

ACHP CHECKLIST

For FHWA STATEWIDE PROGRAMMATIC AGREEMENTS (PAS)

INTRODUCTION

June 22, 2007

What is a PA? Programmatic Agreements (PAs) may be negotiated between a Federal agency, the relevant State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) to govern the compliance with Section 106 of the National Historic Preservation Act (Section 106) for a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings (36 CFR 800.14[b]). PAs are used by FHWA to provide a FHWA Division and State DOT with a tailored approach to compliance with Section 106. Development of a PA is often initiated by a state Department of Transportation (DOT), in consultation with the State Historic Preservation Office (SHPO), with the intention of streamlining Section 106 review for routine projects. FHWA must actively participate in consultation and be a signatory to a PA that addresses FHWA undertakings.

The ACHP and the relevant SHPO must be invited to participate in the development of an FHWA Statewide Program PA and must be signatories. Other federal agencies with jurisdiction should be consulted in the development of a PA. For example, the U.S. Army Corps of Engineers often has overlapping jurisdiction for FHWA undertakings that may require a permit under Section 404 of the Clean Water Act.

Since 1996, five different types of FHWA statewide PAs have been executed:

1. Delegation PAs: Delegate responsibility for specified findings and determinations to the state DOT (e.g., New York, Wisconsin);
2. Delegation and Exemption PAs: Delegate responsibility to the state DOT and exempt specified routine actions from Section 106 review (e.g. Maine);
3. Streamlining and stewardship PAs: Eliminate or reduce the time frame for SHPO review of specified findings, and include provisions for ensuring good stewardship (e.g. California, Vermont).
4. PAs for Historic roads and/or bridges: Streamline review of historic roads and bridges using standard treatments and/or management plans (e.g. Indiana)
5. PAs for Emergency Undertakings: extend emergency provisions of the ACHP's regulations for emergency relief projects (e.g. Pennsylvania).

ACHP CHECKLIST FOR FHWA STATEWIDE PROGRAMMATIC AGREEMENTS (PAs)

Laying the groundwork:

- Identify specific goals for streamlining consultation or delegating consultation to a state DOT, and determine whether a PA is really needed to accomplish those goals;
- Review recent PAs from other states that accomplish identified goals and determine whether any such examples might serve as good models for your state;
- Create an outline of items to be included in the PA;
- Consult with relevant Indian tribes and Native Hawaiian Organizations (NHOs) when developing the PA if properties of traditional religious and cultural significance to them *may* be affected by actions under the scope of the PA;
- Obtain the written consent of relevant tribes if FHWA proposes to have the state DOT initiate consultation with Indian tribes;
- Identify other consulting parties, including individuals, organizations, and entities likely to be interested in the program's effects on historic properties (e.g., the Indiana Historic Bridges Span Task Force) and invite their participation.

Preparation of the Preamble (Whereas clauses) for the PA:

- Clearly identify the program or programs covered by the agreement;
- Briefly identify the reason(s) for the PA (what are you trying to accomplish and why?); and the legal authority for its execution, 36 CFR 800.14(b) of the Section 106 regulations;
- Identify the SHPO, ACHP, and other consulting parties that participated in the development of the agreement;
- Document FHWA's consultation with Indian tribes or NHOs that may ascribe traditional religious and cultural significance to historic properties that may be affected by undertakings covered by the PA, and indicate whether such tribes were invited to concur in the PA;
- Document how the public was afforded an opportunity to comment on the PA;
- Cite other existing PAs if they are affected by or related to this PA;
- Identify the role of each consulting party as either a signatory, invited signatory, or concurring party.
- Include or reference any other important background information.

The Stipulations:

- Must include a preamble at the beginning that states: "FHWA shall ensure that the following measures are carried out:"
- Accurately describe the tailored process for Section 106 Review, referencing specific provisions of 36 CFR Part 800 where appropriate rather than paraphrasing the regulations, and making sure those referenced provisions clearly reflect the specific intent of the parties;
- Identify the responsibilities of both FHWA and the DOT, including the decision-maker or final arbiter for determinations and findings;
- Include provisions for tribal consultation reflective of FHWA's government-to-government responsibility toward federally-recognized Indian tribes (see 36 CFR 800.2(c)(2) and <http://www.achp.gov/regs-tribes.html>) for programs that have the potential to affect historic properties of interest to Indian tribes and NHOs;
- Include provisions for the identification and participation of other consulting parties in individual project review;
- Include provisions for public involvement on individual undertakings covered by the PA, as appropriate, considering the scale of the project and its likely effects on historic properties;
- Address coordination with other environmental reviews: e.g. NEPA, Section 4(f);
- Reference relevant Federal and State standards and guidance, including professional qualifications standards for DOT staff and consultants;
- Include procedures for responding to discovery situations, including the discovery of human remains, and emergency situations for programs where such are likely to occur;
- Provide for dispute resolution by FHWA, in consultation with the ACHP;
- Include a requirement for periodic review by FHWA and SHPO;
- Include simple and clear provisions for amendment, termination, and duration of the PA.

Other considerations:

- Implementation manuals may provide greater detail than the PA, and should be completed in consultation with the parties to the PA;
- Be precise in using terms and define them when needed. For example, instead of "*Phase I(b) Survey*," define what it means. Instead of "*cultural resources*" use "*historic properties*."
- Write the agreement so a cold reader can understand it;
- Be consistent in your use of terms and acronyms;
- Use active voice: identify who will carry out each provision;
- Limit exemptions from Section 106 review to actions with little to no potential to affect historic properties regardless of whether a historic property is present;

- ❑ If the action is exempted only *"if not within or adjacent to a historic district"*, it's not an exemption from Section 106 review. It's an action likely to drop out of the process early, once identification is completed.
- ❑ Clarify that exemptions from FHWA and SHPO review (often called "screened exemptions") are limited to actions with little to no potential to affect historic properties, provided the undertaking meets specified conditions and is reviewed and approved by a qualified cultural resource professional at the DOT;
- ❑ Include Standard Treatments when standard approaches to avoiding, minimizing or mitigating adverse effects can be agreed upon in advance. If applied as prescribed in the PA, no case-by-case FHWA or SHPO review would be required;
- ❑ Incorporate provisions for proactive public outreach to enhance public involvement; identification; and stewardship of resources.

Additional information on drafting Section 106 Programmatic Agreements for FHWA Transportation Programs can be found at:

Agency Use of and Approach to FHWA Approved Programmatic Agreements, by Venner Consulting, Thomas F. King, TransTech Management, Parsons Brinckerhoff, and PB Consult. April 2005. NCHRP Project 25-25(Task 13).
http://www.trb.org/NotesDocs/25-25%2813%29_FR.pdf

"Programmatic Agreement Toolkit." A guidance document on the AASHTO Center for Environmental Excellence website,
http://environment.transportation.org/documents/programmatic_agreement_toolkit/main.html

Preparing Agreement Documents, 2006 revised. [Soon to be available on the ACHP Website.]