

**Programmatic Agreement
Among the Federal Highway Administration,
The Advisory Council on Historic Preservation,
The Delaware Department of Transportation, and
The Delaware State Historic Preservation Officer
Regarding
The Implementation of the Federal Aid Highway Program in Delaware**

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

WHEREAS, FHWA has determined that implementation of the Program in Delaware may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places (NRHP), hereafter referred to as historic properties, and has consulted with the Delaware State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) pursuant to 36 CFR Part 800.14(b) implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f); and

WHEREAS, FHWA has consulted with Federally-recognized Indian Tribes (Tribes) who may attach religious and cultural significance to historic properties that may be affected by this Programmatic Agreement (Agreement). These tribes currently include the Delaware Nation and the Delaware Tribe of Indians; and

WHEREAS, pursuant to the consultation conducted under 36 CFR Part 800.14(b), the signatories have developed this Agreement in order to establish an efficient and effective program alternative for taking into account the effects of the Program on historic properties in Delaware and for affording ACHP a reasonable opportunity to comment on undertakings covered by this Agreement; and

WHEREAS, DelDOT has contacted local government and private historic preservation interests, including preservation planners from New Castle, Kent and Sussex County, the City of Wilmington, and Preservation Delaware Inc. about this Agreement, has requested their comments, and has taken any comments received into account; and

WHEREAS, the definitions given in Appendix A are applicable throughout this Agreement; and

WHEREAS, this Agreement supersedes the previous programmatic agreement among the FHWA, SHPO, DelDOT, and ACHP executed April 25, 2002, as well as the state's application of the Nationwide Transportation Enhancement Program as outlined in the June 11, 1997 FHWA policy memorandum; and

WHEREAS, this Agreement takes into consideration the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) (MAP-21).

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

STIPULATIONS

FHWA, DelDOT, and SHPO shall ensure that the following measures are carried out:

I. Purpose and Scope

- A. This Agreement sets forth the process by which FHWA with the assistance of DelDOT will meet its responsibilities for undertakings pursuant to Sections 106 and 110 of the National Historic Preservation Act (NHPA) 16 U.S.C. § 470f.
- B. In compliance with its responsibilities under the NHPA, and as a condition of its award to DelDOT of any assistance under the Federal Aid Highway Program, FHWA will ensure that DelDOT carries out the requirements of 36 CFR Part 800 and applicable ACHP guidance, the Secretary of the Interior's Standards and Guidelines (48 CFR 44738-9), and the SHPO "Guidelines for Architectural and Archaeological Surveys in Delaware" or its successor for undertakings subject to this Agreement.
- C. FHWA recognizes that it has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions; and that consultation with an Indian tribe must, therefore, recognize the government to government relationship between the federal government and Indian tribes. As such, FHWA will be directly responsible for initiating consultation with Tribes, as defined in Appendix A, and in accordance with the requirements of 36 CFR Part 800.
- D. DelDOT shall be responsible for carrying out the terms of this Agreement except for those specifically reserved for FHWA or SHPO.
- E. Personnel, Use of Consultants, and Training:
 1. Implementation of this Agreement is conditioned upon DelDOT employing staff meeting the Professional Qualifications Standards established by the Secretary of the Interior (36 CFR Part 61) in the areas of architectural history, archaeology, and/or any other closely related field as appropriate, hereafter referred to as "DelDOT qualified staff." If DelDOT at any time has a staff vacancy in one of the above-cited fields, DelDOT shall:
 - a. Consult with the SHPO on all projects defined under Stipulations II.B and III. with regard to identification, evaluation, and assessment of effects on the resource type for which the vacancy exists; or

- b. DelDOT may use consultant staff which have been verified by the SHPO as meeting the Professional Qualifications Standards to assume the role of DelDOT qualified staff in a temporary capacity, which is defined as less than two years;
2. Consistent with 36 CFR Part 800.2(a)(3), DelDOT may use consultants to gather information, analyze data, and prepare documentation. DelDOT and FHWA remain responsible for all consultation, findings and determinations made under this Agreement.
3. DelDOT will ensure that all cultural resource work conducted under this Agreement is carried out by DelDOT qualified staff and/or consultants that meet the qualifications set forth in the Secretary of the Interior's Professional Qualifications Standards for such work.
4. Notwithstanding Stipulation I.E.3., DelDOT's Environmental Studies Manager (ES Manager), who may or may not meet the above-cited definition of qualified staff, may determine when projects fall under the definitions listed under Stipulation II.A. The ES Manager is encouraged to consult with DelDOT qualified staff in reaching such decisions. DelDOT shall immediately notify FHWA and SHPO if responsibility for this aspect of the Agreement will be reassigned to another position within the agency.
5. Training:
 - a. FHWA, DelDOT and SHPO personnel, including but not limited to qualified cultural resource staff and the ES Manager, shall undertake Section 106 training. The parties will also consult on other training that may be beneficial to the purposes of carrying out this agreement, and will participate in such training if funding allows.
 - b. FHWA, DelDOT and SHPO shall ensure that all staff of their respective agencies which have responsibilities for carrying out provisions of this Agreement are provided an overview of this Agreement and are instructed in its application.

II. Projects Exempted from SHPO Review

A. Projects That Will Not Affect Historic Properties

The following types of undertakings are activities for which DelDOT routinely utilizes Federal Aid Highway funds. Due to their low potential to affect historic properties, the following activities have been determined to cause no effect and are exempted from further review by SHPO, provided the undertaking is limited to the activity specified, is not part of a larger undertaking, and is on an existing transportation facility as determined by the ES Manager in consultation with DelDOT qualified staff.

1. Pavement milling, overlaying, patching, chip seal, on existing roads when the roadway footprint is not widened to include new shoulders or travel lanes. Some overlay projects may include shoulder flattening, within the existing roadway footprint;
2. Minor safety improvement projects, typically intersections listed on the Hazard Elimination Program (HEP); when the roadway footprint is not widened;
3. Chemical surfacing treatments applied to roads to protect or preserve existing pavement;
4. Routine maintenance of existing roads, guardrail, drainage structures, including pipe replacements, drainage ditches, and fences that does not include changes in the alignment or footprint of the roadway or include changes in the location or extent of drainage structures and ditches;
5. Roadway striping, pavement marking and installation of vehicle monitoring equipment;
6. Rest area repair and maintenance;
7. Bridge deck rehabilitation and stabilization confined strictly to road surface work on the structure;
8. Bridge structural maintenance, stabilization, and rehabilitation work; provided the bridge is less than 45 years of age and not listed on or eligible for the NRHP;
9. Construction of sidewalk improvements in the form of curb cuts made under the Americans with Disabilities Act (ADA), provided in-kind or compatible materials are used for new construction, and the alignment or radius of curb is not substantially changed;
10. Repair or replacement of lighting, signals, and other traffic control devices;
11. Replacement of safety appurtenances such as guardrails, barriers, glare screens, and energy attenuators;

12. Other minor undertakings that the SHPO, FHWA, ACHP and DelDOT may subsequently agree will cause no effect to historic properties, and are therefore exempt from review under the terms of this stipulation. The signatories must agree to add these types of undertakings in writing. DelDOT shall maintain a list of all such approved types of undertakings and include the list in its annual report prepared pursuant to Stipulation XV.B. The parties may then add these project types to the list in Stipulation II.A. during any subsequent amendment to this Agreement under Stipulation XIX.

B. Projects with Minimal Potential to Adversely Affect Historic Properties

The following types of undertakings are activities for which DelDOT routinely utilizes Federal Aid Highway funds. These undertakings generally do not adversely affect historic properties. To qualify for review under Stipulation II.B., the undertaking must be limited to the activities specified in II.B.4, not part of or segmented from a larger undertaking, and on existing transportation facilities, as determined by DelDOT qualified staff. These types of undertakings shall not usually require Section 106 consultation with the SHPO, except as provided for in Stipulations II.B.1 through 3.

1. DelDOT qualified staff shall identify and define an Area of Potential Effect (APE), as defined in Appendix A of this Agreement, then make a reasonable and good faith effort to identify historic properties, in keeping with the provisions of 36 CFR Part 800.4. If DelDOT qualified staff undertake, or cause to be undertaken, an identification and/or evaluation survey for a project subject to this Stipulation, DelDOT shall inform the SHPO of the results of the survey, in accordance with the requirements of Stipulation I.B. of this Agreement, and request SHPO concurrence on findings and determinations. If SHPO fails to respond within 30 days of receipt of adequately documented findings or determinations, DelDOT may assume concurrence and proceed.
2. If DelDOT qualified staff find that there are no historic properties in the APE, the DelDOT qualified staff shall complete the internal tracking form included as Appendix B of this Agreement, and proceed with the undertaking.
3. If DelDOT qualified staff find that an eligible or listed historic property is located within the APE of the undertaking, DelDOT shall:
 - a. Determine if the undertaking will affect the property, as defined in 36 CFR Part 800.16(i), and
 - i. If DelDOT finds that the property will not be affected, then its qualified staff shall complete the internal tracking forms included in Appendix B of this Agreement, and proceed with the undertaking. DelDOT may also use this form to document its intent to make a finding of *de minimis* impact and/or an exception to Section 4(f) determination, as applicable.

- ii. If DelDOT finds that the property will be affected, then DelDOT shall notify the SHPO and other consulting parties, describing any standard provisions that could be applied that would avoid adverse effects using the Minor Projects Proposed Finding of No Adverse Effect form, included as Appendix C of this Agreement. If the SHPO and other consulting parties agree that the provisions are sufficient, or do not comment within 30 days of receiving the notification, the project will be considered to have No Adverse Effect on historic properties provided that the aforementioned standard provisions are included in the project, and DelDOT may proceed with the undertaking. If the parties do not agree, then the parties shall consult in accordance with Stipulation III.D. of this Agreement.
 - iii. If DelDOT anticipates that the property could be adversely affected, DelDOT shall proceed with consultation in accordance with Stipulation III of this Agreement.
 - b. If the affects to a historic property identified under II.B.3.ii. have been evaluated by DelDOT qualified staff and determined to be “no adverse effect” as defined in 36 CFR Part 800, then DelDOT may, as applicable, indicate that it intends to make a finding of *de minimis* impact and/or an exception to Section 4(f) determination on the Minor Projects Proposed Finding of No Adverse Effect form (Appendix C). If the SHPO and other consulting parties agree that the documentation is sufficient, or do not comment within 30 days of receiving the notification, DelDOT will notify FHWA of the finding and may proceed with the undertaking. If the SHPO or another consulting party objects to the finding, then the parties shall consult in accordance with Stipulation III.D. of this Agreement.
- 4. The following types of undertakings will be subject to the provisions of this stipulation:
 - a. Bridge and culvert replacement provided that the structure:
 - i. Is less than 50-years old; and listed in the National Bridge Inventory (defined in Appendix A); or
 - ii. Has been evaluated and found not eligible for listing in the National Register of Historic Places by DelDOT in consultation with SHPO; or
 - iii. Is exempt from Section 106 review under the provisions of the Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges, issued November 2, 2012.
 - b. All work within existing interchanges, within existing medians of existing divided highways, and between an existing highway and an existing adjacent frontage road.

- c. Installation of safety appurtenances such as guardrails, barriers, glare screens, and energy attenuators.
- d. New landscaping in areas previously disturbed.
- e. Installation of new lighting, signals and other traffic control devices.
- f. Safety projects at existing railroad crossing approaches, signals, and signing where highway alignments cross rail alignments at grade.
- g. Roadway rehabilitation and reconstruction which may include construction of turning lanes, parking lots, auxiliary lanes (i.e. truck climbing, acceleration, and deceleration lanes) and shoulder widening within a previously disturbed area.
- h. Placement of fill material on the side slopes of intersection crossroads and access for purposes of flattening these slopes to meet safety criteria, provided that no soil is removed beyond the area of previous disturbance.
- i. Placement of riprap, scour control measures or other erosion control material, including retaining walls, within an area previously disturbed by construction activities, to prevent erosion of waterways, bridge piers, and substructure elements and slopes.
- j. Installation, replacement and/or rehabilitation of curbs, gutters and sidewalks.
- k. Installation, replacement and/or rehabilitation of transit facilities, including bus bays, bus pullouts, shelters and park and ride facilities, located in previously disturbed areas.
- l. Intersection improvements at existing highway intersections where safety control is required, including construction of turn lanes in previously disturbed areas, lighting, signalization and signing, installation of posts, poles, and support bases.
- m. Paving or minor widening of existing shoulders and right of way– this type of project is limited to laying road surface over sub-base gravel within previously disturbed areas. Generally these projects involve slight shoulder widening or flattening for safety reasons.
- n. Installation of noise barriers within previously disturbed areas.
- o. Projects funded or programmed as Transportation Alternatives in accordance with the MAP-21 legislation. Except the following activities:
 - i. Historic Preservation and rehabilitation of historic transportation buildings, structures or facilities, including historic railroad facilities and canals, that are listed or eligible for the National Register;
 - ii. Archaeological activities relating to impacts from implementation of a transportation project;
 - iii. Environmental mitigation to address pollution due to highway runoff;
 - iv. Control or removal of outdoor advertising only when the object or fixture is a historic property.

- p. Other non-vehicular on-alignment FHWA funded transportation projects such as, but not limited to, rail to trail projects, greenways or similar recreational trail projects.
- q. Other minor undertakings that the SHPO, FHWA, ACHP and DelDOT may subsequently agree generally do not adversely affect historic properties, and therefore qualify for review under the terms of this stipulation. The signatories must agree to add these undertakings in writing. DelDOT shall maintain a list of all such approved undertakings and include the list in its annual reports prepared pursuant to Stipulation XV.B. The parties may add these project types to the list in Stipulation II.B.4. during any subsequent amendment to this Agreement under Stipulation XVIII.

III. Projects Subject to SHPO Review

For those undertakings not exempt from SHPO review under terms of Stipulation II.B.4, the process set forth in 36 CFR Part 800.3 to 800.6 shall be followed with DelDOT acting as the Agency Official except where otherwise noted:

- A. Initiation of the Section 106 Process -- 36 CFR Part 800.3
The DelDOT qualified staff is responsible for establishing the undertaking, defining the APE and initiating consultation with the SHPO. Prior to defining the APE, DelDOT shall request the FHWA to initiate consultation with appropriate Tribes. DelDOT shall, in consultation with the SHPO, define the APE and identify and invite other appropriate parties (such as local governments) to participate in the consultation.
- B. Identification of Historic Properties -- 36 CFR Part 800.4
The DelDOT qualified staff is responsible for identifying all historic properties, including landscapes, traditional cultural places and those properties of religious and cultural significance to the Tribes, within the APE, and evaluating the eligibility of historic properties for the NRHP. DelDOT shall carry out these activities in consultation with the SHPO and any other consulting parties, in accordance with 36 CFR Part 800.4.
- C. Finding of No Historic Properties Affected -- 36 CFR Part 800.4 (d)(1)
If DelDOT determines that no historic properties will be affected by the undertaking, DelDOT shall forward the finding and documentation to the SHPO for concurrence, as provided for in 800.11(d). Copies of this documentation will be provided to all consulting parties. If SHPO does not object within 30 days of receipt of adequate documentation, DelDOT may proceed with the undertaking. If the SHPO or another consulting party objects to DelDOT's findings, the documentation will be submitted to FHWA for resolution. If consensus is not achieved, consultation will proceed under Dispute Resolution Stipulation XVII of this Agreement.

D. Assessment of Adverse Effects – 36 CFR Part 800.5

1. If DelDOT determines, and the SHPO concurs, that historic properties will be affected by the undertaking, DelDOT shall apply the Criteria of Adverse Effect, 36 CFR Part 800.5(a)(1). If DelDOT determines that the undertaking will have no adverse effect on historic properties, it will notify the SHPO and other consulting parties in writing with supporting documentation as required by 36 CFR Part 800.11 (e). The SHPO will review this determination and provide written comments to DelDOT within 30 calendar days after receipt of DelDOT's documentation. If neither the SHPO nor another consulting party objects to DelDOT's no adverse effect determination, DelDOT shall document that finding, make it available to the consulting parties and to the public upon request, and may then proceed with the undertaking as planned. If the SHPO or another consulting party objects to the DelDOT finding, DelDOT shall attempt to resolve the objection through consultation. If the objection cannot be resolved, DelDOT will refer the objection to FHWA and consultation will continue under Dispute Resolution Stipulation XVII of this Agreement.
2. If DelDOT in consultation with the SHPO determines that the undertaking shall have an adverse effect on historic properties, DelDOT shall notify FHWA, other consulting parties if any, and ACHP and proceed with consultation under 36 CFR Part 800.6.

IV. Public Participation

DelDOT shall, through opportunities afforded by DelDOT project development process, seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects to historic properties and confidentiality concerns of private individuals and businesses. DelDOT will use existing procedures to solicit public participation early in the project development process and consistent with 36 CFR Part 800.2 (d).

V. Change in Nature or Scope of Undertaking

If, after conclusion of the processes outlined in Stipulations II and III of this Agreement, any undertaking is modified in a manner that substantially changes the undertaking's methods, materials, footprint, or design, DelDOT shall consult with SHPO and other consulting parties to reassess the appropriateness of the initial findings and determinations. If there is disagreement, consultation will continue under Dispute Resolution Stipulation XVII of this Agreement.

VI. Treatment of Human Remains and Burials

Unmarked human remains and burials are subject to protection under the Delaware Unmarked Human Remains Act (7 Del.C. Chapter 54). If human remains and/or burials are discovered, DelDOT shall ensure that work in that portion of the project stop immediately. The DelDOT project supervisor will immediately (within 24 hours) notify DelDOT's Archaeologist who in turn will notify both FHWA and the SHPO. The remains and/or burials will be covered and/or protected in place in such a way that minimizes further exposure of and damage to the remains and/or burials. FHWA, DelDOT, and SHPO will ensure that any treatment plan for the disposition of remains is fully implemented. Avoidance and preservation in place is the preferred option for treating human remains.

If the remains are Native American, FHWA will immediately notify the Federally Recognized Indian Tribes. FHWA and DelDOT will forward information regarding Native American discoveries to the SHPO and the federally recognized tribes for review and comments. This will occur as soon as possible, within a period of no longer than two (2) weeks. FHWA will request that the parties comment on the information within two (2) weeks of receipt. FHWA will then consult with the federally recognized tribes, the SHPO, and DelDOT to determine an appropriate course of action in accordance with 36 CFR Part 800, and taking into account the above cited state law. The SHPO will comply with the above cited state law and the Native American Graves Protection and Repatriation Act of 1990 (PL 101-601) with regard to disposition of the remains and/or associated funerary objects, as applicable.

VII. Post Review Discoveries

In the event that previously unidentified cultural resources are discovered or unanticipated effects to known historic properties occur during construction, DelDOT shall instruct the contractor to cease construction in the immediate area, and immediately notify FHWA, and in compliance with 36 CFR Part 800.13, consult with the SHPO. If said discovery or unanticipated effects pertain to resources of Native American affiliation, FHWA and DelDOT shall include the Federally Recognized Indian Tribes in the consultation. The FHWA will notify the SHPO and the Federally Recognized Indian Tribes within two (2) working days of the discovery. The FHWA, DelDOT, and the SHPO will meet at the location of the discovery within five (5) days of the initial notification to determine appropriate treatment of the discovery prior to resumption of construction activities within the area of discovery. DelDOT shall ensure that construction work within the affected area does not proceed until appropriate treatment measures are developed and implemented or the determination is made that the resource is not eligible for the National Register of Historic Places. If the affected resource is of Native American affiliation, FHWA shall first consult with the Federally Recognized Indian Tribes before implementing any such treatment option.

VIII. Disposal Site Review

For projects that qualify as a Categorical Exclusion as defined under 23 CFR Part 771.117, no review of locations to be used for disposal of project-related materials will be required. For projects that qualify as an Environmental Assessment as defined under 23 CFR Part 771.119, DelDOT will consult with the SHPO to determine the need for disposal site review; if DelDOT and SHPO agree that review is needed, DelDOT qualified staff shall conduct such reviews. For projects that require an Environmental Impact Statement as defined under 23 CFR Part 771.123, review of disposal sites is required and DelDOT qualified staff shall conduct such reviews and document the findings in the project general file. DelDOT will consult the SHPO in cases where such activities may affect historic properties and the contractor(s) could not identify an alternative location.

IX. Re-Evaluation of Findings

DelDOT shall reevaluate all Section 106 findings and determinations under this Programmatic Agreement for projects that have not been funded for construction within five (5) years following completion of the Section 106 review process. The reevaluation shall establish whether the findings and documentation concerning the undertaking remain accurate, and will go through Section 106 review in accordance with the terms of this Agreement.

X. Emergency Undertakings

As defined in 36 CFR Part 800.12, an emergency undertaking is an essential and immediate response to a disaster or emergency formally declared by the President or Governor; such undertakings can be separated into two categories which shall be addressed as follows:

- A. Undertakings that will be implemented within thirty (30) days after the formal declaration of the disaster or emergency: DelDOT qualified staff shall immediately determine if the emergency response could affect the physical integrity, character and/or use of historic properties. If so, DelDOT shall notify FHWA, SHPO and ACHP within 48 hours. The parties will then consult, review and comment on the emergency undertaking, as soon as possible to determine how to, as fully as practicable under the circumstances, avoid, minimize and/or mitigate for any potential adverse effects to historic properties. Nothing in this Agreement shall be construed as prohibiting DelDOT from taking such actions as it deems necessary to stabilize the situation to protect the safety of the travelling public.

- B. Immediate rescue and salvage operations conducted to preserve life or property such as necessitated by natural disaster or other catastrophic events are exempt from the provisions of Section 106 and this Programmatic Agreement, in accordance with 36 CFR Part 800.12(d).

XI. Curation of Archaeological Materials

All objects of historical or archaeological value or interest found on archaeological sites owned or controlled by the State and related records resulting from research, surveys and excavation under this Agreement (Collections) shall be curated at the Division of Historical and Cultural Affairs (the Division), or its designee, following the policies of the institution. DelDOT shall ensure that all records and materials resulting from the archaeological investigations will be processed, prepared for, and curated in accordance with 36 CFR Part 79 and the Division's "Guidelines for the Curation of Archaeological Collections" (2001) or its successor.

XII. Preservation of Historic Properties in DelDOT Ownership

This stipulation applies only to property acquired with the use of federal funds as part of a federally funded project administered under this Agreement, when through consultation the parties have agreed that preservation in place is the preferred treatment.

- A. DelDOT, in consultation with SHPO and FHWA, will develop appropriate legal instruments such as, but not limited to, preservation easements or preservation covenants for historic properties DelDOT acquires or uses in association with undertakings subject to this Agreement, to ensure protection from future actions or to ensure appropriate treatment.
- B. FHWA, DelDOT and SHPO shall determine the need for and negotiate the terms of any legal instruments that would ensure long-term preservation or protection of the historic properties. Any such legal instrument shall include, at a minimum, the following elements:
 - 1. A clearly defined list of allowed uses and prohibited uses of the site; and
 - 2. For standing structures, a mechanism for periodic monitoring of the site to ensure that protection measures are being appropriately implemented and maintained; and
 - 3. An acknowledgement that protection measures are being instituted in order to minimize or mitigate the Project's adverse effects to a historic property; and
 - 4. A prohibition on any party, its successors, heirs or assigns, from terminating, modifying, altering or otherwise setting aside any such legal instrument unless the party, prior to taking such action: first provides the signatories to this

Agreement with written justification for termination; then consults with the signatories to develop a new treatment plan to address the adverse effects pursuant to 36 CFR Part 800.5, regardless of whether the term of this Agreement has expired or not; and finally obtains the signatories' written concurrence on the plan.

- C. Occasionally property is acquired in excess of what is needed for operational right-of-way and associated design requirements (e.g. land-locked parcels). In these cases, should the need or desire arise to dispose of this excess right-of-way (to be leased, transferred, or sold), preservation covenants for that subject parcel will first be considered by DelDOT, FHWA, and SHPO before DelDOT takes any action to divest itself from such lands. The parties will determine if the subject parcel(s) contains, or has the potential to contain, any historic properties. If so, the parties will determine the need for and negotiate the terms of any legal instruments that would ensure long-term preservation of such properties. Any such legal instrument shall include, at a minimum, the elements described in Stipulation XII.B. of this Agreement. This will adequately address any reasonably foreseeable adverse effects that could occur due to transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions to ensure long-term preservation (or mitigation) of historic properties (36 CFR Part 800.5(a)(2)(vii)).

DelDOT shall maintain an inventory of all properties protected by legal preservation instruments, and shall make that inventory available to the SHPO upon request.

XIII. Historic Bridges

- A. In accordance with the provisions of the Program Comment Issued for Streamlining Section 106 Review for Actions Affecting Post-1945 Concrete and Steel Bridges, issued November 2, 2012, DelDOT commits to maintain and update the Delaware Historic Bridge Survey, in consultation with the SHPO. DelDOT shall initiate the next update within six (6) months of the execution of this Agreement.
- B. The signatories will consider developing criteria to identify select historic bridges for preservation from an up to date historic bridge survey, and develop a program to implement preservation of the select bridges.
- C. DelDOT commits to using the bridge inspection/maintenance program to identify and address the needs of historic bridges in the State and, as much as practical, to preserve their significant character and ensure their long-term preservation, while assuring safety, in consultation with SHPO and other interested parties.

XIV. Cultural Resource Planning Studies

DelDOT, in consultation with SHPO, commits to assist in creating, reviewing, and/or updating historic contexts based on a synthesis of information obtained from DelDOT projects and other related information.

XV. Review and Monitoring of the Agreement

- A. DelDOT shall maintain documentation on the project and tracking forms for undertakings reviewed under Stipulation II.B.2. and II.B.3.a.i. of this Agreement in the project general file. DelDOT will submit quarterly to FHWA and the SHPO copies of completed tracking forms provided for under this Agreement.
- B. DelDOT shall prepare and provide to all parties to this Agreement, an annual report by calendar year addressing the number of projects reviewed under Stipulations II.B.2. and II.B.3.a.i of this Agreement. The report shall be submitted to FHWA, ACHP, and SHPO on or before March 1 of the following year.
- C. Within 30 days of submitting the annual report, DelDOT shall invite FHWA, the ACHP and the SHPO to meet to discuss the report and the implementation of the terms of this Agreement.
- D. ACHP and SHPO, at any time, may monitor, review, and audit the delegated activities carried out pursuant to this Programmatic Agreement, and ACHP shall review such activities if so requested. The FHWA and DelDOT shall cooperate with ACHP and the SHPO in carrying out their monitoring and review responsibilities.

XVI. Dispute Resolution

- A. Should the SHPO or any consulting party object to any plans, specifications provided or determinations made pursuant to this Agreement, the FHWA shall consult with the objecting party and the SHPO to resolve the objection. If the FHWA determines that the objection cannot be resolved, the FHWA shall obtain the recommendation of ACHP (any disputes regarding eligibility of a property for listing in the National Register of Historic Places shall be referred to the Keeper). ACHP shall provide its recommendations within thirty (30) days of receipt of adequate documentation. In accordance with 36 CFR Part 800, the FHWA shall consider ACHP's comments in reaching a final decision on the proposed undertaking and shall report its decision to ACHP.
- B. Any ACHP recommendation provided in response to a request under this Stipulation will be taken into account by the FHWA with reference only to the subject of the dispute. The FHWA's responsibility to carry out actions under this Agreement that are not subject of the dispute will remain unchanged.

XVII. Amendment or Termination

- A. Any party to this Agreement may propose to FHWA that the Agreement be amended, whereupon FHWA shall consult with the other parties to consider such an amendment.
- B. If the FHWA or DelDOT determines that it cannot implement the terms of this Agreement, or the SHPO or ACHP determines that the Agreement is not being properly implemented, FHWA, DelDOT, ACHP or the SHPO may propose to the other parties to this Agreement that it be terminated.
 - 1. The party proposing to terminate this Agreement shall notify all signatories, explaining the reasons for termination and affording them at least thirty (30) days to consult and seek alternatives to termination. The parties shall then consult.
 - 2. Should all consultation fail FHWA, DelDOT, ACHP or the SHPO may terminate the Agreement by so notifying all parties in writing.
 - 3. Should this Agreement be terminated, FHWA shall conduct individual project review pursuant to 36 CFR Part 800.

XVIII. Term of Agreement

This Programmatic Agreement will become effective on the date it is signed by the ACHP and will continue in force five (5) years from the date of the final signature. Six (6) months prior to the end of this five year period, the parties to this Agreement will consult to determine if extension or other amendment of the Agreement is needed, and if so agree on the length of the extension. No extension or amendment will be considered in effect unless all the signatories have agreed to it in writing. If no extension is pursued in writing, the programmatic agreement is void and FHWA shall then consult with SHPO on all individual undertakings in accordance with 36CFR Part 800.

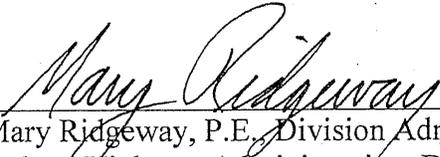
Execution and implementation of this Programmatic Agreement evidence that the Federal Highway Administration has afforded ACHP a reasonable opportunity to comment on the Program and its individual undertakings in Delaware, and that FHWA has taken into account the effects of the Program on historic properties and has complied with Section 106 of the NHPA.



Timothy A. Slavin, State Historic Preservation Office
Delaware State Historic Preservation Officer

8.28.13

(date)



Mary Ridgeway, P.E., Division Administrator
Federal Highway Administration, DELMAR Division,
Delaware Office

8/30/13

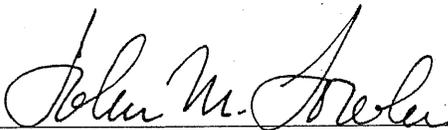
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Natalie Barnhart, Chief Engineer
Delaware Department of Transportation

8/30/13

(date)



John M. Fowler, Executive Director
Advisory Council on Historic Preservation

9/19/13

(date)

APPENDIX A:
Definitions for Programmatic Agreement on
the Federal Aid Highway Program

- 1. Previously Disturbed:** As pertains to Stipulation II. of this Agreement, shall be understood to mean areas in which the natural stratigraphic soil profile has been significantly altered due to construction activities (e.g., cut and fill, grading). This definition does not include relatively minor alterations of the profile such as are caused by plowing or intermittent disturbance such as caused by logging.
- 2. Area of Potential Effect (APE):** "The geographic area or areas within which an undertaking may directly *or* indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." (36 CFR Part 800.16(d)). For the purposes of this Agreement, this definition shall be understood to include, but not necessarily limited to, an undertaking's proposed footprint of construction, right of way acquisition, permanent and temporary easements, as well as any staging, stockpile, disposal, access, new borrow, stormwater management and wetland mitigation areas, or other ancillary activity area(s) directly associated with the undertaking.
- 3. Historic Bridge:** A bridge, culvert, *or* similar type of structure that is listed in, or has been determined eligible for listing in the National Register of Historic Places, either through the *Delaware Historic Bridges Survey and Evaluation* (2nd Edition, Revised; Lichtenstein Consulting Engineers, 2000), any subsequent updates thereto, or individual evaluations made on a case by case basis.
- 4. National Bridge Inventory:** The National Bridge Inventory, (NBI) is a database, compiled by the FHWA, with information on all bridges in the United States that have roads passing above or below. Initiated in 1972, the bridge inventory is developed with the purpose of having a unified database for bridges, including identification information, bridge types and specifications, operational and structural conditions, bridge data including geometric data and functional description, inspection data, etc. Any bridge located on a public road which length is more than 20 feet (6 meters) long used for carrying traffic is included.
- 4. Federally Recognized Indian Tribes (Tribes):** Tribes means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (36 CFR Part 800.16(m)).

APPENDIX B:
FINDING OF NO HISTORIC PROPERTIES AFFECTED
 Programmatic Agreement Tracking Form

Date:

Project Name/Location:

State Contract No.:

Federal Aid Project No.:

Programmatic Agreement Project Type II.B.4. and description

Exempt Under the Post 1945 Bridge Program Comment:

In accordance with Stipulation II.B.2 or II.B.3a.i. of the 2013 Programmatic Agreement for the Federal Aid Highway Program in Delaware, DelDOT Qualified Staff have reviewed the above-referenced project and determined that no historic properties will be affected. This form provides the information supporting that finding.

Area of Potential Effects (APE) consists of (describe):

Efforts to Identify Historic Properties: DelDOT conducted survey for this project?

No. Reason:

Yes. Title of report:

Are there resources within the APE? No Yes, as described in the table

NAME or TYPE	CRS #	DATE	DESCRIPTION	NR STATUS
(Barnes House) (Site 7NC-F-128)	(N00000)	(c. 1910) (c. Woodland I)	(bungalow) (quarry site)	(listed, elig., unk.)

More? Attach pages

Justification for Finding:

By this form, DelDOT is documenting its intent to apply a finding of *de minimis* impact (23 CFR Part 774.5(b)) based on a finding of no historic properties affected and/or an exception to the requirement for Section 4(f) approval 23 CFR Part 774.13.

DelDOT Architectural Historian Qualified Staff Name

Signature _____ Date _____

Justification for Finding:

DelDOT Archaeologist Qualified Staff Name

Signature _____ Date _____

APPENDIX C:
DELAWARE DEPARTMENT OF TRANSPORTATION
 Minor Projects: Proposed Finding of No Adverse Effect
 Applying Standard Design or Treatments

Date:
Project Name/Location:
State Contract No.:
Federal Aid Project No.:
Programmatic Agreement Project Type: II.B.4.

, Director
 State Historic Preservation Officer
 Division of Historical and Cultural Affairs
 21 The Green
 Dover, DE 19901

Dear :

The Delaware Department of Transportation (DelDOT) proposes to conduct an undertaking subject to compliance with Section 106 of the National Historic Preservation Act, and its implementing regulations, 36 CFR Part 800. The undertaking involves

In accordance with Stipulation II.B.1. of the 2013 Programmatic Agreement (Agreement) for the Federal Aid Highway Program in Delaware, DelDOT Qualified Staff have identified the following historic properties/potential historic properties in the Area of Potential Effect:

NAME or TYPE (Barnes House)	CRS # (N00000)	DATE (c. 1910)	DESCRIPTION (bungalow)	NR STATUS (listed, elig., unk.)

More? Attach pages

Further, pursuant to Stipulation II.B.3.a.ii. of the Agreement, DelDOT proposes that the undertaking, as it is currently defined, will have No Adverse Effect on these historic properties, as DelDOT will ensure that the standard design requirements are met and/or other provisions are applied, as identified on the attached checklist.

By this form, DelDOT is also notifying you of its intent to apply a finding of *de minimis* impact (23 CFR Part 774.5(b)) based on a finding of no adverse effect and SHPO occurrence and/or an exception to the requirement for Section 4(f) approval 23 CFR Part 774.13.

Date: _____ **DelDOT Proposed Standard NAE Finding for:**

If you agree with this finding, please sign below. If within 30 days you notify DelDOT that you do not agree with this finding, consultation will proceed in accordance with Stipulation III.D. of the Agreement.

Sincerely,

, Manager
DelDOT Environmental Studies

By: Signature _____
DelDOT Qualified Staff Name

Enclosures? If so, list:

cc: _____, FHWA
_____, FHWA
_____, SHPO Reviewer

List Consulting Parties:

,
,
,

.....
SHPO Response: CONCUR DO NOT CONCUR **Reason:**

Director/State Historic Preservation Officer

By: Signature _____
Name/Title

Date: _____

Date:

DelDOT Proposed Standard NAE Finding for:

CHECK ALL THAT APPLY

Standard note(s) will be included in the project plans, specifications and/or other contract documents that instruct the contractor to:

- Alert all contractors and subcontractors of the presence and location(s) of the historic properties, contributing elements thereof.
- Follow guidance in DelDOT's *Historic Bridge Manual: Guidance and Treatment for Delaware's Historic Bridges*, as applicable.
- Avoid any use of the property (no Right of Way acquisition, Temporary Construction Easement, or Permanent Easement). All properties? If not, specify
- Limit any use of the property to area(s) specified in the plans. All properties? If not, specify
- Prepare mock up, test panels, or samples of replacement materials or finishes for review and approval by DelDOT Environmental Studies Qualified Staff. DelDOT will invite the SHPO and consulting or interested parties to review these materials. DelDOT will document decisions, in conjunction with the District Engineer.
- If unforeseen damage to any historic properties occurs, notify DelDOT Environmental Studies Qualified Staff prior to implementing repairs to ensure that repairs will meet *The Secretary of The Interior Standards*, as determined by DelDOT in consultation with SHPO and other consulting parties.
- Notify DelDOT Environmental Studies Qualified Staff prior to implementing any changes affecting location, design, methods of construction, materials, or footprint of the project, to ensure the proposed change will not alter the finding of No Adverse Effect.

Other Provisions:

- Placement of geotextile or other temporary, protective material on ground surfaces to protect known or potential archaeological site areas during construction. DelDOT shall ensure that installation and removal of such materials does not result in disturbance of the ground surface or soil compaction.
- DelDOT Environmental Studies Qualified Staff to attend Pre-Construction meeting to explain special provisions to contractors and inspectors.
- Other, similar provisions that will avoid adverse effects; describe: