



Section 106 Delegation Programmatic Agreements:

Review & Best Practices

Prepared for

AASHTO Committee on Environment and Sustainability

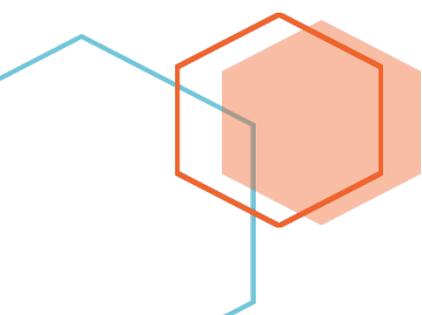
Prepared by

Paul Graham
Louis Berger U.S. Inc.
Kansas City, Missouri

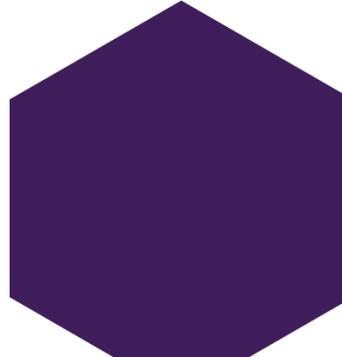
Terry Klein
SRI Foundation
Rio Rancho, New Mexico

The information contained in this report was prepared as part of NCHRP Project 25-25, Task 107, National Cooperative Highway Research Program.

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Contractor's Final Report
February 2019



ACKNOWLEDGMENTS

This study was conducted for the AASHTO Committee on Environment and Sustainability, with funding provided through the National Cooperative Highway Research Program (NCHRP) Project 25-25, Task 107, *Section 106 Delegation Programmatic Agreements: Review and Best Practices*. The NCHRP is supported by annual voluntary contributions from the state Departments of Transportation. Project 25-25 is intended to fund quick response studies on behalf of the Committee on Environment and Sustainability. The report was prepared by Paul Graham, Louis Berger U.S., Inc. and Terry Klein, SRI Foundation. The work was guided by a technical working group that included the following.

Gale D'Avino – Georgia Department of Transportation (Chair)
Sigrid Bergland – Michigan Department of Transportation
Brennan Dolan – Iowa Department of Transportation
Anmarie Medin – California State Historic Preservation Office
Scott Pletka – Texas Department of Transportation
Kara Russell – Pennsylvania Department of Transportation
Stacy Stupka – Nebraska Department of Transportation
David Clarke – Federal Highway Administration (liaison)

The project was managed by Ann Hartell, NCHRP Senior Program Officer.

Disclaimer

The opinions and conclusions expressed or implied are those of the research agency that performed the research and are not necessarily those of the Transportation Research Board or its sponsoring agencies. This report has not been reviewed or accepted by the Transportation Research Board Executive Committee or the Governing Board of the National Research Council.

SUMMARY

Project Goals

National Cooperative Highway Research Program (NCHRP) Project 25-25, Task 107 provides state Departments of Transportation (DOTs), the Federal Highway Administration (FHWA), and State Historic Preservation Offices (SHPOs) practical guidance for the application, preparation, modification, and implementation of Section 106 of the National Historic Preservation Act (Section 106) delegation programmatic agreements (PAs). These delegation PAs 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 party, such as a state DOT that is an applicant for federal funds. FHWA, however, generally remains legally responsible for Section 106 compliance. FHWA does not retain legal responsibility for Section 106 compliance when a state DOT has taken on National Environmental Policy Act (NEPA) assignment through a Memorandum of Understanding (MOU), pursuant to 23 USC 326 and 327. Through such a MOU, the state DOT becomes the "federal agency" for National Environmental Policy Act (NEPA) and Section 106 (and other laws) and has full legal responsibility for compliance with these statutes and their associated regulations. NCHRP Task 107 explores the procedures and consultations associated with modifying and updating delegation PAs as part of NEPA assignment; that is, how states that have an existing delegation PA prior to NEPA assignment modify, update, or replace their PAs as part of taking on NEPA assignment.

Project Approach

As a first step, the Task 107 project team obtained copies of all active delegation PAs and thereafter compiled a list of states that have active PAs, states that are in the process of developing or updating their PAs, and states that do not have a delegation PA. After compiling this list, the project team sent an initial survey questionnaire to those states that (1) are in the process of updating their PAs, (2) have PAs that do not have a sunset clause, and (3) do not have a delegation PA. The questionnaire asked about topics such as the following.

- If your state has a Section 106 PA that does not have a stipulation noting the duration of the PA, do you plan to prepare a new PA? If you are not planning to prepare a new PA, please share with us the reasons why you are not planning to prepare a new PA.
- If your state does not currently have a Section 106 delegation PA, are you planning to develop one in the future? If you are not planning to develop a PA, please share with us the reasons why you are not planning to develop a PA.

The project team also conducted an analysis of all of the active delegation PAs. This analysis examined various aspects of these PAs, such as:

- What Section 106 steps has the FHWA division office delegated to the state DOT through the PA?
- What Section 106 decisions and findings can the state DOT make without consulting with the SHPO, as stipulated in the delegation PA?

Many delegation PAs include a stipulation whereby a state DOT, without SHPO consultation, 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. The project team’s analysis of the delegation PAs includes an examination of the number of states that include this screening process in their PAs and how this screening is accomplished.

After completion of these analyses of active delegation PAs, the project team sent questionnaires to state DOTs, SHPOs, FHWA division office staff, and key staff at the Advisory Council on Historic Preservation (ACHP) concerning 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, updating, and implementation of state DOT Section 106 delegation PAs.

Primary Findings

The state DOTs, FHWA division offices, SHPOs, and ACHP staff responding to the Task 107 survey questionnaires identified similar key elements for developing and updating a successful delegation PA. The following are some examples of these key elements.

- There needs to be a level of trust among FHWA, the state DOT, and SHPO. These parties need to be willing to work together.
- Identify the goals of the PA or PA update. Define these goals before beginning the writing/editing process. Obtain buy-in from senior leadership (those who will actually sign the PA) on these goals before proceeding to write the document.
- Have regular meetings with the signatories and invited signatories to create opportunities for specific questions and items to be discussed.
- Develop a timeline for preparing or updating the PA. Allow enough time to draft or amend a PA, including consulting with federally recognized tribes, notifying state and local agencies, and allowing tribes and agencies to comment on the draft agreement. Include time for a legal review, if such a review is required.
- Focus on those things that will be most beneficial to the state DOT and other parties, and include these things in the PA. Do not try to address everything at once; this generally results in a cumbersome and time-consuming effort.
- Tribal participation needs to take place early in PA development. Having summits, listening sessions, and other types of face-to-face meetings with the tribes will greatly increase tribal participation in the development of a PA.

The following are some examples of the key elements to implementing a delegation PA.

- It is important to maintain open and regular lines of communication between the state DOT and SHPO. Such communication results in building trust and relationships and, in turn, the effectiveness of PA implementation.
- Have mandatory training on the PA, especially on the use of the streamlining provisions (such as the screening of projects to determine if they are exempt from further Section 106 review). This training is critical to ensure appropriate implementation of a PA’s provisions.

As demonstrated through the analysis of state DOT delegation PAs, as well as through the agency responses to the survey questionnaires, these PAs establish procedures that streamline and expedite project delivery schedules, which may result in decreased project costs. These procedures include reducing the number of projects requiring outside consultation, reducing case-by-case Section 106 reviews and consultation, and focusing agency efforts on those projects that may adversely affect historic properties. As one state DOT tellingly noted, “We would never want to go back to the system before the PA!”

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1.0 INTRODUCTION

Federal regulation 36 CFR 800 establishes the standard steps and process for how a federal agency complies with Section 106 of the National Historic Preservation Act (NHPA) (Section 106). The Section 106 regulation also allows a federal agency to use a “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 programmatic agreements (PAs). These agreements can be used to govern implementation of a particular federal agency program.

National Cooperative Highway Research Program (NCHRP) Project 25-25, Task 107 provides state Departments of Transportation (DOTs), the Federal Highway Administration (FHWA), and State Historic Preservation Offices (SHPOs) practical guidance for the application, preparation, modification, and implementation of Section 106 delegation PAs. These delegation PAs 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 party, such as a state DOT that is an applicant for federal funds. FHWA, however, generally remains legally responsible for Section 106 compliance.

FHWA does not retain legal responsibility for Section 106 compliance when a state DOT has taken on National Environmental Policy Act (NEPA) assignment through a Memorandum of Understanding (MOU), pursuant to 23 USC 326 and 327.¹ Through such a MOU, the state DOT becomes the “federal agency” for NEPA and Section 106 (and other laws) and has full legal responsibility for compliance with these statutes and their associated regulations. Further, FHWA does not participate in any aspect of project-specific environmental compliance. At the time of this report, six state DOTs have taken on full NEPA assignment (pursuant to 23 USC 327), assuming responsibility for NEPA compliance for all NEPA classes of action—Categorical Exclusions (CEs), Environmental Assessments (EAs), and Environmental Impact Statements (EISs). This assignment is accomplished through what is generally referred to as a “327 MOU.” These “full NEPA assignment” states are Alaska, California, Florida, Ohio, Texas, and Utah. Arizona DOT and Nebraska DOT have assignment for certain categories of CEs (pursuant to 23 USC 326; i.e., through a “326 MOU”); in Arizona and Nebraska, FHWA retains responsibility for some CEs and for all EAs and EISs. NCHRP Task 107 explores the procedures and consultations associated with modifying and updating delegation PAs as part of NEPA assignment. It investigates how states that have an existing delegation PA prior to NEPA assignment, modify, update, or replace their PAs as part of taking on NEPA assignment.

¹ See Federal Highway Administration, Environmental Review Toolkit (Washington, DC: U.S. Department of Transportation, 2018, <https://www.environment.fhwa.dot.gov/nepa/assignment.aspx>). It should be noted that FHWA retains legal responsibility for government-to-government consultation with federally recognized tribes.

NCHRP Task 107 also supplements and builds on NCHRP 25-25, Task 91, *Synthesis of Transportation Exclusions to Section 106 Review*.² NCHRP Task 91 examined how the FHWA and state DOTs, through PAs and other mechanisms, exclude projects from further review and consultation under Section 106. That study examined 25 state DOT Section 106 PAs, along with a number of MOUs, letter agreements, and funding agreements. After collecting and reviewing these state DOT PAs and other documents, the Task 91 project team interviewed state DOT cultural resource management staff to gather information on the state DOTs' applied experiences in streamlining Section 106 compliance by excluding classes of actions from further Section 106 review.

NCHRP Task 91 not only looked at classes of actions exempted from further Section 106 review but also considered delegation of Section 106 decision making to state DOTs. These decisions are often made by the state DOTs without consulting SHPOs, and in some cases without informing or consulting the FHWA. The delegated Section 106 decision-making process examined during the Task 91 study included the following formal steps in the Section 106 process.

- Identifying historic properties (including identification of areas of potential effect (APEs), defining the level of effort to identify historic properties, and evaluating National Register of Historic Places [National Register] eligibility)
- Assessing effects (including making findings of no historic properties affected, no adverse effect, and adverse effect)
- Resolving adverse effects

NCHRP Task 107 expands and details how these steps and other aspects of the Section 106 review process are delegated to state DOTs through delegation PAs. Task 107 also looks at how these delegation PAs establish procedures that streamline and expedite project delivery schedules and decrease project costs. Such procedures include reducing the number of projects requiring outside consultation, reducing case-by-case reviews, and focusing on those projects that may adversely affect historic properties.

Task 107 additionally produced a quick reference guide for all parties involved in preparing, updating, and implementing a delegation PA. This reference guide, which is a stand-alone document separate from this report, addresses the following topics.

- The value of delegation PAs
- Things to consider prior to preparing a new delegation PA or updating an existing PA
- What needs to be in place prior to preparing a delegation PA or updating an existing PA?
- Preparing/writing the PA
- Implementing a PA
- Working with tribes on preparing and implementing a delegation PA

² Terry Klein, David Cushman, Meg Scantlebury, Monte Kim, *NCHRP 25-25, Task 91, Synthesis of Transportation Exclusions to Section 106 Review* (Fairfax, VA, and Rio Rancho, NM: prepared for AASHTO Committee on Environment and Sustainability, National Cooperative Highway Research Program, Transportation Research Board, Washington, DC, by ICF International and SRI Foundation, 2015, [http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25\(91\)_FR.pdf](http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25(91)_FR.pdf)).

2.0 PROJECT APPROACH

As a first step, the Task 107 project team obtained copies of all active delegation PAs and thereafter compiled a list of the states that have active PAs, states that are in the process of developing or updating their PAs, and states that do not have a delegation PA (see Appendix A). The project team compiled the list of PAs in partnership with the FHWA liaison at the Advisory Council on Historic Preservation (ACHP) and the FHWA Federal Preservation Officer (FPO).

After compiling this list of delegation PAs, the project team sent an initial survey questionnaire to those states that (1) are in the process of updating their PAs, (2) have expired PAs or PAs that do not have a sunset clause, and (3) do not have a delegation PA. The following questionnaire was sent these states (a total of 23 states).

- If your state is in the process of updating your Section 106 delegation PA, what is your projected schedule for completion and execution of your PA?
- If your state has a Section 106 PA that has either expired or does not have a stipulation noting the duration of the PA (e.g., five years from the execution of the PA), do you plan to prepare a new PA? If you are, what is your projected schedule for completing and executing the PA? If you are not planning on preparing a new PA, please share with us the reasons why you are not planning to prepare a new PA.
- If your state does not currently have a Section 106 delegation PA, are you planning on developing one in the future? If you are planning on developing a PA, please tell us what your projected schedule is for the PA. If you are not planning to develop a PA, please share with us the reasons why you are not planning to develop a PA.

The project team also conducted an analysis of all of the active delegation PAs (see Appendix B). The following questions were used to guide this analysis.

- What Section 106 steps has the FHWA division office delegated to the state DOT through the delegation PA?
- What Section 106 decisions and findings can the state DOT make without consulting with the SHPO, as stipulated in the delegation PA?
- What Section 106 decisions and findings can the state DOT make without consulting with the ACHP, as stipulated in the delegation PA?
- At what point does FHWA retain involvement or reinsert itself in consultation?
- What oversight provisions to ensure quality control are included in the delegation PA?

This analysis of the active delegation PAs examined the delegation of the following steps and decisions in the Section 106 process (as listed in 36 CFR 800).

- Initiating Section 106
- Finding of No Potential to Cause Effects
- Defining the APE
- Evaluating National Register Eligibility

- Finding of No Historic Properties Affected
- Finding of No Adverse Effect
- Finding of Adverse Effect
- Resolving Adverse Effects

Many delegation PAs include a stipulation whereby 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 (most often listed in an appendix or attachment to the PA). If a project meets these conditions or project type, no further Section 106 review is required. Some states equate this screening process with making a finding of “No Potential to Cause Effects” or “No Historic Properties Affected.” A few states describe these screened projects as having “minimal potential to cause effects.” The state DOT conducts this screening process and makes the resulting decisions without consultation with the FHWA or the SHPO.

In most cases, this screening process is conducted by a qualified individual (i.e., an individual meeting the Secretary of Interior’s Professional Qualifications Standards at 36 CFR Part 61), and the PAs stipulate that this individual must be able to decide if a project meets the screening criteria and therefore does not require further Section 106 review. In addition, some state PAs allow the state DOT to screen projects regardless of the NEPA class of action (CEs, EAs, and EISs), whereas other PAs restrict the ability to screen projects to only CEs. The project team’s analysis of the delegation PAs includes an examination of the number of states that include this screening process in their PAs, and how this screening is conducted.

This analysis of delegation PAs also took into account situations in which FHWA’s responsibilities for NEPA compliance and several laws under the NEPA “umbrella,” including Section 106, are assigned to a state DOT through NEPA assignment. The delegation PAs for these NEPA assignment states reflect the stipulations in their MOUs, and that the state DOT is the “federal agency” for compliance with Section 106. It should be noted, however, that the NEPA assignment MOUs often list specific projects or classes of projects for which FHWA retains legal responsibility for NEPA and Section 106 compliance (and other laws), and this is also reflected in the PAs.

Finally, FHWA retains legal responsibility for government-to-government consultation with federally recognized tribes. Government-to-government consultation, including consultation under Section 106, cannot be assigned to a state DOT, although the state DOT can and often does conduct most aspects of tribal consultation on behalf of FHWA, if tribes agree to their participation in the consultation. This, too, is reflected in the delegation PAs for NEPA assignment states.

The project team also looked at the duration stipulations of all of the active delegation PAs, which note how long the PAs would be in effect and the process for their renewal.

After completion of these analyses of active delegation PAs, the project team 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 (see Appendix C). Questionnaires with different sets of questions were sent to each type of agency, given their respective roles and responsibilities under the Section 106 process. Questionnaires were sent to all states with a delegation PA. Agency staff members could either participate in a telephone interview, discussing the questions in the

questionnaire with a project team member, or submit completed questionnaires via email to the project team. The purpose of these questionnaires was to provide insights into best practices and practical guidance for the application, preparation, and modifications of state DOT Section 106 delegation PAs.

The number of responses from the agencies was as follows.

- FHWA Division Offices: 1 interview and 9 completed questionnaires (one was a joint response from a FHWA division office and a state DOT)
- SHPOs: 6 completed questionnaires
- State DOTs: 2 interviews and 16 completed questionnaires

The project team also received a completed questionnaire from the ACHP, representing the views of senior ACHP staff.

3.0 ANALYSIS OF STATE DOT DELEGATION PROGRAMMATIC AGREEMENTS

3.1 RESULTS OF INITIAL SURVEY OF STATE DOTs

As shown in Appendix A, nine states have no delegation PA. Of the remaining 42, 37 states have active PAs and four states are in the process of updating their PAs (note: the use of the terminology “state DOT” in this report is inclusive of Puerto Rico for ease of reference). Five states are in the process of developing the first PAs for their states.

As discussed above, the project team sent an initial survey questionnaire to those states that (1) are in the process of updating their PAs, (2) have PAs that do not have a sunset clause, and (3) do not have a delegation PA. The project team received responses from 13 states, and these responses are summarized below.

- The state DOTs that are in the process of developing a new PA or are updating an existing PA will complete these efforts in 2019. One state will have its new PA completed within the next three years.
- A few state DOTs noted that their SHPOs did not want to pursue a delegation PA. Their SHPOs were uncomfortable with delegating decision making to FHWA and the state DOT.
- One state DOT was told by their SHPO that a delegation PA was not necessary, stating that streamlining measures were already allowed pursuant to 36 CFR 800.3(a)(1) (i.e., no potential to cause effects findings), and that delegation authority is already allowed under 36 CFR 800.2(c)(4) (i.e., agency authorizes an applicant to initiate consultation with consulting parties).
- One state DOT developing a PA noted that its PA will be “a straight delegation of the ability to consult and conclude 106 providing documentation to FHWA prior to NEPA approval.” They used the ACHP/FHWA PA template, but they revised it to exclude any stipulations where the state DOT makes a Section 106 finding without consulting with SHPO. The state DOT wanted no streamlining, no decision making without consultation, and no year-end reporting.
- States that have PAs with no duration stipulation (sunset clause) generally have no plan or schedule for updating their PAs.
- A few states have no plan to pursue a delegation PA.
- Personnel changes at state DOTs and SHPOs have negatively affected states’ ability to develop a PA. In some cases, this has lengthened the time it takes to develop a PA.
- Staff workloads and time constraints have also affected PA development. Some states are not pursuing the development of a PA or updating their existing PA because of these constraints.
- One state plans to prepare one PA for archaeological resources and a second PA for historic bridges. They do not plan on pursuing a general Section 106 delegation agreement.

3.2 ANALYSIS OF DELEGATION PAS

The analysis presented below is based on Tables B-1 and B-2 in Appendix B. It should be noted that the tables showing the Section 106 steps delegated by FHWA to a state DOT do not apply to states that have full NEPA assignment delegation through a 327 MOU, as these states serve as the federal agency for the

purpose of Section 106 compliance (and this is noted in the tables with “N/A,” Not Applicable). In addition, “N/A” is similarly used for the two states (Arizona and Nebraska) that currently have a 326 MOU for most classes of CEs. This was done because the majority of their projects are CEs, and because both states are working toward full NEPA assignment.

With five exceptions, all of the delegation PAs listed in Appendix B are applicable to all projects, regardless of the NEPA class of action. The Connecticut, Massachusetts, Missouri, and West Virginia PAs, in their entirety, are only applicable to projects classified as CEs, and these projects are generally referred to as “minor projects.” The Rhode Island agreement applies only to specific types of “minor projects”; however, the PA does not explicitly link the term “minor project” with a class of NEPA action. In addition, as noted below and in Appendix B, some of the PAs that apply to all NEPA classes of action include stipulations that restrict the use of streamlining provisions to projects classified as CEs.

3.2.1 What Section 106 process steps have FHWA division offices delegated to state DOTs?

FHWA division offices most often delegate to the state DOTs the steps in the Section 106 process laid out in 36 CFR 800.3 and 800.4. These steps include initiating Section 106 and making findings of No Potential to Cause Effects, defining the APE, determining National Register eligibility, and making findings of No Historic Properties Affected. FHWA generally retains the remaining Section 106 steps: findings of No Adverse Effect, findings of Adverse Effect, and consulting to resolve Adverse Effects. Only two states have been delegated the latter step in the Section 106 process. As noted above, states that have full NEPA assignment are legally responsible for implementing all steps in the Section 106 process, except for those projects and actions that FHWA retains pursuant to their respective NEPA assignment MOU.

The majority of the PAs include stipulations whereby the state DOT can screen certain classes of projects and determine whether a project is exempt from further Section 106 review. Eighty-four percent of the PAs allow the state DOT to screen projects without consulting with FHWA. As noted above, the PAs for four states apply only to CEs, and therefore only projects that are classified as CEs are run through this screening process. Virginia’s PA, which applies to all classes of NEPA actions, does specify that this screening process can be used only on projects classified as CEs.

3.2.2 What Section 106 decisions and findings can a state DOT make without consulting SHPO?

The majority of the delegation PAs allow state DOTs to screen projects and determine which projects are exempt from further review, without SHPO consultation. More than half of the PAs (54 percent) allow the state DOTs to define a project’s APE without consulting with their SHPO. The Arizona, Texas, and California PAs include detailed directions on how to define an APE, and all three states can define an APE without consulting their SHPO. Colorado, New Hampshire, Utah, Rhode Island, and Illinois can define an APE without SHPO consultation but only on projects that are defined in the PA as a “minor project” or are classified as CEs. The Alaska Department of Transportation and Public Facilities (DOT&PF) and New Mexico DOT can define APEs for screened projects without SHPO consultation, but they conduct standard APE consultation for non-screened projects.

Approximately one-third (32 percent) of all states can make a finding of No Historic Properties Affected without SHPO consultation. Arizona, California, Iowa, and Texas, can make a finding of No Adverse Effect, without SHPO consultation, when this finding is based on specific conditions stipulated in the PA. These conditions can involve measures to avoid and protect historic properties, and these measures can be stipulated in project design and construction plans. The California and Iowa PAs also include a condition linked to the Secretary of the Interior's Standards for the Treatment of Historic Properties, whereby a No Adverse Effect finding can be made when the proposed work is consistent with the Secretary of the Interior's Standards and is carried out as stipulated in the PA. Although the Pennsylvania PA gives the state DOT authority to make a finding of No Adverse Effect without SHPO consultation, the PA includes four specific conditions when the state DOT does have to consult with the SHPO on a finding of No Adverse Effect, such as when a project is controversial or the project involves rehabilitation of a historic property.

Even though some state DOTs can make these decisions and findings without consulting SHPOs, these state DOTs informally consult with their SHPO on these findings and decisions, and this is noted in their PAs.

Except for Pennsylvania, none of the PAs allows the state DOT to determine National Register eligibility without SHPO consultation. Pennsylvania DOT may consult with the SHPO and FHWA in making an eligibility determination. None of the PAs allows the state DOTs to make findings of No Adverse Effect (without conditions) and findings of Adverse Effect, without SHPO consultation. All state DOTs must consult with their SHPO on the measures to resolve any Adverse Effects.

3.2.3 What Section 106 decisions and findings can a state DOT make without consulting the ACHP?

Only three state DOTs, California, Pennsylvania, and Texas, have the ability not to inform the ACHP when there is a finding of Adverse Effect, and therefore the project team has not included a table on consulting with the ACHP in Appendix B.

The California PA stipulates the conditions under which the state DOT notifies the ACHP about an Adverse Effect and invites the ACHP to participate in the resolution of the Adverse Effect. These conditions reflect those stipulated in Appendix A of 36 CFR 800, with the addition that the ACHP will be invited to participate when the parties cannot reach an agreement on how to resolve an Adverse Effect. California DOT still files all executed Memoranda of Agreement (MOA) with the ACHP prior to proceeding with the project.

The Pennsylvania PA allows the resolution of adverse effects via a letter of agreement if FHWA, SHPO, and the state DOT agree to the measures to resolve adverse effects, and other consulting parties do not object to the proposed measures. The execution of a letter of agreement and implementation of its terms document FHWA's compliance with Section 106. FHWA, however, will notify the ACHP when certain situations or issues arise, such as an Adverse Effect to a National Historic Landmark or when the state DOT, SHPO, and FHWA are not able to reach agreement on resolving adverse effects. In these cases, FHWA will carry out the requirements of 36 CFR 800.6.

As a state with NEPA assignment, the Texas PA allows the state DOT to execute a “standard two-party” agreement with SHPO that stipulates how they will resolve an Adverse Effect. This Adverse Effect finding and subsequent agreement is accomplished without ACHP involvement, and the agreement is not filed with the ACHP. This process is used for projects where no other parties have a role in carrying out the measures to resolve an Adverse Effect.

3.2.4 At what point does FHWA retain involvement or reinsert itself in consultation?

For non-NEPA assignment states, FHWA is generally not involved in the following steps in the Section 106 process: initiating Section 106 and making findings of No Potential to Cause Effects, defining the APE, determining National Register eligibility, and making findings of No Historic Properties Affected. FHWA is involved in consultation on findings of No Adverse Effect in 55 percent of the PAs, and 77 percent of the PAs for findings of Adverse Effect. The agency is involved in almost all decision making involving resolution of Adverse Effects, including conducting formal consultation with the ACHP to resolve any Adverse Effects.

The majority of the PAs stipulate that FHWA reinsert itself whenever there is a dispute over a Section 106 finding or decision made by a state DOT. This is not the case for those states that have taken on full NEPA assignment. In all cases, FHWA is involved in any amendment to the PA and, of course, termination of the PA.

3.2.5 What oversight provisions to ensure quality control are included in the PAs?

Analysis of this question focused on the monitoring and reporting stipulations. Eighty-one percent of the state DOTs report annually on their implementation of the PA. This reporting is accomplished through an annual report and/or an annual meeting. During this annual meeting, some states evaluate the effectiveness of the PA and, if warranted, make revisions to stipulations in the PA. Quarterly reporting is generally used to report findings and decisions made by the state DOT that do not require consultation with SHPO, such as screened projects or findings of No Adverse Effect with standard conditions.

A few of the PAs stipulate that the signatories will review implementation of the PA as needed or requested. One PA was evaluated after its execution, and no additional monitoring is stipulated in the PA. Another PA has no reporting or monitoring stipulations.

3.2.6 What types of duration stipulations are used in the PAs?

During the analysis of the delegation PAs, the project team observed that the duration stipulations in the PAs varied. The project team consequently decided to explore these duration stipulations a bit further. Table B-3 in Appendix B shows the range of the duration stipulations of the active delegation PAs. The duration stipulations range from one year to 15 years. The majority are five or 10 years. Five PAs have no duration stipulation.

The PAs have a number of different approaches for extending the duration of a PA. For example, some PAs stipulate that if there are no objections to extending the PA for an additional term (and the length of this additional term is defined in the PA), then the PA will automatically be extended to that term. Some states require written agreement among the PA signatories to extend the term of the PA, and some PAs

stipulate that the signatories can determine the duration of the PA extension, which may be shorter or longer than the original duration stipulated in the PA.

The active PAs range in signature date from 1996 to the present. The project team's analysis showed that all PAs with no duration stipulation were signed before 2007. Also, there is no pattern in terms of the five-year versus 10-year durations based on year of signature; from 2013 to 2016, five-year and 10-year durations were used equally. In 2017, the year when the highest number of PAs were signed, there were three PAs with five-year durations and six PAs with 10-year durations. All PAs signed in 2018, as of the date of this report, have five-year durations.

3.2.7 Additional observations from the analysis of the delegation PAs

Most PAs have the FHWA, SHPO, state DOT, and ACHP as signatories. Some PAs have more than these standard signatories.

- The Minnesota, South Carolina, Utah, and Virginia PAs have U.S. Army Corp of Engineers (USACE) districts as signatories.
- The Virginia PA also has the Tennessee Valley Authority as a signatory.
- The Maine PA includes the Federal Transit Administration as a signatory.
- The Rhode Island PA includes the Blackstone River Valley National Heritage Corridor, Inc.
- The Nevada PA has several additional signatories: the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), the USACE, and the Nevada Division of Parks.
- The Arizona PA has the most additional signatories: the Bureau of Indian Affairs, BLM, USACE, USFS, the Arizona State Lands Department, Arizona State Parks, the Arizona State Museum, and two federally recognized tribes.

In addition, some PAs have unique stipulations that are worthy of mention.

- Arizona and Pennsylvania can use standard treatments, as defined in their PAs, in lieu of preparing an MOA as a means to resolve adverse effects. This is done in consultation with FHWA, the consulting parties, and the ACHP in Arizona. In Pennsylvania, this is done in consultation with FHWA and the consulting parties, but not the ACHP.
- The Illinois PA includes stipulations whereby FHWA and the state DOT can follow the state's "Illinois Programmatic Agreement for Mitigation of Adverse Effects to Euro-American Tradition Archaeological Sites" in lieu of preparing a MOA. Illinois DOT may also, with the concurrence of SHPO, other consulting parties, and ACHP (if participating), develop an undertaking-specific treatment plan describing how adverse effects will be resolved, in lieu of preparing a MOA.
- The California DOT PA includes a list of property categories that do not warrant National Register evaluations. These exempted properties may be documented, if documentation is warranted, at a level commensurate with the nature of the property.
- The Delaware PA includes a stipulation committing the state DOT to assist its SHPO in preparing historic contexts based on the synthesis of information obtained from state DOT projects and other related information.
- The Minnesota PA includes a stipulation on "Innovative Programs" to facilitate historic and archaeological preservation planning and actions, and stipulates that the DOT will continue to

fund these programs in consultation with all parties. Examples of such programs include statewide thematic surveys of historic properties, statewide archaeological predictive models, development of historic contexts and preservation priorities, and preparation and implementation of preservation and management plans.

- The Rhode Island PA allows pre-approved consultants to submit certain documents directly to SHPO, and the types of documents are determined in consultation between the state DOT and SHPO. This is noted in a footnote to Stipulation II, located at the bottom of page 2 of the PA agreement.

One final observation relates to the structure and content of the PAs. Having read 37 PAs, the project team found it very useful when a PA had a table of contents after the Whereas clauses and before the PA stipulations, or as the first stipulation. Good examples of this include the West Virginia and Utah PAs. The California PA has a table of contents inserted after the preamble listing the PA signatories and before the Whereas clauses.

4.0 SURVEY OF STATE DOTs, FHWA DIVISION OFFICES, SHPOS, AND ACHP

To provide insights into best practices and practical guidance for the application, preparation, and modifications of delegation PAs, the project team sent questionnaires to state DOTs, SHPOs, FHWA division offices, as well as key staff at the ACHP, regarding their experiences in the development and implementation of delegation PAs. Questionnaires with different sets of questions were sent to each type of agency, given their respective roles and responsibilities under the Section 106 process. Agency staff members could either participate in a telephone interview, discussing the questions in the questionnaire with a project team member, or submit completed questionnaires via email to the project team.

Appendix D provides the responses from the agencies. The responses are grouped under each type of agency: state DOTs, FHWA division offices, SHPOs, and the ACHP. Below is a summary of the responses from these agencies, highlighting the issues, topics, challenges, best practices, and lessons learned that the agencies identified most frequently. The summary below also includes specific and unique responses that the team felt were worthy of special consideration, based on the team's analysis of the delegation PAs and the team's own experience working with state DOTs, FHWA division offices, and SHPOs.

As one of the key parties to the development and updating of all delegation PAs, the project team thought that it was appropriate to include the ACHP's entire, verbatim response after this summary. In this way, state DOTs, FHWA division offices, and SHPOs can understand the ACHP's position concerning the context, structure, and process for developing, updating, and implementing a delegation PA.

After the presentation of the ACHP response, responses are provided to two follow-up questions to the state DOTs.

4.1 SUMMARY OF STATE DOT, FHWA DIVISION OFFICE, AND SHPO SURVEY RESPONSES

4.1.1 Length of time it took to prepare a new PA or modify and update an existing PA

- The time it took to prepare a new PA generally ranged from one to three years. One state DOT updated its existing PA in six months. Two full NEPA assignment states completed revisions to an existing PA (to accommodate NEPA assignment) in six months. One state DOT said their first PA took several years, with many meetings and draft documents; however, their current (and second) PA took two years.

4.1.2 Types of cost and staffing resources needed to prepare a PA or modify or update an existing PA

- How states responded to the question on the cost and staffing used to prepare a PA varied in terms of metrics. One state noted that PA preparation took up 20 percent of a senior cultural resource program manager's time over one year. Another noted that PA development involved

two to three staff at one-quarter time over two years; another involved 50 to 60 hours a month for 11 months. Two states provided cost estimates ranging from \$40,000 to \$65,000 to prepare a PA.

- Several states noted that they do not track costs and staffing for developing or updating their PAs, so they could not address this topic or could only provide very gross estimates of hours and cost.

4.1.3 Use of a consultant to prepare or update a PA

- Only one state used a consultant to assist in preparing a PA. Another state had the Volpe National Transportation Systems Center assist in the preparation of their PA.

4.1.4 Types of funds used to cover the costs of preparing a PA or modifying or updating an existing PA

- In all cases, state DOT funds were used to prepare a PA. State responses described these funds as “overhead salaries” or “office budget” or “existing state funds.”

4.1.5 Lessons learned from efforts to prepare a PA or to modify or update an existing PA

- There needs to be a level of trust among FHWA, the state DOT, and SHPO. All of the parties need to be willing to work together.
- It is important to have the right individuals involved in the development of a PA, those who have the appropriate skills and understanding of the Section 106 process.
- Each agency involved in PA development or updating should have a single point of contact as the primary representative of the agency, and it is ideal that this point of contact is someone with a high degree of decision-making authority.
- Before preparing a PA, the state DOT needs to have experienced and appropriate staff (e.g., staff meeting the Secretary of Interior’s professional qualification standards) to take on the decisions and findings delegated to the state DOT through the PA.
- Having regular coordination meetings is one way of building a good relationship among all of the parties; this helps the parties get through the more challenging parts of negotiating a PA.
- It takes time to negotiate a PA. Modifying/amending a PA can also be a lot of work and can take a lot of time.
- The parties should come to a reasonable understanding on the schedule for developing a PA and build this into the development process.
- Things take longer than planned. Be patient.
- Consult initially on a concept rather than a draft PA.
- If there is going to be a legal review of the PA, time for this review needs to be included in the PA development schedule, along with time to respond to comments from the legal review. Best to get the legal reviewers involved as early as possible so they understand the purpose of the PA.
- Avoid doing an unwieldy and cumbersome PA. Work toward a simple and straightforward PA. Use clear and unambiguous language and provisions in a PA.
- Focus on those things that will be most beneficial to the state DOT and other parties, and include these things in the PA. One can always add more items during future updates and revisions. Do not try to address everything at once; this generally results in a cumbersome and time-consuming effort.

- Having face-to-face meetings with the parties to the PA is very important, especially at key milestones in the development of a PA. There is only so much that can be accomplished through teleconferences and video conferencing.
- Be flexible and focus on the goals of the PA.
- First, gain a full understanding of minor state DOT undertakings and their frequency of occurrence, and then develop for the PA a list of projects and actions that require no further Section 106 review (and no consultation with the SHPO).
- 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 and listening sessions with the tribes will greatly increase tribal participation in the development of a PA.

4.1.6 Types of positive responses and comments received from PA signatories, stakeholders, and state DOT staff after a PA is implemented

- The parties saw great benefits in terms of the PA streamlining provisions (e.g., the state DOT having the ability to identify projects exempted from further Section 106 review without consultation with SHPO and FHWA involvement). These provisions can be applied to the majority of a state DOT's projects.
- A PA improves communication between the DOT and SHPO.
- The time saved on smaller (screened) projects is used to focus on more complex Section 106 issues, which can create a better overall outcome. SHPO staff also benefit from reduced project reviews created by the streamlining, allowing them to work closely with the state DOT on more complex transportation projects.

4.1.7 Aspects of a PA that worked well and might be showcased for other states as a best practice

- PA streamlining provisions worked well. These allow a state DOT the ability to identify projects exempted from further Section 106 review without SHPO and FHWA involvement, in addition to other types of streamlining provisions (e.g., findings of No Historic Properties Affected made by the state DOT without SHPO consultation). These streamlining provisions save the state DOTs and SHPOs time and paperwork.
- The streamlining provisions allow the parties to focus on projects with greatest impact on historic properties and to focus on complicated projects that need close attention.
- The identification and implementation of a list of standard mitigation and standard treatments for certain frequently encountered historic properties and impacts have streamlined simple project implementation and benefited the program.
- Having mandatory training on the PA was key, especially on the use of the streamlining provisions.

4.1.8 Effectiveness of oversight provisions stipulated in PAs (i.e., oversight by FHWA or other signatories of PA implementation)

- One FHWA division office noted that the oversight provisions have been adequate in terms of conducting reviews of the state DOT's program and individual projects.
- Another division office stated that the oversight provisions have been rigorously adhered to; the state DOT undertakes annual internal reviews/audits with input from SHPO, and provides opportunities for FHWA and ACHP to participate.
- One SHPO stated that as a result of the good working relationship between the SHPO and the state DOT's qualified cultural resource management staff, there is a high level of trust, and as a result, the oversight provisions never come into question.

4.1.9 Challenges experienced in the preparation of a PA

- Changes in personnel during the development of the PA. This results in changes in expectations and directions while the PA is being developed, and it makes the preparation process longer and more complicated.
- Not having the right resources, staffing, and time for developing a PA.
- Having to deal with ongoing, time-sensitive project work at the same time as developing a PA. This situation requires management to (1) prioritize developing the PA above project work and (2) delegate project work to staff not working on the PA.
- SHPO unfamiliar with some of a DOT's operations and concerns. It takes time to educate SHPO staff about these operations and concerns.
- An attitude that the PA had to be perfect and identify every possibility lengthened the PA development process. The PA needs to meet the letter and intent of the law/regulation but not necessarily satisfy every participant's wishes.
- Adding another federal agency to the PA as a signatory, such as the USACE, requires more time and coordination in order to create acceptable language for all parties.

4.1.10 Challenges encountered during implementation of a PA

- Not having clear and explicitly stated provisions or definitions in a PA (especially in terms of streamlining provisions dealing with projects requiring no further Section 106 review). This results in (1) confusion among state DOT staff (and errors in application), and (2) the signatories spending time interpreting the expectations associated with these provisions and definitions.
- Maintaining records of streamlined findings and decisions, as stipulated in the PA (e.g., batch or quarterly reporting of projects requiring no further review).
- Lack of staffing at state agencies to implement the PA.
- Development of administrative tools needed to implement a PA and changing staff workflow in order to implement a PA.
- Unanticipated project-specific situations that come up during the initial stages of implementing a PA, requiring clarifications and guidance for state DOT staff and, in some cases, consultation with SHPO and other PA signatories.

- One FHWA division office noted that the state DOT wanted to include projects that occur very infrequently in the list of projects requiring no further review. This resulted in having to continually adjust the list of exempted projects in the PA. The division office noted that this is not a good use of time and resources, and may weaken trust among the parties, especially the SHPO, who may be thinking that an appropriate list of exempted projects has already been included in the PA.

4.1.11 Agency management concerns once a PA was implemented and addressing these concerns or negative comments

- Agency management had unrealistic expectations of what a PA would do. They expected that many more projects would be advanced without consultation, or that a project would be done more quickly.
- Discovered that some in management had not taken the time to read all of the stipulations in a PA. The lesson learned is to make sure that management is fully aware of and agrees to what a PA will do before the state DOT consults with the other parties to prepare a PA.
- Having a training program for management helps to address their concerns and expectations.

4.1.12 State DOTs with 326 or 327 MOUs (NEPA Assignment)

- It is important to think about modifying an existing PA from the beginning so that the application for 327 NEPA assignment and the 327 MOU are consistent with a state's PA modification plan.
- Coordinate annual program reviews and reporting on a PA with those associated with a 327 MOU.
- It is important to be clear with tribes on the goals and outcomes of a 327 MOU vs. a PA.
- The parties need to define what to do with an existing PA before and/or after the transition to CE NEPA assignment under a 326 MOU and then full NEPA assignment under a 327 MOU.

4.1.13 Additional comments on PA development and implementation.

- It is important to maintain open and regular lines of communications between the state DOT and SHPO. Such communication results in building trust and relationships, and in turn, the effectiveness of PA implementation.
- Designate a champion to keep the PA development process moving. "Day jobs" get in the way!
- To develop a PA, it is best to have a group of people representing both the SHPO and state DOT, so these individuals can bring the broadest range of scenarios to the table. It is also important to include the state DOT cultural resource management staff in the review of the PA before it is completed because there will be a shift in their workload once the PA is implemented. Their input should be considered in how well the process laid out in the PA might be implemented.
- Having a state DOT-funded review position at the SHPO expedites project reviews and also allows participation in site visits and pre-planning meetings. It also means that the SHPO has a staff member who could be devoted to the PA development process.

4.2 RESPONSE FROM ADVISORY COUNCIL ON HISTORIC PRESERVATION

4.2.1 What are the lessons learned from your participation in the preparation of state DOT delegation PAs or modifying or updating a state's existing PA? What should have been done differently based on these lessons learned?

- These statewide agreements successfully clarify the roles and responsibilities of FHWA division offices and the state departments of transportation, and define common activities which specific statewide experience has demonstrated has little or no potential to affect historic properties and are therefore able to be concluded through streamlined measures. Overall, these agreements create a more efficient Section 106 review process.
- Here are some of the lessons learned:
 - Schedule regular meetings with the signatories and invited signatories in order to allow opportunities for specific questions and items to be discussed rather than communicate through emails and track edits for draft PAs.
 - Allow enough time to draft a PA or an amendment including consulting with tribes, and notifying the public, state and local agencies, and allowing them to comment on the draft agreement. On average, the entire process to draft an agreement or amend an agreement can take 1 to 2 years.
 - Coordinate and draft a PA with other federal agencies that often are involved with FHWA projects (i.e., USACE, Federal Transit Authority, and Tennessee Valley Authority) depending on the state.
 - Allow locally administered projects that receive FHWA funds to be included in these statewide PAs that delegate responsibilities to state DOTs. Certain states have already done this. Some counties, cities, or local municipalities do not have the staffing or knowledge to conduct section 106 reviews. More recently, the ACHP has had to participate in minor FHWA projects that were locally administered due to an insufficient consultation process.

4.2.2 What aspects of these types of PAs worked very well and might be showcased for FHWA division offices, state DOTs, SHPOs, and consulting parties as best practices?

- The ACHP has listed below certain components that worked very well in conjunction with the template PA and recommend for future agreements:
 - Include the names of the tribes that were notified and consulted on this PA.
 - Include the agreed-upon language from the template PA for the administrative stipulations (emergency situations, post-review and unanticipated discoveries, treatment of human remains, amendment, termination, resolution to objections, confidentiality, and duration). Sometime not all these administrative stipulations are included in agreements.
 - Specify in a Whereas clause if the state DOT employs cultural resource specialists and consultants who meet the Secretary of Interior's Professional Qualification Standards (*Federal Register* 48:44738-44739) in the fields of archaeology and architectural history, to carry out its cultural resource programs and responsibilities.
 - Specify how the state DOT will consult with the SHPO if it has a vacancy or vacancies with their cultural resource specialists and the agreed upon delegated responsibilities to the state

- DOT cannot be fulfilled by a cultural resource specialist who meets the Secretary of Interior's Professional Qualification Standards.
- Specify if consultants will be used for documentation, identification, and/or evaluation of potentially eligible historic properties.
 - Specify if the state DOT cultural resources specialist(s) or other staff will receive any Section 106 training and/or other training that may be beneficial to the purposes of carrying out the agreement.
 - Require all staff of the respective agencies that have responsibilities for carrying out provisions of the agreement be provided an overview of the PA and be instructed in its application.
 - Include language explaining the FHWA's and state DOT's roles and responsibilities when an undertaking adversely affects a National Historic Landmark.
 - Include a stipulation that explains how the state DOT will solicit public participation early in the project development process and consistent with 36 C.F.R. 800.2(d).
 - Include a stipulation that if an undertaking changes, then the state DOT, the SHPO, and other consulting parties as appropriate will consult to reassess the appropriateness of the initial findings and determinations.
 - Include a stipulation on how archaeological materials and related records resulting from research, surveys, and excavations collected under the agreement shall be curated.
 - Specify in stipulations how human remains will be treated if found on federal, tribal, state, county, and municipal lands.
 - Explain how disputes from the signatories, invited signatories, consulting parties, concurring parties, and the public will be addressed.
 - Include a stipulation on how appendices or attachments can be updated or changed and whether this will or will not require an amendment to the agreement.

4.2.3 In retrospect, how effective were the oversight provisions stipulated in these PAs (i.e., oversight by FHWA or other signatories of PA implementation)?

- From the ACHP's perspective, they have been very effective as noted through the annual reports and/or annual meetings.

4.2.4 What challenges did you experience in the preparation of state PAs?

- The ACHP did not experience any challenges in reviewing and commenting on these PAs since the majority of the states used the template PA jointly developed between FHWA and ACHP.

4.2.5 Did you encounter any challenges during the implementation of these PA?

- None have been reported at the ACHP. We recommend these types of challenges be included in the annual reports provided to the consulting parties.

4.2.6 Did you encounter any issues or difficulties with states modifying their existing PA as part of taking on NEPA assignment?

- The ACHP answered very specific questions recently about when and how the ACHP would be notified for adverse effect notifications. Some older PAs stipulated that the ACHP would not be notified for certain adverse effects. For any type of adverse effect, the federal agency is required to notify the ACHP.

4.2.7 Are there any lessons learned from your participation in modifying an existing PA in the context of NEPA assignment?

- The ACHP does not have any recommendations at this time. No real distinction has been noted from modifying an existing PA in the context of NEPA assignment versus with a FHWA division office.

4.2.8 Do you have any additional comments you would like to make about your experiences participating in the development and implementation of state DOT delegation PAs? If you do, please provide these comments in the space below.

- The ACHP supports states developing more comprehensive agreements that include provisions for identifying, evaluating, and maintaining historic bridges if the state does not have a statewide historic bridge agreement.

4.3 FOLLOW-UP STATE DOT QUESTIONS

4.3.1 Working with Federal Land-Managing Agencies

The project team sent out the question below as a follow-up to the responses from the state DOTs. The purpose of this question was to assess how the state DOTs consulted (or did not consult) with federal land-managing agencies when a state DOT made a decision that a project required no further Section 106 review (e.g., a screened or exempted project), when the project crossed federal lands and the federal agency is not a signatory to the PA. This question was sent only to western and Midwestern states given the amount of federal lands within these states.

- Your programmatic agreement includes a list of actions that do not require further Section 106 review (e.g., “screened undertakings”), based on meeting certain conditions and/or a review by qualified staff within the DOT. If these actions take place on lands owned and managed by a federal agency, such as the Forest Service or the Bureau of Land Management, and these agencies are not a signatory to your agreement, are these agencies consulted prior to the DOT making a determination as to whether or not the action does not require further Section 106 review? If they are consulted, how is this consultation documented?

One state DOT noted that if the project occurs within federal lands and the DOT does not have title in fee to their right-of-way (ROW), the DOT always checks first with the land-managing agency to see if the agency will allow the state DOT to use the PA on the agency’s lands. If an agency does not allow this, the DOT follows the standard Section 106 process for the project. Another DOT had a similar process but

noted that the review remained internal if there was some type of transportation easement/agreement for ROW, if the project did not extend outside the ROW, and if the project was consistent with the conditions listed in the PA for projects not requiring further review. Two state DOTs noted that if the project was in state DOT ROW, they did not contact the agencies; however, both of these DOTs did report to the BLM if any of these projects crossed BLM land. Another state DOT noted that if the land is owned by the National Park Service (NPS), the project cannot be exempted from further review under the PA; instead, standard Section 106 consultation was followed. For other land-managing agencies, this same state can only apply an exemption if the ROW take is 12 feet or less.

One of the NEPA assignment states noted that the state DOT approached other federal agencies and asked them to treat the state DOT as the lead federal agency and to accept the DOT's decisions and findings as a way to satisfy the other agencies' Section 106 obligations in the context of Federal-Aid Highway Program projects. The USACE globally accepted this approach for all state-assigned projects, as did the BLM for projects on their lands. Another NEPA assignment state noted that if the project is on another agency's land or on tribal land, the state DOT does not use the exempted project provisions of the PA; they conduct standard Section 106 consultation.

4.3.2 Additional Federal Agencies as Signatories to a PA

In their responses to the survey questionnaire, a few states DOTs made comments about the pros and cons of having other federal agencies as signatories to the PA, such as the USACE, and land-managing agencies, such as the BLM. For example, one state DOT noted that as a way to avoid duplicating consultation, management supported bringing the USACE into the agreement. A SHPO noted that having the USACE as a signatory has saved time. Having the agency as a signatory avoids duplication of effort and the standard end-of-the-process reviews by the USACE.

Other states noted the difficulties of having other agencies as signatories, resulting in increased negotiating complexities and extending the period for developing a PA. One state said that rather than including three federal agencies as signatories to their agreement, in retrospect they would have done three separate agreements instead. This state noted that involving multiple agencies resulted in a lot of time and effort to develop the PA, including a lot of wordsmithing to address the needs and concerns of each agency.

The project team explored this topic further by asking a follow-up question to states that did not have other federal agencies as signatories to their PA. These states were asked:

- A few state DOT delegation programmatic agreements have other federal agencies as signatories to their agreement, such as the U.S. Army Corps of Engineers, U.S. Forest Service, Bureau of Land Management, and Bureau of Reclamation. Since your PA does not include other federal agencies as signatories to your agreement, can you share with us why you made the decision not to include other agencies as signatories?

One state responded that they asked the USACE to be a signatory to their PA, but the USACE declined the offer, even though the state DOT and the USACE have a very good working relationship. The USACE did not give a reason for declining. Another state noted that they had discussions with their FHWA division office about having other agencies as PA signatories, but they believed that involving

more federal agencies would result in less flexibility, given the need for all agencies to sign off on various exempted activities and processes in the PA.

Another state DOT noted that the USACE was reluctant to be a signatory to the PA given the difference in how the state DOT defines a project's APE versus how the USACE defines it: the USACE confines a project APE to their permit area, not the entire project. Finally, another state DOT said that they did not have "the bandwidth" to deal with other agencies as signatories at the time of their PA development, and considered it more practical to build on an existing PA in the future.

4.4 ADDITIONAL OBSERVATIONS

4.4.1 Considering approaches used by other State DOTs

In response to the question about challenges experienced in the preparation of their PA, one state DOT noted that it was helpful to get different perspectives from different states, but this was also a challenge because there was no consistency among the other states' PAs. During the project team's analysis of active PAs, this inconsistency among the PAs was very evident; however, this should be expected. The diverse nature of each state's projects, geography, Section 106 consulting parties (especially tribes), and relationships (i.e., levels of trust) among the parties are reasons for this lack of consistency among the PAs. Each state PA is tailored and customized to local situations and conditions, as noted by a few of the questionnaire respondents. In addition, there have been changes over time in direction and guidance from the ACHP and FHWA headquarters concerning the content and structure of these PAs.

4.4.2 Implementing a PA in a state where environmental decision making is decentralized (i.e., conducted in the districts)

A few states have decentralized the majority of their environmental review decision making and most do not have cultural resource specialists on staff in district offices. As a result, issues related to PA implementation can arise. One state DOT respondent (a state DOT cultural resources management professional) noted that in their state, the district environmental specialist(s) have the ability (though very limited) to identify projects that do not require further review. However, there were some incidents where the districts made the wrong decisions. Rather than using the limited list of projects under their purview, they used the list of projects that have to be screened by a cultural resource management professional in the central office. These incidents were discovered during the statewide quarterly review of exempted projects. As a result of this discovery, the central office met with all of the environmental coordinators in the districts and reviewed the PA requirements for these exempted projects, as a way to limit the potential for such errors in the future.

A state DOT cultural resource management professional from another state said that the PA stipulations allowing non-historic preservation specialists to make decisions on exempting certain classes of projects from further review has been problematic. These non-historic preservation specialists often raise questions to cultural resource management staff about the projects that do not require further review. These questions demonstrate their lack of understanding of the PA stipulations that lay out the decision-making authority of these non-historic preservation specialists.

Another state noted that their PA sets up a process whereby a district can be placed on “probation” if they make these and other types of errors in implementing the PA. The offending district is then responsible for meeting the requirements of their probation, as defined by the state DOT central office. Further, the probation of one district does not affect the ability for the other districts to continue making project decisions and findings, following the PA stipulations. This probation process is described under an administrative stipulation in the PA.

5.0 EFFECTIVE PRACTICES FOR DEVELOPING, UPDATING, AND IMPLEMENTING A DELEGATION PROGRAMMATIC AGREEMENT

The following list describes effective practices for developing, updating, modifying, and implementing a delegation PA. These effective practices are drawn from the project team's analysis of all of the active delegation PAs listed in Appendix A; from the survey of state DOTs, FHWA division offices, SHPOs, and the ACHP; and from the project team's experiences in developing and implementing these delegation PAs. The discussion below on effective practices for implementing a PA also examines issues associated with the ever-increasing retirements of agency staff who were involved in the development and early implementation of the PAs. As noted above, several agency responses to the questionnaires provide suggestions on how to deal with new staff to continue successful implementation of their PAs.

5.1 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 to not only 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 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. Everyone involved must be clear on this timeline.
- 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 identification/screening of projects requiring no further Section 106 review, without SHPO consultation). It may also be useful to look at the list of projects included in other state DOT PAs.
- Determine 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 all involved legal staff.
- As models, consider using the FHWA/ACHP PA template 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.

5.2 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.

5.3 PREPARING AND WRITING THE PA

The following list, although not exhaustive, provides guidance for preparing and writing a new PA or updating an existing 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 by preparing a concept draft of the PA using plain language. A concept 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.
- PA development and updating should 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.
- Conduct quality control and legal review of the draft document.
- Engage all consulting parties regarding the draft document. Hold meetings with all consulting parties as necessary to explain the document and answer questions.

5.4 IMPLEMENTING A PA

- Remember that successful agreements function and thrive by building inter-agency relationships and trust. This cannot be emphasized enough in the development and implementation of a delegation agreement.
- 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.
- Though these types of agreements streamline processes, they typically will increase workloads on certain state DOT staff. Changes in agency workflow procedures must be understood by all involved.
- 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.
- If standard treatments for frequently encountered historic properties are included in the agreement, all parties must understand when and how those treatments will be implemented.
- Regular communication among the agencies and consulting parties is critical for successful implementation of a delegation PA.

5.5 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 how 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.

6.0 SUMMARY

6.1 KEY ELEMENTS FOR DEVELOPING, UPDATING, AND IMPLEMENTING A SUCCESSFUL DELEGATION PA

The state DOTs, FHWA division offices, SHPOs, and ACHP staff responding to the Task 107 survey questionnaire identified similar key elements in developing and updating a successful delegation PA.

- There needs to be a level of trust among FHWA, the state DOT, and SHPO. All of these parties need to be willing to work together.
- Each agency involved in PA development or updating should have a single point of contact as the primary representative of the agency, and it is ideal that this point of contact is someone with a high degree of decision-making authority.
- Identify the goals of the PA or PA update. Define these goals before beginning the writing/editing process. Obtain buy-in from senior leadership (those who will actually sign the PA) on these goals before proceeding to write the document.
- Have regular meetings with the signatories and invited signatories in order to allow opportunities for specific questions and items to be discussed.
- Develop a timeline for preparing or updating the PA. Allow enough time to draft or amend a PA, including consulting with tribes and notifying state and local agencies, and allowing them to comment on the draft agreement. Include time for a legal review, if such a review is required.
- Focus on those things that will be most beneficial to the state DOT and other parties, and include these things in the PA. Do not try to address everything at once; this generally results in a cumbersome and time-consuming effort.
- Tribal participation needs to take place early in PA development. 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.

The following are some of the key elements in implementing a delegation PA.

- It is important to maintain open and regular lines of communications between the state DOT and SHPO. Such communication results in building trust and relationships and, in turn, increases the effectiveness of PA implementation.
- The identification and implementation of a list of standard treatments for certain frequently encountered historic properties and impacts streamlines project delivery and Section 106 compliance.
- Require mandatory training on the PA, especially on the use of the streamlining provisions (such as the screening of projects to determine if they are exempted from further Section 106 review). This training is critical to ensure appropriate implementation of a PA's provisions, especially given changes in personnel at state DOTs, SHPOs, and FHWA division offices.
- A state DOT needs to be prepared for increased workloads among the state DOT's cultural resources management staff. These DOT staff will be conducting project background research in order to be able to screen projects, to determine if the projects require further Section 106 review.

There will also be an increase in administrative record keeping, such as quarterly and annual reporting of internal state DOT decision making.

6.2 VALUE OF SECTION 106 DELEGATION PAS

As noted by the ACHP in their response to the survey questionnaire:

These statewide agreements successfully clarify the roles and responsibilities of FHWA division offices and the state departments of transportation, and define common activities which specific statewide experience has demonstrated has little or no potential to affect historic properties and are therefore able to be concluded through streamlined measures. Overall, these agreements create a more efficient Section 106 review process.

Several state DOTs, FHWA division offices, and SHPOs also noted that these delegation PAs saved time by allowing the state DOT to screen projects that do not require further Section 106 review. An important outcome of this internal screening process is that all parties can focus on complex Section 106 issues, resulting in improved historic preservation and project delivery outcomes. SHPO staff also benefit from reduced project reviews created by the streamlining provisions included in these PAs, allowing SHPOs to work closely with the state DOTs on more complicated transportation projects.

As demonstrated by the analysis of state DOT delegation PAs and through agency responses to the survey questionnaires, these PAs establish procedures that streamline and expedite project delivery schedules and decrease project costs. These procedures include reducing the number of projects requiring outside consultation, reducing case-by-case Section 106 reviews and consultation, and focusing agency efforts on those projects that may adversely affect historic properties. As one state DOT tellingly noted, “We would never want to go back to the system before the PA!”

APPENDIX A: LIST OF DELEGATION SECTION 106 PROGRAMMATIC AGREEMENTS

NCHRP 25-25, TASK 107
STATEWIDE SECTION 106 DELEGATION PROGRAMMATIC AGREEMENTS
(As of December 31, 2018)

| STATE | SIGNED | EXPIRES | WHAT IS COVERED BY PA | COMMENTS |
|----------------------|----------|---------------------|--|--|
| Alaska | 11/1/17 | 11/1/27 | Federal-Aid Highway Program | 326 and 327 NEPA assignment |
| Arizona | 12/16/15 | 12/16/25 | Federal-Aid Highway Program | 326 NEPA assignment. New PA development in progress to address 327 NEPA assignment |
| California | 12/23/13 | 1/1/24 | Federal-Aid Highway Program | 326 and 327 NEPA assignment |
| Colorado | 6/25/14 | 6/25/24 | Federal-Aid Highway Program | |
| Connecticut | 5/4/18 | 5/4/23 | Federal-Aid Highway Program | |
| Delaware | 9/27/18 | 9/27/23 | Federal-Aid Highway Program | |
| District of Columbia | 8/28/08 | 8/28/18 | Federal-Aid Highway Program | New PA development in progress |
| Florida | 6/7/17 | 3/14/21 | Federal-Aid Highway Program | 327 NEPA assignment. PA addresses minor projects |
| Georgia | | | Federal-Aid Highway Program | PA development in progress |
| Idaho | 8/4/06 | None | Federal-Aid Highway Program | PA for minor projects. |
| Illinois | 2/15/18 | 2/15/23 | Federal-Aid Highway Program | |
| Indiana | 8/25/17 | 8/25/27 10/16/26 | Federal-Aid Highway Program | PA for minor projects |
| Iowa | 5/4/18 | 4/18/23 5/4/23 | Federal-Aid Highway Program | |
| Kentucky | 6/2/11 | 6/2/19 | Federal-Aid Highway Program | PA for minor projects. |
| Louisiana | | | Federal-Aid Highway Program | PA development in progress |
| Maine | 4/11/04 | None | Federal-Aid Highway and Federal Transit Administration Assistance Programs | |
| Maryland | 12/19/17 | 9/1/27 | Federal-Aid Highway Program | PA for minor projects |
| Massachusetts | 10/15/04 | None | Federal-Aid Highway Program | PA for minor projects |
| Michigan | 7/25/11 | 7/25/21 | Federal-Aid Trunk Line Highway Projects | |
| Minnesota | 4/7/15 | 12/31/19 | Federal-Aid Highway Program | |
| Missouri | 12/31/14 | 12/31/19 | Federal-Aid Highway Program | PA for minor projects |
| Nebraska | 7/31/15 | 7/31/20 | Federal-Aid Highway Program | |
| Nevada | 10/18/17 | 10/31/20 | Federal-Aid Highway Program | |
| New Hampshire | 8/24/18 | 8/24/23 | Federal-Aid Highway Program | |
| New Jersey | 11/13/96 | None | Federal-Aid Highway Program | |
| New Mexico | 12/5/14 | 12/5/19 | Federal-Aid Highway Program | |
| North Carolina | 10/23/15 | 6/30/20 | Federal-Aid Highway Program | PA for minor projects |
| North Dakota | | | Federal-Aid Highway Program | Minor Project PA development in progress |
| Ohio | 11/8/17 | 11/8/22 | Federal-Aid Highway Projects | 327 NEPA assignment |
| Oregon | 12/23/11 | 12/23/26 | Federal-Aid Highway Program | |
| Pennsylvania | 12/14/17 | 12/14/27 | Federal-Aid Highway Program | |
| Puerto Rico | 7/26/18 | 8/1/19 | Federal-Aid Highway Program | |
| Rhode Island | 2/14/18 | 2/14/23 | Federal-Aid Highway Program | PA for minor projects |
| South Carolina | 10/6/17 | 10/6/27 | Federal-Aid Highway Program | |
| South Dakota | | | Federal-Aid Highway Program | PA development in progress |

STATEWIDE SECTION 106 DELEGATION PROGRAMMATIC AGREEMENTS (continued)

| STATE | SIGNED | EXPIRES | WHAT IS COVERED BY PA | COMMENTS |
|---------------|----------|---------|-----------------------------|--------------------------------|
| Tennessee | | | Federal-Aid Highway Program | PA development in progress |
| Texas | 5/15/15 | 5/15/20 | Transportation Undertakings | 327 NEPA assignment |
| Utah | 8/23/17 | 8/23/27 | Federal-Aid Highway Program | 326 and 327 NEPA assignment |
| Virginia | 8/2/16 | 8/2/21 | Federal-Aid Highway Program | |
| Washington | 8/14/18 | 8/31/19 | Federal-Aid Highway Program | New PA development in progress |
| West Virginia | 2/3/16 | 2/3/26 | Federal-Aid Highway Program | |
| Wisconsin | 12/17/96 | None | Federal-Aid Highway Program | |

The following states do not have statewide delegation PAs: Alabama, Arkansas, Hawaii, Kansas, Mississippi, Montana, New York, Oklahoma, and Wyoming.

In summary:

- 9 states have no PA; see states listed above
- 5 states are working on their first PA (Georgia, Louisiana, North Dakota, South Dakota, Tennessee).
- 4 states are updating existing PAs (Arizona, DC, Washington, Vermont)
- 5 states have PAs with no expiration date (Idaho, Massachusetts, Maine, New Jersey, Wisconsin)

APPENDIX B: ANALYSIS OF DELEGATION PROGRAMMATIC AGREEMENTS

TABLE B-1: Delegation of Section 106 Decisions and Findings to State DOTs: States A-M
(As of December 31, 2018)

TABLE B-2: Delegation of Section 106 Decisions and Findings to State DOTs: States N-W
(As of December 31, 2018)

TABLE B-3: Length of Duration of PAs

Steps in Section 106 Process Where FHWA Retains Involvement or Reinserts Itself in Consultation

| | AK | AZ | CA | CO | CT | DE | DC | FL | ID | IL | IN | IA | KY | ME | MD | MA | MI | MN | MO | Total Count | |
|--|-----|-----|-----|----|----|----|----|-----|----|----|----|----|----|----|----|----|----|----|----|-------------|--|
| Initiating Section 106 | | | | | | | | | | | | | | | | | | | | | |
| Finding of No Potential to Cause Effects | N/A | N/A | N/A | | | | 1 | N/A | | | | | | | | | | | 1 | 2 | |
| Defining the Area of Potential Effects | N/A | N/A | N/A | | | | 1 | N/A | 1 | | | | | | | | | | 1 | 3 | |
| Determining National Register Eligibility | N/A | N/A | N/A | | | | 1 | N/A | 1 | | | | | | | | | | 1 | 3 | |
| Finding of No Historic Properties Affected | N/A | N/A | N/A | | | | 1 | N/A | 1 | | | | | | | | | | 1 | 3 | |
| Finding of No Adverse Effect | N/A | N/A | N/A | | | | 1 | N/A | 1 | | | | | | | | | | 1 | 3 | |
| Finding of Adverse Effect | N/A | N/A | N/A | | | | 1 | N/A | 1 | | | | | | | | | | 1 | 3 | |
| Resolving Adverse Effects | N/A | N/A | N/A | | 1 | | 1 | N/A | 1 | | | | | | | 1 | 1 | 1 | 1 | 7 | |
| Conducting Formal Consultation with ACHP | N/A | N/A | N/A | 1 | 1 | 1 | 1 | N/A | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 14 | |
| | N/A | N/A | N/A | 1 | 1 | 1 | 1 | N/A | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 15 | |

Oversight Provisions to Ensure Quality Control

| | AK | AZ | CA | CO | CT | DE | DC | FL | ID | IL | IN | IA | KY | ME | MD | MA | MI | MN | MO | Total Count | |
|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-------------|---|
| Monitoring and Reporting on Actions/Decisions Made Under PA | | | | | | | | | | | | | | | | | | | | | |
| Quarterly | | | | | | | | | | | | | | | | | | | | | |
| Bi-annually | | 1 | 1 | | 1 | 1 | | | | | | | | | | | | | | | 4 |
| Annually | 1 | | | | | | | | | | | | | | | | | | | | 1 |
| | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | 1 | | 1 | 1 | 1 | | 1 | 1 | 16 | |

Notes:

1. Arizona has 326 NEPA Assignment (i.e., for certain classes of CEs). Since these projects make up the majority of Arizona DOT's program, "N/A" is used above, as done for for NEPA Assignment states. In addition, Arizona is working toward full NEPA Assignment under a 327 MOU.
2. Alaska DOT&PF can define areas of potential effects without SHPO consultation on screened projects. For non-screened projects, Alaska DOT&PF does standard area of potential effects consultation.
3. Arizona, Iowa, and California DOTs can make findings of No Adverse Effects without consulting SHPO, when certain conditions are met, as stipulated in their PAs. If these standard conditions are not met, then the state DOTs do standard consultation.
4. Illinois DOT initiates Section 106 consultation for all projects, but FHWA sends initiation letters to tribes and agencies for EAs and EISs. Illinois DOT also defines areas of potential effects without SHPO consultation for CEs.

Steps in Section 106 Process Where FHWA Retains Involvement or Reinserts Itself in Consultation

| | NE | NV | NH | NJ | NM | NC | OH | OR | PA | PR | RI | SC | TX | UT | VA | WA | WV | WI | Total Count |
|--|-----|----|----|----|----|----|-----|----|----|----|----|----|-----|-----|----|----|----|----|-------------|
| Initiating Section 106 | N/A | 1 | | | | | N/A | | 1 | | | 1 | N/A | N/A | | | 1 | | 4 |
| Finding of No Potential to Cause Effects | N/A | 1 | | | | | N/A | | 1 | | | 1 | N/A | N/A | | | 1 | | 4 |
| Defining the Area of Potential Effects | N/A | 1 | 1 | | 1 | | N/A | | 1 | 1 | | 1 | N/A | N/A | | | 1 | | 7 |
| Determining National Register Eligibility | N/A | 1 | 1 | | | | N/A | | 1 | 1 | | 1 | N/A | N/A | | | 1 | | 6 |
| Finding of No Historic Properties Affected | N/A | 1 | | | | | N/A | | 1 | 1 | | 1 | N/A | N/A | 1 | | 1 | | 6 |
| Finding of No Adverse Effect | N/A | 1 | 1 | | 1 | | N/A | | 1 | 1 | | 1 | N/A | N/A | 1 | 1 | 1 | | 9 |
| Finding of Adverse Effect | N/A | 1 | 1 | 1 | 1 | 1 | N/A | 1 | 1 | 1 | 1 | 1 | N/A | N/A | 1 | | 1 | 1 | 13 |
| Resolving Adverse Effects | N/A | 1 | 1 | 1 | 1 | 1 | N/A | 1 | | 1 | 1 | 1 | N/A | N/A | 1 | 1 | 1 | 1 | 13 |
| Conducting Formal Consultation with ACHP | N/A | 1 | 1 | 1 | 1 | 1 | N/A | 1 | 1 | 1 | 1 | 1 | N/A | N/A | 1 | 1 | 1 | 1 | 14 |

Oversight Provisions to Ensure Quality Control

| | NE | NV | NH | NJ | NM | NC | OH | OR | PA | PR | RI | SC | TX | UT | VA | WA | WV | WI | Total Count |
|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-------------|
| Monitoring and Reporting on Actions/Decisions Made Under PA | | | | | | | | | | | | | | | | | | | |
| Quarterly | 1 | 1 | | | | | | | | | | | 1 | | | 1 | | | 4 |
| Bi-annually | | | | | | | | | | | | | | | | | | | 0 |
| Annually | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | | 15 |

Notes:

1. Nebraska has 326 NEPA Assignment (i.e., for certain classes of CEs). Since these projects make up the majority of Nebraska DOT's program, "N/A" is used above, as done for for NEPA Assignment states. In addition, Nebraska is working toward full NEPA Assignment under a 327 MOU.
2. New Mexico can define areas of potential effects without SHPO consultation on screened projects. For non-screened projects, New Mexico does standard area of potential effects consultation.
3. Both Texas and Pennsylvania DOTs can make findings of No Adverse Effect without consulting SHPO, when certain conditions are met, as stipulated in their PAs

APPENDIX C: SURVEY/INTERVIEW QUESTIONNAIRES

QUESTIONNAIRE FOR ACHP STAFF

NCHRP 25-25, Task 107

“Synthesis of Best Practices for the Development and Implementation of Section 106 Delegation Programmatic Agreements”

1. What are the lessons learned from your participation in the preparation of state DOT delegation PAs or modifying or updating a state’s existing PA? What should have been done differently based on these lessons learned?
2. What aspects of these types of PAs worked very well and might be showcased for FHWA division offices, state DOTs, SHPOs, and consulting parties as best practices?
3. In retrospect, how effective were the oversight provisions stipulated in these PAs (i.e., oversight by FHWA or other signatories of PA implementation)?
4. What challenges did you experience in the preparation of state PAs?
5. Did you encounter any challenges during the implementation of these PA?
6. Did you encounter any issues or difficulties with states modifying their existing PA as part of taking on NEPA assignment?
7. Are there any lessons learned from your participation in modifying an existing PA in the context of NEPA assignment?
8. Do you have any additional comments you would like to make about your experiences participating in the development and implementation of state DOT delegation PAs? If you do, please provide these comments in the space below:

QUESTIONNAIRE FOR SHPOS

NCHRP 25-25, Task 107

“Synthesis of Best Practices for the Development and Implementation of Section 106 Delegation Programmatic Agreements”

1. What are the lessons learned from your efforts to prepare your state’s delegation PA or modify or update your existing PA? What would you have done differently based on these lessons learned?
2. After the PA was implemented, what types of positive responses and comments have been received from PA signatories, stakeholders, and state DOT staff (especially from project managers and environmental planners) in terms of:
 - Overall Section 106 outcomes
 - Streamlining stipulations

3. What aspects of the PA worked very well and might be showcased for other state DOTs, SHPOs, FHWA division offices, and consulting parties as best practices?
4. In retrospect, how effective were the oversight provisions stipulated in the PA (i.e., oversight by FHWA or other signatories of PA implementation)?
5. What challenges did you experience in the preparation of the PA?
6. Did you encounter any challenges during the implementation of the PA?
7. Do you have any additional comments you would like to make about your experiences developing and implementing a delegation PA? If you do, please provide these comments in the space below:

QUESTIONNAIRE FOR FHWA DIVISION OFFICES

NCHRP 25-25, Task 107

“Synthesis of Best Practices for the Development and Implementation of Section 106 Delegation Programmatic Agreements”

1. What are the lessons learned from your efforts to prepare your state’s PA or modify or update your state’s existing PA? What would you have done differently based on these lessons learned?
2. After the PA was implemented, what types of positive responses and comments have been received from PA signatories, stakeholders, and state DOT staff (especially from project managers and environmental planners) in terms of:
 - Streamlining stipulations
 - Improved project delivery efficiencies
 - Overall project delivery and Section 106 outcomes
3. What aspects of the PA worked very well and might be showcased for other FHWA division offices, state DOTs, SHPOs, and consulting parties as best practices?
4. In retrospect, how effective were the oversight provisions stipulated in the PA (i.e., oversight by FHWA or other signatories of PA implementation)?
5. What challenges did you experience in the preparation of the PA?
6. Did you encounter any challenges during the implementation of the PA?
7. Do you have any additional comments you would like to make about your experiences developing and implementing a delegation PA? If you do, please provide these comments in the space below:

For states with current or pending 326 or 327 MOUs, please answer the following additional questions:

8. If your state DOT has taken on NEPA assignment, or is in the process of working toward the completion of the NEPA assignment MOU, did you encounter any issues or difficulties in modifying the existing PA as part of NEPA assignment?

9. Are there any lessons learned from modifying the existing PA in the context of NEPA assignment?

QUESTIONNAIRE FOR DOTs

NCHRP 25-25, Task 107

“Synthesis of Best Practices for the Development and Implementation of Section 106 Delegation Programmatic Agreements”

1. If you can, please provide information on the length of time it took to prepare a new PA or modify and update your existing PA.
2. What types of cost and staffing resources were needed to prepare the PA or modify or update your existing PA?
3. What types of funds were used to cover the costs of preparing the PA or modifying or updating your existing PA?
4. What are the lessons learned from your efforts to prepare the PA or modify or update your existing PA? What would you have done differently based on these lessons learned?
5. After the PA was implemented, what types of positive responses and comments have been received from PA signatories, stakeholders, and state DOT staff (especially from project managers and environmental planners) in terms of:
 - Streamlining stipulations
 - Improved project delivery efficiencies
 - Overall project delivery and Section 106 outcomes
6. What aspects of the PA worked very well and might be showcased for other state DOTs, SHPOs, FHWA division offices, and consulting parties as best practices?
7. In retrospect, how effective were the oversight provisions stipulated in the PA (i.e., oversight by FHWA or other signatories of PA implementation)?
8. What challenges did you experience in the preparation of the PA?
9. While developing or updating your PA, did you have any difficulties or problems obtaining support from agency management on the need for a PA or making modifications or updating an existing PA?
10. Did your agency’s management have any concerns or negative comments once the PA was implemented? These concerns or negative comments from management might include (a) not meeting perceived expectations for streamlining and expediting project delivery once the PA was in place, (b) not seeing the benefits of having the PA as quickly as expected, or (c) having incorrect expectations about what was or was not required by the PA.
11. If you did encounter any of the above concerns or negative comments, how were these concerns or negative comments addressed, and what could have been done to preempt these types of concerns or negative comments from agency management?
12. Did you encounter any additional challenges during the implementation of the PA?

13. Do you have any additional comments you would like to make about your experiences developing and implementing a delegation PA? If you do, please provide these comments in the space below:

For State DOTs with current or pending 326 or 327 MOUs, please answer the following additional questions:

14. If you have taken on NEPA assignment, or are in the process of working toward the completion of your NEPA assignment MOU, did you encounter any issues or difficulties in modifying your existing PA as part of NEPA assignment?

15. Are there any lessons learned from modifying your existing PA in the context of NEPA assignment?

APPENDIX D: RESULTS OF SURVEY/INTERVIEWS OF STATE DOTs, FHWA DIVISIONS, SHPOS, AND ACHP

Below are the results of the agency survey interviews and questionnaires. They highlight common issues, topics, challenges, best practices, and lessons learned that were identified by the state DOTs, FHWA division offices, SHPOs, and ACHP staff. This discussion separates out the responses from these agencies, beginning with the input from the state DOTs. The project team also includes specific and at times unique responses that the team thought were worthy of special consideration, based on the team's analysis of all active delegation PAs and the team's own experience working for state DOTs and SHPOs.

STATE DOTs

- 1. Length of time it took to prepare a new PA or modify and update an existing PA.**
 - The time it took to prepare a new PA generally ranged from one to three years. One state DOT updated its existing PA in six months. Two NEPA assignment states completed revisions to an existing PA (to accommodate NEPA assignment) in six months. One state DOT said their first PA took several years, with many meetings and draft documents; however, their current (and second) PA took two years.
- 2. Types of cost and staffing resources needed to prepare a PA or modify or update an existing PA.**
 - How states responded to the question on the cost and staffing used to prepare a PA varied in terms of metrics. One state noted that PA preparation took up 20 percent of a senior cultural resource program manager's time over one year. Another noted that PA development involved two to three staff at one-quarter time over two years, and another involved 50 to 60 hours a month for 11 months. One state estimated that their PA required a total of 400 hours among all of the parties involved in the PA development. Two states provided cost estimates ranging from \$40,000 to \$65,000 to prepare a PA.
 - Most states noted that they do not track costs and staffing for developing or updating their PAs, so they could not address this topic or could only provide very gross estimates of hours and cost.
- 3. Use of a consultant to prepare or update a PA.**
 - Only one state used a consultant to assist in preparing a PA. Another state had the Volpe National Transportation Systems Center assist in the preparation of their PA.
- 4. Types of funds used to cover the costs of preparing a PA or modifying or updating an existing PA.**
 - In all cases, state DOT funds were used to prepare a PA. State responses described these funds as "overhead salaries" or "office budget" or "existing state funds" or "state operating funds."
- 5. Is there any guidance or a manual on how to implement the PA?**
 - Some states do not have a manual or guidance on their Section 106 review procedures or their PA.

- Those that do have a manual or guidance noted these documents addressed their entire cultural resources management program in addition to PA implementation, along with other standard operating procedures, as opposed to having a stand-alone document on how to implement the PA. One state will be updating their overall guidance to address their updated PA. The new guidance will show how the PA is implemented in the DOT's day-to-day workflow.
- One state did have a handbook for PA implementation, and the handbook was developed and signed by the PA signatories.

6. Lessons learned from efforts to prepare a PA or modify or update an existing PA.

- There needs to be a level of trust among FHWA, the state DOT, and SHPO. All of the parties need to be willing to work together.
- It was important for the agreement to be equitable to all parties.
- It takes time to negotiate a PA. Modifying/amending a PA can also be a lot of work and can take a lot of time.
- Things take longer than planned. Build in additional time to the schedule. Be patient.
- Consult initially on a concept rather than a formal draft PA. For the next update of their PA, one state DOT said they would "test drive" their list of projects requiring no further review with knowledgeable users.
- Avoid doing an unwieldy and cumbersome PA. Work toward a simple and straightforward PA. Use clear and unambiguous language and provisions in a PA.
- Focus on those things that will be most beneficial to the state DOT and other parties, and include these things in the PA. One can always add more items during future updates and revisions. Do not try to address everything at once; this generally results in a cumbersome and time-consuming effort.
- Having face-to-face meetings with the parties to the PA is very important, especially at key milestones in the development of a PA. There is only so much that can be accomplished through teleconferences and video conferencing.
- Be flexible and focus on the goals of the PA.
- First, gain a full understanding of minor DOT undertakings and their frequency of occurrence, and then develop for the PA a list of projects and actions that require no further Section 106 review (and no consultation with the SHPO).

7. Types of positive responses and comments that have been received from PA signatories, stakeholders, and state DOT staff after a PA is implemented.

- The parties saw great benefits in terms of the PA streamlining provisions. Of particular value was the ability for a state DOT to identify projects exempted from further Section 106 review without consultation with SHPO and FHWA.
- Improves communication between the DOT and SHPO.
- Several states noted that the PA signatories and tribes had only positive comments about their PA.

8. Aspects of a PA that worked well and might be showcased for other states as a best practice.

- PA streamlining provisions where a state DOT has the ability to identify projects exempted from further Section 106 review without consultation with SHPO and FHWA involvement, in addition to other types of streamlining provisions (e.g., findings of No Historic Properties Affected made by the DOT without SHPO consultation). These streamlining provisions save the state DOTs and SHPOs time and paperwork.

- The streamlining provisions allow the parties to focus on projects with greatest impact on historic properties and to focus on complicated projects that need close attention.
- Establish a simple process whereby the parties can add or modify to the PA categories of projects requiring no further Section 106 review, without having to amend the entire PA. For example, using email (in the form of written agreements among the parties) to add or modify projects listed in the PA.
- The identification and implementation of a list of standard mitigation and standard treatments for certain frequently encountered historic properties and impacts have streamlined project implementation and benefited the state DOT's program.
- Have mandatory training on the PA, especially on the use of the streamlining provisions. This training is critical in order to ensure appropriate implementation of these provisions.

9. Effectiveness of oversight provisions stipulated in PAs (i.e., oversight by FHWA or other signatories of PA implementation).

- Most state DOTs noted that the oversight provisions seemed adequate. Other states said they were very effective.
- One state DOT said that the provisions were so effective they are considering eliminating the annual in-person meeting. This reflected the positive relationship that had been built between the state DOT and SHPO through the implementation of the PA.
- Another state DOT noted that having annual reviews, in addition to transparency in terms of PA implementation, established reasonable and realistic safeguards against abuse of the agreement.

10. Challenges experienced in the preparation of a PA.

- Changes in personnel during the development of the PA. This results in changes in expectations and directions while the PA is being developed, and it makes the preparation process longer and more complicated.
- Having to deal with ongoing, time-sensitive project work at the same time as developing a PA. This situation requires management to (1) support the effort to prepare the PA, (2) prioritize developing the PA above project work, and (3) delegate project work to staff not working on the PA.
- SHPO unfamiliarity with some of a DOT's operations and concerns, so it takes time to educate SHPO staff about these operations and concerns.
- Adding another federal agency to the PA as a signatory, such as the USACE, requires more time and coordination in order to create acceptable language for all parties (note: see Section 5.0 below, Some Final Observations).
- Insertion of additional clauses by legal counsel took time to sort out with the ACHP and SHPO.
- One state noted that trying to develop a standard list of project types exempted from further review was a challenge.

11. While developing or updating your PA, did you have any difficulties or problems obtaining support from agency management on the need for a PA or making modifications or updating and existing PA?

- Most states noted they had the support of agency management. Several states noted that management understood the importance of the PA as a tool for streamlining projects, increasing efficiencies, and bringing predictability to projects. However, a few states said that management asked why it took so long to develop their PA.

- One state noted that their management set the time frame for developing the PA and was not flexible on the schedule when it was clear that working with the consulting parties would take more time.
- Benefits of the PA were realized quickly and quantitative measures such as time savings and schedule efficiencies helped prove management's support.

12. Regarding agency management concerns or negative comments once a PA was implemented and addressing these concerns or negative comments. And if you did, how were these addressed? (This combines Questions 12 and 13 of the state DOT questionnaires).

- Agency management had unrealistic expectations of what a PA would do. They expected that a lot more things would be advanced without consultation, or that a project would be done more quickly.
- Discovered that some in management had not taken the time to read all of the stipulations in a PA. The lesson learned is to make sure that management is fully aware of and agrees to what a PA will do before the DOT consults with the other parties to prepare a PA.
- Having a training program for management helps to address their concerns and expectations.
- One state DOT said they are adding new stipulations to their updated PA to address management concerns.
- One state DOT noted that their management would like to have a PA that relied less on SOI qualified cultural resources management staff and more on project engineers. This, however, was not acceptable to SHPO or the tribes. The tribes made it clear that they liked the PA as is. The position of the SHPO and tribes helped convince management that the process established by the PA works.

13. Challenges encountered during implementation of a PA.

- Not having clear and explicitly stated provisions or definitions in a PA (especially in terms of streamlining provisions dealing with projects requiring no further Section 106 review). This results in (1) confusion among state DOT staff (and errors in application), and (2) the signatories spending time interpreting the expectations associated with these provisions and definitions.
- Lack of staffing at state agencies to implement the PA.
- Maintaining records of streamlined findings and decisions, as stipulated in the PA (e.g., batch or quarterly reporting of projects requiring no further review).
- Development of administrative tools needed to implement a PA and changing staff workflow in order to implement a PA.
- Need continual training for cultural resources management staff, environmental managers and project managers on the PA. Keeping track of all of this training is a challenge.

14. If you were not involved in the development of the PA, how does this affect your ability to implement the PA? Do you find implementation of the PA to be straightforward and problem free? What specific factors influence your ability to effectively implement the PA (either helped or hinder)? For example, is the PA clearly worded in plain language, are there sufficient guidance documents for implementation, institutional memory, or other support mechanisms?

- Most responses noted that their PA was easy to follow and was straightforward.

- One state noted that having extensive guidance and regular training helped new staff understand the PA. The importance of training was noted by other state DOTs as a critical element to effective PA implementation.
- Another state noted that new staff initially had difficulty understanding and implementing the PA, so the state DOT worked to clarify the language and organization of the PA during an update of the PA.

15. Additional comments on PA development and implementation.

- One state DOT noted, “We would never want to go back to the system before the PA!”
- Another state DOT stated that cultural resource management staff within a DOT “owns” a PA once it is in place, since no one else in the agency knows the PA like these staff. As a result, it is critical that these staff know precisely how a PA is to function in all of its details and is able to speak about the efficiencies gained through implementing the PA. Therefore, cultural resource management staff must be involved in development of any delegation PA.
- One state DOT noted the importance of having Secretary of the Interior (SOI)-qualified staff to review projects and apply the exemptions listed in the PA, rather than allowing non-SOI-qualified staff (e.g., environmental staff within a district office) to make decisions on which projects are exempted from further review.
- Designate a champion to keep the PA development process moving. “Day jobs” get in the way!
- The PA works because the SHPO and tribes trust the state DOT cultural resource management staff to communicate and consult openly and with their interests in mind. Similarly, the FHWA must trust the state DOT to do the same on their behalf.

16. States with current or pending 326 or 327 MOUs (this combines Questions 17 and 18 in the state DOT questionnaire).

- It is important to think about modifying an existing PA from the beginning so the application for 327 NEPA assignment and the 327 MOU are consistent with a state’s PA modification plan.
- Coordinate annual program reviews and reporting on a PA with those associated with a 327 MOU.
- NEPA assignment changed the way the state DOT managed projects. As a result, it was a challenge to anticipate how much project management processes would change, processes that would need to be addressed in the updated PA.
- One state noted that their biggest challenge for NEPA assignment was the timing for updating their PA and other statewide agreements while assignment was pending.
- It is important to be clear with tribes on the goals and outcomes of a 327 MOU versus a PA.
- It is important to define all roles and responsibilities in a PA to ensure that they follow the 327 MOU.

FHWA DIVISION OFFICES

Response from the FHWA division offices generally mirrored those from the state DOTs. Below are responses from the division offices that are not reflected in the responses from the state DOTs.

1. Lessons learned from efforts to prepare a PA or modify or update an existing PA.

- It is important to have the right individuals involved in the development of a PA; individuals with the appropriate skills and understanding of the Section 106 process. One division office noted that the PA development process was expedited because the state DOT staff person responsible for PA development was well respected by all the agencies.
- Before preparing a PA, need to have experienced and appropriate staff within the DOT (e.g., staff meeting the Secretary of the Interior’s professional qualification standards) to take on the decisions and findings delegated to the state DOT through the PA.
- Having regular coordination meetings is one way of building a good relationship among all of the parties; this helps the parties get through the more challenging parts of negotiating a PA.
- The parties should come to a reasonable understanding on the schedule for developing a PA and build this into the development process.
- Have guidance on implementing the PA at the beginning of PA implementation.
- 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 and listening sessions with the tribes will greatly increase tribal participation in the development of a PA.
- If there is going to be a legal review of the PA, time for this review needs to be included in the PA development schedule, along with time to respond to comments from the legal review. Best to get the legal reviewers involved as early as possible so they understand the purpose of the PA.
- Each agency involved in PA development or updating should have a single point of contact as the primary representative of the agency, and it is ideal that this point of contact is someone with a high degree of decision-making authority.
- Do not try to address each agency’s idiosyncratic concerns; keep discussions at a high level and add in specifics as easily modified attachments.

2. Types of positive responses and comments that have been received from PA signatories, stakeholders, and state DOT staff after a PA is implemented.

- The state DOT and SHPO saw huge benefits in terms of streamlining resulting from the ability to screen projects that require no further Section 106 review. The screening process allows the agencies to focus on high-risk projects.
- Allowing the state DOT to consult directly with SHPO without going through FHWA saves a lot of time. FHWA is comfortable with this delegation given the state DOT’s professional cultural resources management staff.
- One division office noted that the ACHP commented positively on a PA that included a process for carrying out public involvement in the Section 106 process.

3. Aspects of a PA that worked well and might be showcased for other states as a best practice.

- Including language in the PA about using tribal expertise to identify places of religious and cultural significance to tribes.
- It is helpful to outline in the PA how the state DOT will conduct early coordination with tribes.
- After the draft PA was sent out for review by all of the parties, a teleconference was held with all parties, including Certified Local Governments, to discuss the PA. The conference call was introduced by the Division Administrator, which indicated to all participants the high value FHWA placed on the PA.
- The identification and implementation of a list of standard mitigations and standard treatments for certain historic properties and impacts has streamlined project implementation.

4. Effectiveness of oversight provisions stipulated in PAs (i.e., oversight by FHWA or other signatories of PA implementation).

- One division office noted that their PA did not have a specific oversight provision, though the PA does require an annual report. This is a particular concern in terms of projects that are screened and determined to not require further review when, in fact, the projects did have the potential to affect historic properties.
- Another division office stated that the oversight provisions have been adequate in terms of conducting reviews of the state DOT's program and individual projects.
- One division office stated that the oversight provisions have been rigorously adhered to; the state DOT undertakes annual internal reviews/audits with input from SHPO, and the DOT provides opportunities for FHWA and ACHP to participate.

5. Challenges experienced in the preparation of a PA.

- Not having the right resources, staffing, and time for developing a PA.
- A belief that the PA had to be perfect and must identify every possibility lengthened the PA development process. Need to meet the letter and intent of the law/regulation but not necessarily meet every participant's wishes.
- Outreach to tribes and getting tribes to respond and participate in PA development can be difficult because the tribes work under different time frames than the agencies. Getting sufficient tribal participation can be a challenge.

6. Challenges encountered during implementation of a PA.

- The state DOT wanted to include projects that occur very infrequently in the list of projects requiring no further review. This practice resulted in frequent adjustments to the list of exempted project in the PA. This is not a good use of time and resources, and it may weaken trust among the parties, especially the SHPO, who may think that an appropriate list of exempted projects has already been included in the PA.
- State DOT staff training was challenging, but the division office is pleased with the implementation of the required training for staff implementing the PA.

7. If you were not involved in the development of the PA, how does this affect your ability to implement the PA? Do you find implementation of the PA to be straightforward and problem free? What specific factors influence your ability to effectively implement the PA (either helped or hinder)? For example, is the PA clearly worded in plain language, are there sufficient guidance documents for implementation, institutional memory, or other support mechanisms?

Responses to this question were similar to the responses from the state DOTs.

8. Additional comments on PA development and implementation.

Responses to this question were similar to the responses from the state DOTs; however, an additional comment is included below. While working with state DOTs around the country, the project team repeatedly heard that local governments do not understand the Section 106 process and their role in the process. This lack of understanding and experience results in schedule delays,

increased costs, and increased conflict in locally sponsored projects that use Federal-Aid Highway Program funding.

- The PA is very clear in its assignment of responsibilities; consequently, the process for local governments (who are less familiar with the Section 106 process) is clearly defined.

9. States with current or pending 326 or 327 MOUs (also includes responses from Question 10 from the FHWA division office questionnaire).

- The parties need to define what to do with an existing PA before and/or after the transition to CE NEPA assignment under a 326 MOU and then full NEPA assignment under a 327 MOU.
- One division office noted that as a result of discussions among FHWA, ACHP, and SHPO regarding government-to-government consultation, the updated PA clarified FHWA's tribal consultation responsibilities under the PA in the context of NEPA assignment.

STATE HISTORIC PRESERVATION OFFICES

The responses from the SHPOs were generally similar to those from the state DOTs and FHWA division offices. Below are responses from SHPOs that are not reflected in the responses from state DOTs or FHWA division offices.

1. Lessons learned from efforts to prepare a PA or modify or update an existing PA.

- One SHPO said they were initially concerned that there would be considerable frontloading of work on the state DOT's cultural resources management staff since, under the PA, DOT staff need to conduct project background research to screen projects—research that was often conducted in the past by consultants. The SHPO also expressed concern that the DOT retains SOI-qualified staff, including an architect/architectural historian, which the state DOT currently does not have.
- One SHPO noted that the development of their PA started with a large group, but things did not keep on track with this large group until the FHWA division office put together a draft that identified “must haves” and “open for discussion.” Based on their experience, this SHPO recommends starting small, putting together a draft, and then bringing it to a larger group for discussion.
- Another SHPO said all of the key stakeholders got together in a room for three days to deal with all of the issues the stakeholders wanted to address through a PA (and they could not leave the room until they dealt with the issues). The development of the PA was based on the outcome of this meeting. The three-day meeting was managed by an outside facilitator.

2. Types of positive responses and comments that have been received from PA signatories, stakeholders, and state DOT staff after a PA is implemented.

- The time saved on smaller (screened) projects is used to focus on more complex Section 106 issues, which can create a better overall outcome. SHPO staff also benefit from reduced project reviews created by the streamlining, allowing them to work closely with the state DOT on more complex and complicated transportation projects.

- The state DOT has accommodated SHPO's request for real-time submittal of documentation on screened projects and on findings that do not require SHPO review, in order to avoid overloading SHPO staff during quarterly batched reporting on these projects and findings.
- State DOT project managers are generally supportive of the agreement due to its streamlining provisions for minor projects. State DOT project managers and engineers have suggested amendments to the PA, based on their experiences advancing projects following the process established by the PA.

3. Aspects of a PA that worked well and might be showcased for other states as a best practice.

- The inclusion of an archaeological monitoring and discovery plan within the PA has been very useful when a project is not covered by a specific agreement document. This allows for a standard process to be followed when discoveries arise. For instance, when there is no MOA for a project that would otherwise have a more detailed plan, the plan in the PA fills that need. It saves a lot of time and headaches when something comes up.
- One SHPO noted that the PA is working well because of the open line of communication between the SHPO and the state DOT. They have monthly meetings as well as quarterly video conferences with all of the DOT districts and with the central office.
- Another SHPO noted that having two categories of projects requiring no further review (i.e., projects that have no potential to affect historic properties and projects that have minimal potential to affect historic properties) has worked well. The first category of projects may be approved by state DOT district office staff without review by the DOT's environmental staff (or SHPO consultation); the latter category may be approved by state DOT environmental staff without SHPO consultation.

4. Effectiveness of oversight provisions stipulated in PAs (i.e., oversight by FHWA or other signatories of PA implementation).

- One SHPO stated that as a result of the good working relationship between the SHPO and the state DOT's qualified cultural resource management staff, there is a high level of trust, and as a result, the oversight provisions never come into question.
- One SHPO noted that the provisions work well, while another SHPO stated that the most useful provision is one where FHWA staff meets with SHPO staff every six months to discuss issues. The SHPO found this to be very constructive.

5. Challenges experienced in the preparation of a PA.

- In terms of the list of screened projects that require no further review, the parties had to bridge the gap between cultural and environmental/engineering professionals to make sure the parties were capturing the needs of construction projects and concerns for cultural resources.

6. Challenges encountered during implementation of a PA.

- One SHPO noted their biggest challenge occurs with projects where compliance documents are funded by a local government. In these cases, the outcomes are predetermined and the documents that are produced may not always be of the highest quality. A few responses from the state DOTs made references to similar difficulties with local public agency projects that are funded through the Federal-Aid Highway Program.

7. If you were not involved in the development of the PA, how does this affect your ability to implement the PA? Do you find implementation of the PA to be straightforward and problem free? What specific factors influence your ability to effectively implement the PA (either helped or hinder)? For example, is the PA clearly worded in plain language, are there sufficient guidance documents for implementation, institutional memory, or other support mechanisms?

- Overall, the PA is clearly worded, but it does take some practice to properly implement the PA. The ability to conduct informal consultations between the state DOT and SHPO is written into the document for just this reason. The cultural resources management professionals at the state DOT are prompted in the PA to consult the DOT cultural resources liaison at the SHPO for technical assistance.

8. Additional comments on PA development and implementation.

- One SHPO noted, “It was a long road to get to where we are today. However, I’m sure that all signatories would agree that it was well worth the effort to create the PA.”
- To develop a PA, it is best to have a group of people representing both the SHPO and state DOT, so these individuals can bring the broadest range of scenarios to the table. It is also important to include the state DOT cultural resource management staff in the review of the PA before it is finalized, because there will be a shift in their workload once the

PA is implemented. Their input should be considered as to how well the process laid out in the PA might be implemented.

- Having a state DOT-funded review position at the SHPO expedites project reviews and allows for participation in site visits and pre-planning meetings. It also means that the SHPO has a staff member who could be devoted to the PA development process.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

(Note: Given the critical role of the ACHP in the development of delegation PAs, it was important to have the ACHP responses in both the body of the report (Section 4.2) and here in the appendix.)

As one of the key parties to the development and updating of all delegation PAs, the project team thought it was appropriate to include the ACHP’s entire, verbatim response. In this way, state DOTs, FHWA division offices, and SHPOs have a “heads up” on the ACHP’s position concerning the context, structure and process for developing, updating, and implementing a delegation PA.

1. What are the lessons learned from your participation in the preparation of state DOT delegation PAs or modifying or updating a state’s existing PA? What should have been done differently based on these lessons learned?

- These statewide agreements successfully clarify the roles and responsibilities of FHWA division offices and the state departments of transportation, and define common activities which specific statewide experience has demonstrated has little or no potential to affect historic properties and are therefore able to be concluded through streamlined measures. Overall, these agreements create a more efficient Section 106 review process.
- Here are some of the lessons learned:

- Schedule regular meetings with the signatories and invited signatories in order to allow opportunities for specific questions and items to be discussed rather than communicate through emails and track edits for draft PAs.
- Allow enough time to draft a PA or an amendment including consulting with tribes, and notifying the public, state and local agencies, and allowing them to comment on the draft agreement. On average, the entire process to draft an agreement or amend an agreement can take 1 to 2 years.
- Coordinate and draft a PA with other federal agencies that often are involved with FHWA projects (i.e., USACE, Federal Transit Authority, and Tennessee Valley Authority) depending on the state.
- Allow locally administered projects that receive FHWA funds to be included in these statewide PAs that delegate responsibilities to state DOTs. Certain states have already done this. Some counties, cities, or local municipalities do not have the staffing or knowledge to conduct section 106 reviews. More recently, the ACHP has had to participate in minor FHWA projects that were locally administered due to an insufficient consultation process.

2. What aspects of these types of PAs worked very well and might be showcased for FHWA division offices, state DOTs, SHPOs, and consulting parties as best practices?

- The ACHP has listed below certain components that worked very well in conjunction with the template PA and recommend for future agreements:
 - Include the names of the tribes that were notified and consulted on this PA.
 - Include the agreed-upon language from the template PA for the administrative stipulations (emergency situations, post-review and unanticipated discoveries, treatment of human remains, amendment, termination, resolution to objections, confidentiality, and duration). Sometime not all these administrative stipulations are included in agreements.
 - Specify in a Whereas Clause whether the state DOT employs cultural resources specialists and consultants who meet the Secretary of Interior's Professional Qualification Standards (*Federal Register* 48:44738-44739) in the fields of archaeology and architectural history to carry out its cultural resource programs and responsibilities.
 - Specify how the state DOT will consult with the SHPO if it has a vacancy or vacancies with their cultural resource specialists and the agreed upon delegated responsibilities to the state DOT cannot be fulfilled by a cultural resource specialist who meets the Secretary of Interior's Professional Qualification Standards.
 - Specify if consultants will be used for documentation, identification, and/or evaluation of potentially eligible historic properties.
 - Specify if the state DOT cultural resources specialist(s) or other staff will receive any Section 106 training and/or other training that may be beneficial to the purposes of carrying out the agreement.
 - Require all staff of the respective agencies that have responsibilities for carrying out provisions of the agreement be provided an overview of the PA and be instructed in its application.
 - Include language explaining the FHWA's and state DOT's roles and responsibilities when an undertaking adversely affects a National Historic Landmark.
 - Include a stipulation that explains how the state DOT will solicit public participation early in the project development process and consistent with 36 C.F.R. 800.2(d).
 - Include a stipulation that if an undertaking changes, then the state DOT, the State Historic Preservation Officer (SHPO), and other consulting parties as appropriate will consult to reassess the appropriateness of the initial findings and determinations.

- Include a stipulation on how archaeological materials and related records resulting from research, surveys, and excavations collected under the agreement shall be curated.
 - Specify in stipulations how human remains will be treated if found on federal, tribal, state, county, and municipal lands.
 - Explain how disputes from the signatories, invited signatories, consulting parties, concurring parties, and the public will be addressed.
 - Include a stipulation on how appendices or attachments can be updated or changed and whether this will or will not require an amendment to the agreement.
- 3. In retrospect, how effective were the oversight provisions stipulated in these PAs (i.e., oversight by FHWA or other signatories of PA implementation)?**
- From the ACHP's perspective, they have been very effective as noted through the annual reports and/or annual meetings.
- 4. What challenges did you experience in the preparation of state PAs?**
- The ACHP did not experience any challenges in reviewing and commenting on these PAs since the majority of the states used the template PA jointly developed between FHWA and ACHP.
- 5. Did you encounter any challenges during the implementation of these PA?**
- None have been reported at the ACHP. We recommend these types of challenges be included in the annual reports provided to the consulting parties.
- 6. Did you encounter any issues or difficulties with states modifying their existing PA as part of taking on NEPA assignment?**
- The ACHP answered very specific questions recently about when and how the ACHP would be notified for adverse effect notifications. Some older PAs stipulated that the ACHP would not be notified for certain adverse effects. For any type of adverse effect, the federal agency is required to notify the ACHP.
- 7. Are there any lessons learned from your participation in modifying an existing PA in the context of NEPA assignment?**
- The ACHP does not have any recommendations at this time. No real distinction has been noted from modifying an existing PA in the context of NEPA assignment versus with a FHWA division office.
- 8. Do you have any additional comments you would like to make about your experiences participating in the development and implementation of state DOT delegation PAs? If you do, please provide these comments in the space below:**
- The ACHP supports states developing more comprehensive programmatic agreements. Such agreements should include provisions for identifying, evaluating, and maintaining historic bridges, if the state does not have a statewide historic bridge agreement.