

ACHP CHECKLIST
For
FHWA SECTION 106 PROGRAMMATIC AGREEMENTS

INTRODUCTION

June 15, 2013

What is a Section 106 Programmatic Agreement? Programmatic Agreements (PAs) may be negotiated among a Federal agency, the relevant State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (ACHP) to govern 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 projects or multiple undertakings (36 CFR 800.14[b]). PAs are used by the Federal Highway Administration (FHWA) to provide an FHWA Division and State Department of Transportation (DOT) with a tailored approach to compliance with Section 106.

Development of a PA is often initiated by a State DOT, in consultation with the State Historic Preservation Office (SHPO), to streamline Section 106 review for routine projects. PAs are sometimes also used to develop standard treatments for a certain type of historic property, such as historic bridges or archaeological properties. FHWA must actively participate in consultation and be a signatory to any PA that alters the review process for FHWA undertakings. The ACHP and the relevant SHPO must be invited to participate in the development of any PA, and for statewide PAs, both must be signatories to the agreement. FHWA should consult other federal agencies with jurisdiction, such as the U.S. Army Corps of Engineers, to determine if they would also like to be a party to the PA.

Most State DOTs now operate under Section 106 PAs for at least a portion of their Federal-Aid Highway Program. A standard format divides the PA into three basic sections: (1) A preamble (WHEREAS clauses); (2) Stipulations (the body of the PA, including administrative provisions; and (3) signatures of the parties to the PA. Several links are provided below to existing PAs that serve as examples of this format.

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Laying the groundwork:

- Identify specific goals for improving efficiencies in consultation, and determine whether a PA is really needed to accomplish those goals (Note that 36 CFR 800.2[c][4] allows federal agencies to authorize an applicant to initiate consultation with SHPO/THPO and others without a PA);
- 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, Preservation Pennsylvania, etc.) and invite their participation.
- Be responsive to comments and concerns raised by consulting parties, as well as to those of the SHPO and the ACHP, working with them to address issues raised.

Preparation of the Preamble (Whereas clauses):

- Clearly identify lead federal agency and 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 they 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 statement at the beginning of the Stipulations section stating: “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:

- Keep it simple! 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*,” or include a glossary defining these terms.
- 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;
- Exempted categories of undertakings are common elements of Section 106 PAs and can be a valuable tool for expediting the review of activities that have little to no potential to cause effects to historic properties. Exempted categories (that is, types of projects that require no review by SHPO) should be limited to actions with little to no

potential to affect historic properties regardless of whether a historic property is present. This category should be separated from actions that could cause effects if they occur within a historic site or district;

- ❑ Screened exemptions: If a category of undertaking requires an inventory or screening by a cultural resource professional to ensure that it will not affect historic properties, the PA should clearly identify the conditions for a project in this category to be exempted from SHPO or FHWA review;
- ❑ 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, limited or 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:

A list of FHWA Statewide Section 106 Programmatic Agreements
[http://www.achp.gov/docs/List of FHWA Statewide PAs Currently in Effect 29nov2013.pdf](http://www.achp.gov/docs/List%20of%20FHWA%20Statewide%20PAs%20Currently%20in%20Effect%2029nov2013.pdf)

AASHTO Center for Environmental Excellence Programmatic Agreement Library (PAL) Database:
http://environment.transportation.org/pal_database

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

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