PA development process to which all involved can agree.
- Identify all of the signatories to the PA, including invited signatories and concurring parties.
- The decision on what types of projects will be covered by the PA should be based on research of past state DOT projects and their effects on historic properties. This research will serve as a baseline for streamlining provisions to be included in the PA (e.g., state DOT staff screening of projects requiring no further Section 106 review). It may also be useful to look at the list of projects included in other state DOT delegation PAs.
- Decide early whether there needs to be a legal review of the draft PA. If so, it is critical to the PA process timeline to have a pre-review briefing with legal staff.

As models, consider using the **FHWA/ACHP PA template** (included in Appendix A of this quick reference guide) and PAs from other states, understanding that each state customizes their PA to local conditions, issues, parties, historic property types, and agency processes and procedures.

WHAT NEEDS TO BE IN PLACE PRIOR TO PREPARING A DELEGATION PA OR UPDATING AN EXISTING PA?

- Successful PAs have management buy-in before developing or updating a PA. Without agency management's full understanding and buy-in, the development or updating of the PA may take more time and effort, and may encounter multiple roadblocks and conflicts.
- There must be commitments from agency management to allow staff to work on the PA. Management must allow shifts in workloads among staff to accomplish the goal of PA completion. Management may also have to be educated about the "long view" of the PA and how it sustains a streamlined project delivery process.
- Agencies must assign staff to work on the PA and define their responsibilities and authority. In some cases, especially if all participants agree to a compressed timeline, agency staff may be exclusively assigned to the PA development process.

PREPARING/WRITING THE PA

- Define the vision/goals for the PA or update.
- Develop the timeline and schedule for developing each section of the PA. This will help focus the effort.
- Some states have benefited from having a meeting facilitator on the PA development team. This is something for agencies to consider as it may enhance the flow and outcomes of meetings.
- Determine when to hold face-to-face meetings, virtual meetings, and teleconferences, and make sure these meetings are in the PA development timeline/schedule.
- Decide what communication protocols to use.
- Determine how, and by whom, all meetings will be documented and who will distribute meeting minutes/notes.
- Begin the process with the preparation of a conceptual draft of the PA using plain language. A conceptual draft lists or outlines the sections/components to be included in a new PA or the sections/components that will be updated for an existing PA.
- Decide how the draft PA, whether the entire document or sections, will be circulated for review among the preparation team.
- During PA development and updating, focus on those things that will be beneficial to the state DOT project development process and beneficial to other parties' work processes. Include these items in the draft PA.

Do not try to address everything at once; this generally results in a cumbersome and time-consuming effort.

- Bear in mind that any agreement is a negotiated contract. Participants should not expect that everything they asked for will be included in the new PA or PA update.
- Engage all consulting parties regarding the draft document. Hold meetings with all consulting parties as necessary to explain the document and answer questions.

IMPLEMENTING A PA

- Successful agreements function and thrive by building inter-agency relationships and trust.
- Before the PA is signed, protocols and procedures for implementation of the agreement need to be established.
- The participating agencies need to have training in place regarding the agreement, especially for staff who were not involved in the preparation of the PA. New staff must receive this training and should be mentored by senior staff on the use and implementation of the PA.
- Training is also critical for those states that are delegating project approvals of very minor projects to non-cultural resource specialists in state DOT district or division offices. Training will ensure that state DOT staff, at all levels, will make the appropriate decisions at the correct times in the project development process and follow all procedures outlined in the agreement.
- Although these types of agreements streamline processes, they will typically increase workloads on certain state DOT staff. Changes in agency workflow procedures must be understood by all involved, especially by agency management.
- State DOTs need to understand that there will be increases in administrative record keeping. This will include quarterly and/or annual reporting, and tracking of streamlining provisions that do not require outside consultation.
- Many agreements will use standardized reporting formats for certain types of projects, especially those exempted from further Section 106 review. Preparers of this documentation need to be clear on who receives the documentation and when it is to be distributed.
- Regular communication among the agencies and consulting parties is critical for successful implementation of a delegation PA.

WORKING WITH TRIBES

- Building relationships and trust with tribes is critical. Remember that each tribe is unique.
- Tribes that have a religious and cultural interest or affiliation with the state should be contacted to determine whether they wish to be invited signatories or concurring parties to the PA. If a tribe does not want to be an invited signatory or concurring party, they need to be provided an opportunity to comment on the PA during its preparation.
- Tribal participation needs to take place early in PA development. It is important to engage multiple members of each tribe and to contact the tribes multiple times. Having summits, listening sessions, and other types of face-to-face meetings with tribes will greatly increase tribal participation in the development of a PA.
- Include language in the PA about using tribal expertise to identify places of religious and cultural significance to tribes.
- Include language in the PA about using tribal expertise to assess effects on properties of religious and cultural significance to tribes, and to resolve any adverse effects on such properties.
- Include the names of the tribes that were notified and consulted about the PA in the final agreement.

APPENDIX A

FEDERAL HIGHWAY ADMINISTRATION ADVISORY COUNCIL ON HISTORIC PRESERVATION PROGRAMMATIC AGREEMENT TEMPLATE

(5-18-15 DRAFT)

(Note: The following PA Template is marked “Draft” as the FHWA and ACHP consider this to be a living document, which will be revised to address any future policy changes.)

TEMPLATE
PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE _____ STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE _____ DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL AID HIGHWAY PROGRAM IN _____

WHEREAS, the Federal Highway Administration (FHWA), under the authority of 23 U.S.C. 101 et seq., implements the Federal-aid Highway Program (Program) in the state of _____ by funding and approving state and locally sponsored transportation projects that are administered by the _____ Department of Transportation (DOT);

WHEREAS, the _____ FHWA Division Administrator is the "Agency Official" responsible for ensuring that the Program in the state of _____ complies with Section 106 of the National Historic Preservation Act (NHPA)(54 U.S.C. § 306108), as amended, and codified in its implementing regulations, 36 CFR Part 800, as amended (August 5, 2004);

WHEREAS, _____ DOT administers Federal-aid projects throughout the State of _____ as authorized by Title 23 U.S.C 302;

WHEREAS, the responsibilities of the _____ State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR Part 800 are to advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and to respond to Federal agencies' requests within a specified period of time;

WHEREAS, FHWA has determined that certain types of minor transportation projects processed as categorical exclusions under National Environmental Policy Act (NEPA) _____ may have an effect upon properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP), hereafter referred to as historic properties, and has consulted with the _____ State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) pursuant to Section 800.14(b) of the regulations implementing Section 106 of the NHPA;

WHEREAS, FHWA has consulted with Federally-recognized Indian tribes (Tribes) with ancestral lands in _____ about this Agreement, has requested their comments, and has taken any comments received into account. These Tribes include _____, _____, _____;

WHEREAS, any project involving tribal lands as defined in 36 CFR 800.16(x), or any project that may affect a property identified by a federally recognized Indian tribe as possessing traditional religious and cultural significance, shall not be governed by this agreement, but shall be reviewed by FHWA in accordance with 36 CFR 800;

WHEREAS, pursuant to the consultation conducted under 36 CFR 800.14(b), the signatories have developed this Programmatic Agreement (Agreement) in order to establish an efficient and effective program alternative for taking into account the effects of the Program on

historic properties in _____ and for affording the ACHP a reasonable opportunity to comment on undertakings covered by this agreement;

WHEREAS, FHWA has notified the public, Federal and State agencies, and Certified Local Governments (CLGs) about this Agreement, has requested their comments, and has taken any comments received into account;

WHEREAS, _____DOT has participated in the consultation and has been invited to be a signatory to this Agreement; and

[WHEREAS, this Agreement shall supersede the following previous programmatic agreements among the FHWA, SHPO, and _____DOT :]

NOW, THEREFORE, FHWA, the SHPO, the ACHP, and _____DOT agree that the Program in _____ shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in _____ and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this Agreement expires or is terminated.

To aid the signatories of this PA, the stipulations are organized in the following order:

- I. Applicability and Scope
- II. Definitions
- III. Professional Qualifications Standards
- IV. Responsibilities
- V. Consultation with Tribes
- VI. Participation of Other Consulting Parties and the Public
- VII. Project Review
 - a. Excepted
 - b. Screened
- VIII. Emergency Situations
- IX. Post-Review Discoveries
- X. Identification and Treatment of Human Remains
- XI. Monitoring and Reporting
- XII. Dispute Resolution
- XIII. Amendment
- XIV. Termination
- XV. Confidentiality
- XVI. Duration of Agreement

STIPULATIONS

The FHWA, with the assistance of _____DOT, shall ensure that the following measures are carried out:

I. APPLICABILITY AND SCOPE

- A. This Agreement sets forth the process by which the FHWA, with the assistance of _____DOT, will meet its responsibilities pursuant to Section 106 and 110 of the NHPA (54 U.S.C. §§ 306102 and 306108).
- B. This Agreement only applies to highway projects classified as categorical exclusions under 23 CFR 771.115 and 23 CFR 771.117. Projects that require an Environmental Assessment or Environmental Impact Statement for compliance with NEPA will follow the procedures in 36 CFR 800.
- C. The objective of this Agreement is to make more efficient the methods by which FHWA and _____DOT review individual undertakings processed under Section 106 that may affect historic properties and to establish the process by which FHWA (who retains ultimate Section 106 responsibility, except where such responsibility has been delegated to _____DOT) carries out its Section 106 responsibilities.
- D. Through this Agreement, FHWA authorizes _____DOT to initiate and, in many cases, conclude consultation with the SHPO and other consulting parties for purposes of compliance with Section 106 of the NHPA.
- E. Through this Agreement, FHWA and _____DOT establish three categories of projects (Excepted projects and Screened Projects Types I and II) that require different levels of review and consultation with the SHPO.
- F. The FHWA retains the responsibility to consult with Tribes as required under 36 CFR 800, as amended. The _____DOT may assist FHWA if individual Tribes agree to alternate procedures.
- G. This Agreement shall not apply to undertakings that occur on or affect tribal lands as they are defined in 36 CFR 800.16(x). For such undertakings, FHWA shall follow the procedures in 36 CFR Part 800.
- H. Cooperating Federal Agencies who recognize FHWA as the lead Federal agency for an undertaking may fulfill their obligations under Section 106 of NHPA according to 36 CFR 800.2(a)(2), provided that FHWA and _____DOT follow the requirements of this Agreement and the cooperating agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by FHWA and _____DOT.

II. DEFINITIONS

- A. Area of Potential Effects (APE)....
- B. *Excepted Projects*: Undertakings which typically have no appreciable potential to cause effects to historic properties. Examples include pavement resurfacing, installation of

fencing, construction of bicycle/pedestrian lanes, installation of rumble strips, and landscaping in previously disturbed ground. Work is limited to the activities listed in Appendix A. An undertaking will not qualify as excepted from review if conditions must be imposed to ensure that potential historic properties would not be affected.

C.

Screened Projects: Undertakings that have some potential to affect historic properties. Following appropriate screening by qualified professionals, some may be determined exempt from further Section 106 review under this agreement.

D. *Ground disturbance* is defined as any work or activity that results in a disturbance of the earth, including excavating, digging, trenching, drilling, augering, backfilling, clearing, and grading.

E. For purposes of this agreement, the definitions provided in 36 CFR Part 800.16 (a) through (y) shall apply whenever applicable.

III. PROFESSIONAL QUALIFICATIONS STANDARDS

Actions prescribed by this Agreement that involve the identification, evaluation, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meets the Secretary of the Interior's Professional Qualifications Standards (published in 48 FR 44738-44739). However, nothing in this stipulation may be interpreted to preclude FHWA or _____DOT or any agent or contractor thereof from using the services of persons who do not meet these qualifications standards, providing their activities are conducted under the supervision of a person who does meet the standards.

IV. RESPONSIBILITIES

The following section identifies the responsibilities of FHWA and of _____DOT in complying with the terms of this Agreement.

A. FHWA Responsibilities

1. Consistent with the requirements of 36 CFR 800.2(a) and 800.2(a)(1-4), FHWA remains legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to this Agreement by _____DOT under the authority of FHWA. At any point in the Section 106 process, FHWA may inquire as to the status of any undertaking carried out under the authority of this Agreement and may participate directly in any undertaking at its discretion.
2. FHWA retains the responsibility for government-to-government consultation with Tribes as defined in 36 CFR 800.16(m). FHWA may ask _____DOT to assist in

- consultation if the individual Tribes agree to alternate procedures.
3. FHWA shall be responsible for resolving disputes and objections pursuant to Stipulation XI(B) of this Agreement.

B. _____DOT Responsibilities

_____DOT, using staff and/or consultants meeting the Secretary of the Interior's professional qualifications standards (48 FR 44738-9), will independently perform the work and consultation described in 36 CFR 800.3 – 36 CFR 800.5 (including any succeeding revisions to the regulations) on behalf of FHWA. Assignment of these responsibilities is based on adequate and appropriate performance by _____DOT as evaluated in monitoring by FHWA pursuant to Stipulation XIII.A of this Agreement. These responsibilities include carrying out the following requirements:

1. 36 CFR 800.3(a) Determine whether the undertaking is a type of activity that has the potential to cause effects on historic properties.
2. 36 CFR 800.3(c) and (d) Determine whether the undertaking may occur on or has the potential to affect historic properties on tribal lands.
3. 36 CFR 800.3(e) solicit public comment and involvement.
4. 36 CFR 800.3 identify additional consulting parties who should be invited to participate in the undertakings covered by this Agreement.
5. 36 CFR 800.4(a) and (b) determine and document, in consultation with the SHPO, the scope of identification efforts and level of effort, including the undertaking's area of potential effects (APE).
6. 36 CFR 800.4 In consultation with the SHPO, identify properties within the APE included in or eligible for listing in the NRHP.
7. 36 CFR 800.5(a)(1) Determine whether historic properties may be affected by the undertaking by applying the criteria of adverse effect.
8. 36 CFR 800.6 In consultation with FHWA, the SHPO, the ACHP (if it has chosen to participate), and any other consulting parties address any adverse effects through the development, circulation, and execution of a MOA, as appropriate.
9. Provide FHWA copies of all correspondence sent out on its behalf (e.g. letters to SHPO or Tribes).

V. CONSULTATION WITH TRIBES

1. FHWA shall take the lead in identifying and establishing consultation with Indian tribes consistent with the requirements of 36 CFR 800.2(c)(2) and 36 CFR 800.3(c)-(f). _____DOT may provide general coordination information to Tribes but FHWA shall retain ultimate responsibility for complying with all federal requirements pertaining to government-to-government consultation with Tribes. [If there is a standing agreement with the tribe/s, DOT may conduct day to day coordination for a specific project.]
- B. In accordance with 36 CFR 800.3(f)(2), any Tribes that might attach religious and cultural significance to historic properties in the APE shall be identified by _____DOT and invited by FHWA to be consulting parties.

- C. _____DOT shall ensure that consultation with Tribes is initiated early in the project planning process to identify cultural, confidentiality, or other concerns and to allow adequate time for consideration.
- D. _____DOT shall ensure that consultation continues with Tribes throughout the Section 106 review process prescribed by this Agreement whenever such tribes express a concern about an undertaking or about historic properties that may be affected by an undertaking.
- E. FHWA may ask _____DOT to assist in consultation if the individual Tribes agree.

VI. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

A. Additional Consulting Parties

- 1. Consulting parties shall be identified in writing by _____DOT in consultation with the SHPO pursuant to 36 CFR 800.3(c-f) and their participation in undertakings covered under this Agreement shall be governed by 36 CFR 800.3(f)(3). Individuals and organizations with a demonstrated interest in an undertaking shall be invited by _____DOT in consultation with FHWA to participate in the Section 106 process. Any land-managing agency whose land may be affected by an undertaking shall be invited by _____DOT to participate in the Section 106 process. Written requests by individuals, organizations, and agencies to become consulting parties will be evaluated on a case-by-case basis by _____DOT and FHWA in consultation with the SHPO.

B. Public Involvement

- 1. Public involvement in planning and implementing undertakings covered by this Agreement shall be governed by FHWA's and _____DOT's environmental compliance procedures. _____DOT's Public Involvement Plan (Attachment 1) provides guidance for identifying, informing, and involving the public. FHWA's Technical Advisory and similar and subsequent guidance documents will also be used. Public involvement and the release of information hereunder shall be consistent with 36 CFR 800.2(d), 800.3(e), and 800.1 1(c)(1 and 3).
- 2. The _____DOT shall continue to seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, and the likely interest of the public in the effects on historic properties, to remain consistent with the intent of 36 CFR Part 800, as amended.
- 3. For those actions that do not routinely require public review and comment (e.g., unscreened projects), appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of historic properties, and the undertaking's potential impacts on them.
- 4. The _____DOT shall make FHWA and SHPO aware of any and all public controversy as it relates to the historic properties potentially affected by the proposed

undertaking, including properties of religious and/or cultural significance to the Tribes.

VII. PROJECT REVIEW

A. Excepted Projects

1. Certain projects have no appreciable potential to affect historic properties, whether or not there may be historic properties in the project area. The signatories to this Agreement agree that minor projects limited to the activities listed in Appendix A will require no further coordination pursuant to 36 CFR 800.3(a). Projects comprising additional activities not included in Appendix A will be subject to screening as provided for in stipulation VII.B of this agreement.
2. The _____DOT may add additional activities to the list in Appendix A upon written notice to and concurrence from all parties to this agreement.
3. For projects that are limited to the activities listed in Appendix A, _____DOT will document its finding that the action is exempt from further review and maintain that documentation in its project files.

B. Screened Projects with potential to affect historic properties

1. The _____DOT cultural resource staff will evaluate each undertaking for potential effects to historic properties. At a minimum, evaluations shall consist of [state should establish an appropriate minimum level of evaluation; e.g. a review of the state's cultural resources filed in a Geographic Information system (GIS) and a review of modern-day aerial photography]. Field investigations will be performed at the discretion of _____DOT's cultural resource staff. Provided an undertaking is limited to the activities listed in Appendices A or B, is not located within or adjacent to historic property, and has no known public controversy related to historic properties, no further coordination pursuant to Section 106 shall be required.
2. No Historic Properties Affected. For those undertakings in which there are a) no previously recorded historic properties within the Area of Potential Effect (APE) and b) no newly identified historic properties within the APE, _____DOT's cultural resource staff may issue a finding of "no historic properties affected" and will consult with the SHPO and others as _____DOT determines appropriate.
3. If there are potential historic properties identified within the APE:
 - a. _____DOT's cultural resource staff will apply the National Register Evaluation Criteria in coordination with the _____SHPO and other consulting parties, as appropriate, to assess the need for any additional investigation and determine National Register eligibility in accordance with 36 CFR 800.4.
 - b. If the APE may contain properties of traditional cultural and religious

significance to Indian tribes, or identified properties within the APE may be of interest to tribes, FHWA will initiate consultation with appropriate tribes.

4. No Adverse Effect.
 - a. _____DOT will apply the Criteria of Adverse Effect to any historic properties in consultation with the _____SHPO and other consulting parties, as appropriate, in accordance with 36 CFR 800. 5.
 - b. The _____DOT shall include the following documentation in the project file:
 - i. Any records on consultation
 - ii. Any records on efforts to identify historic properties
 - iii. Any findings of eligibility.
 - iv. Any findings of effect.
 - v. Any records on resolving adverse effects.
5. For all undertakings requiring the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under NEPA; OR for undertakings in which adverse effects to historic properties cannot be avoided, _____DOT's cultural resource staff will notify FHWA, and FHWA will notify the ACHP of the finding of adverse effect and consult with the SHPO and other consulting parties in order to resolve adverse effects and conclude the Section 106 process in accordance with 36 CFR 800.6.

EMERGENCY SITUATIONS

For the purposes of this Agreement, emergencies are defined as occurrences that require emergency highway system and facility repairs that are necessary to 1) protect the life, safety, or health of the public; 2) minimize the extent of damage to the highway system and facilities; 3) protect remaining highway facilities; or 4) restore essential traffic. The following stipulations apply to emergency situations:

- A. Repairs to address emergency situations as defined above can occur regardless of funding category, and regardless of declarations made by federal, state, or local agencies.
- B. If the emergency repair project could affect historic properties, _____DOT's cultural resource staff shall notify the SHPO, the FHWA, and Tribes prior to any work take place. The SHPO and any Tribe that may attach religious and cultural significance to historic properties likely to be affected will have 72 hours to respond.
- C. For projects where the repair must be made within the first 30 days of the occurrence of the event that caused the emergency or the declaration of the emergency by an appropriate authority, the processing of environmental documentation will happen concurrently or after the fact. In these cases, _____DOT will comply with the procedures in Stipulation VIII of this Agreement to the extent possible, but the reviews will likely be conducted after the emergency work is completed.

- D. For projects taking longer than 30 days for repair, _____DOT will comply with the procedures in Stipulation VII.
- E. Written notification of an emergency action shall be provided to the SHPO. The notice shall be clearly and prominently marked as an emergency notification, and shall include an explanation of how the action meets the requirements for emergency as defined herein. The notice shall also include a brief description of the eligibility and/or significance of the resource(s) involved, the nature, effect, and anticipated effect of the emergency action on the resource(s), and the anticipated time frame available for comment.

IX. POST-REVIEW DISCOVERIES

A. Planning for Subsequent Discoveries

When _____DOT's identification efforts indicate that historic properties are likely to be discovered during implementation of an undertaking, _____DOT shall include in any environmental document, contract, and specifications a plan for discovery of such properties. Implementation of the plan as originally proposed, or modified as necessary owing to the nature and extent of the properties discovered, will be in accordance with 36 CFR 800.4-6

B. Late Discoveries

1. If previously unidentified archaeological or historic properties, or unanticipated effects, are discovered after _____DOT has completed its review under this Agreement, that portion of the project will stop immediately, in accordance with _____DOT Engineering Directive Memorandum Number C-16 (Attachment 3).
2. No further construction in the area of discovery will proceed until the requirements of 36 CFR 800.13 have been satisfied, including consultation with Tribes that may attach traditional cultural and religious significance to the discovered property.
3. _____DOT will consult with SHPO and Tribes, as appropriate to record, document, and evaluate NRHP eligibility of the property and the project's effect on the property, and to design a plan for avoiding, minimizing, or mitigating adverse effects on the eligible property.
4. If neither the SHPO nor a Tribes files an objection within 72 hours of _____DOT's plan for addressing the discovery, _____DOT may carry out the requirements of 36 CFR 800.13 on behalf of FHWA, and the ACHP does not need to be notified.

X. IDENTIFICATION AND TREATMENT OF HUMAN REMAINS

- A. In the event that human remains are identified prior to, during, or after project construction, _____DOT will develop a treatment plan in consultation with FHWA and

the SHPO. If it is determined that the human remains are associated with a Native American occupation, _____DOT and FHWA will consult with the Tribes prior to the development or execution of a treatment plan.

- B. All work conducted on human remains and abandoned cemeteries will comply with **cite applicable state law regarding burials**

XI. ADMINISTRATIVE STIPULATIONS

A. Monitoring and Reporting

1. FHWA, the SHPO, and ACHP may review activities carried out pursuant to this Agreement. _____DOT shall facilitate this review by compiling specific categories of information to document the effectiveness of the Agreement and by making this information available on an annual basis to FHWA, the SHPO, and ACHP in the form of a written report. Categories of information can include, but are not limited to, a summary of actions taken under the Agreement, including all findings and determinations, accomplishments, estimated time and cost savings, public objections, and inadvertent effects or foreclosures. The range and type of information included by _____DOT in the written report and the manner in which this information is organized and presented must be such that it facilitates the ability of the reviewing parties to assess accurately the degree to which the Agreement and its manner of implementation constitute an efficient and effective program alternative under 36 CFR 800, and to determine whether this Agreement should remain in effect, and if so, whether and how it should be improved through appropriate amendment.
2. FHWA shall monitor the provisions of this Agreement no more than every 24 months after the date of execution of this agreement. The monitoring effort shall consist of a review of project records and interviews of staff at _____DOT, SHPO, as well as interviews with other consulting parties. FHWA shall prepare a report that summarizes the conclusions of monitoring that will be posted and publically available on the _____DOT website. FHWA will also transmit the monitoring report to the ACHP for review.
3. _____DOT shall prepare a written report annually on a calendar year basis. The report will provide a description of the number of Type I, I and III projects that were reviewed during the calendar year. The report will also describe accomplishments/successes achieved over the course of the year as well as suggestions for improvements. _____DOT shall submit the annual reports to FHWA, the SHPO, and ACHP no later than March 31 of each year.

B. Resolving Objections to Implementation of this Agreement

1. Should any signatory party object in writing to FHWA regarding the manner in which the terms of this Agreement are carried out, FHWA will immediately notify the other

signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. FHWA will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. The FHWA shall establish a reasonable time frame for such consultations.

2. Should any signatory party object to a _____ DOT or FHWA determination of eligibility, FHWA will submit the determination to the Keeper of the National Register of Historic Places for resolution.
3. If the objection is resolved through consultation, FHWA may authorize the disputed action to proceed in accordance with the terms of such resolution.
4. If after initiating such consultation, FHWA determines that the objection cannot be resolved through consultation, FHWA shall forward all documentation relevant to the objection to the ACHP and other signatory parties, including FHWA's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:
 - i. Advise FHWA that ACHP concurs in FHWA's proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or
 - ii. Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection; or
 - iii. Notify FHWA that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4) and proceed to refer the objection and comment. In this event, FHWA shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 CFR 800.7(~)(4).
5. Should ACHP not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, FHWA may assume ACHP's concurrence in its proposed response to the objection.
6. FHWA shall take into account any ACHP recommendation or comment and any comments from the other signatory parties to this Agreement in reaching a final decision regarding the objection. FHWA's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.
7. FHWA shall provide all other signatory parties to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this Stipulation.

8. FHWA may authorize any action subject to objection under this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of this Stipulation.
9. At any time during implementation of the terms of this Agreement, should any member of the public raise an objection in writing pertaining to such implementation to any signatory party to this Agreement, that signatory party shall immediately notify FHWA. FHWA shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment on the objection to FHWA. FHWA shall establish a reasonable time frame for this comment period. FHWA shall consider the objection, and in reaching its decision, FHWA will take all comments from the other parties into account. Within 15 days following closure of the comment period, FHWA will render a decision regarding the objection and respond to the objecting party. FHWA will promptly notify the other parties of its decision in writing, including a copy of the response to the objecting party. FHWA's decision regarding resolution of the objection will be final. Following the issuance of its final decision, FHWA may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

XII. AMENDMENT

- A. Any signatory party to this Agreement may at any time propose amendments, whereupon all signatory parties shall consult to consider such amendment. This Agreement may be amended only upon written concurrence of all signatory parties.
- B. Each attachment to this Agreement may be individually amended through consultation of the signatory parties without requiring amendment of the Agreement, unless the signatory parties through such consultation decide otherwise.

XIII. TERMINATION

- A. Any signatory party may terminate this agreement. If this Agreement is not amended as provided for in Stipulation XIII, or if any signatory party proposes termination of this Agreement for other reasons, the party proposing termination shall notify the other signatory parties in writing, explain the reasons for proposing termination, and consult with the other parties for no more than 30 days to seek alternatives to termination.
- B. Should such consultation result in an agreement on an alternative to termination, the signatory parties shall proceed in accordance with that agreement.
- C. Should such consultation fail, the signatory party proposing termination may terminate this Agreement by promptly notifying the other parties in writing.
- D. Should this Agreement be terminated, FHWA would carry out the requirements of 36 CFR Part 800 for individual undertakings.

- E. Beginning with the date of termination, FHWA shall ensure that until and unless a new Agreement is executed for the actions covered by this Agreement, such undertakings shall be reviewed individually in accordance with 36 CFR 800.4-800.6.

XIV. CONFIDENTIALITY

All parties to this Agreement acknowledge that information about historic properties, potential historic properties, or properties considered historic for purposes of this Agreement are or may be subject to the provisions of Section 304 of NHPA. Section 304 allows FHWA to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if _____DOT determines that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. Having so acknowledged, all parties to this Agreement will ensure that all actions and documentation prescribed by this Agreement are, where necessary, consistent with the requirements of Section 304 of the NHPA.

XV. DURATION OF AGREEMENT

This Agreement shall remain in effect for a period of ten (10) years after the date it takes effect, unless it is terminated prior to that time. Ninety days prior to the conclusion of the ten year period, _____DOT will notify all parties in writing. If there are no objections from consulting parties, the term of the Agreement will automatically be extended for an additional ten years. If any party objects to extending the Agreement, or proposes amendments, _____DOT will consult with the parties to consider amendments or other actions to avoid termination.

Execution and implementation of this agreement evidence that FHWA has delegated certain Section 106 responsibilities to _____ DOT, and has afforded ACHP a reasonable opportunity to comment on the Program and its individual undertakings in _____; that FHWA has taken into account the effects of the program and its individual undertakings on historic properties, and that FHWA has complied with Section 106 of the NHPA and 36 CFR 800 for the Program and its individual undertakings.

Signatories:

Federal Highway Administration

By: _____ Date: _____

State Historic Preservation Officer

By: _____ Date: _____

Advisory Council on Historic Preservation

By: _____ Date: _____
John M. Fowler, Executive Director

_____ Department of Transportation

By: _____ Date: _____

PROGRAMMATIC AGREEMENT TEMPLATE APPENDIX A

[Sample activities listed here are intended to be tailored to an individual state's experience and level of assurance that projects limited to these activities have no appreciable potential to affect historic properties.]

EXCEPTED ACTIVITIES

1. General highway maintenance and repair, including filling potholes, crack sealing, joint grinding, milling and resurfacing in kind.
2. Guardrail replacement where no new bank stabilization is required.
3. Installation or maintenance of highway signs, pavement markings and/or contemporary fencing within existing operational ROW.
4. General pavement marking, line painting, or installation of sensors in existing pavements.
5. Installation of raised pavement markers.
6. Herbicidal spraying within existing ROW.
7. Mowing or brush removal/trimming within existing ROW.
8. Improvements to existing maintenance facilities.
9. Study type projects (e.g. feasibility studies).
10. Acquisition of scenic easements.
11. Storm damage repairs, such as culvert clearing or repair, shoulder reconstruction, or slide or debris removal.
12. Other...

SCREENED ACTIVITIES

1. Minor widening of less than one-half lane width, adding lanes in the median, or adding paved shoulders.
2. Minor modification of interchanges and realignments of on/off ramps.
3. Approval of utility installations along or across a transportation ROW provided no drainage of wetlands will occur.
4. Installation of noise barriers or retaining walls.
5. Addition of bicycle lanes, pedestrian walkways, or shared use paths.
6. Modification of existing features, such as slopes, ditches, curbs, sidewalks, driveways, dikes, or headwalls, within or adjacent to the ROW.
7. Minor operational improvements, such as culvert replacements and median or side-ditch paving.
8. Addition or replacement of devices, such as glare screens, median barriers, fencing, guardrails, safety barriers, energy attenuators, guide posts, markers, safety cable, ladders, lighting, hoists, or signs.
9. Abandonment, removal, reconstruction, or alteration of railroad grade crossings or separations or grade crossing protection.

10. Additions or alterations to existing buildings, such as work on or in office or equipment buildings, maintenance stations, warehouses, roadside rest areas, vista points, minor transit facilities, weigh and inspection station, or toll facilities.
11. Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety.
12. Any work on non-eligible, non-contributing bridges, including rehabilitation or reconstruction.
13. Modification of traffic control systems or devices utilizing existing infrastructure, including installation, removal, or modification of regulatory, warning, or informational signs or signals.
14. Installation of freeway surveillance or ramp metering equipment.
15. Replacement of existing highway signs.
16. Removal or control of outdoor advertising.
17. Establishment, replacement, or removal of landscaping, vegetation, or irrigation systems on state or locally owned property, including highway and local roads ROW and building sites.
18. Joint or multiple use permits with other agencies or encroachment permits.
19. Minor maintenance on historic bridges and tunnels.
20. Other...

(5-18-15 DRAFT)