Programmatic Agreement
Among the Federal Highway Administration, Kentucky Transportation Cabinet, Kentucky State Historic Preservation Officer, and the Advisory Council on Historic Preservation
Regarding
Implementing Section 106 of the National Historic Preservation Act For Federally Funded Road Projects in the Commonwealth of Kentucky

WHEREAS, the Federal Highway Administration (FHWA), under the authority of 23 USC 101, implements the Federal-aid Highway Program (Program) in the Commonwealth of Kentucky by funding and approving state and locally sponsored transportation projects that are administered by the Kentucky Transportation Cabinet (KYTC); and

WHEREAS, the Kentucky Division Administrator, FHWA, is the "Agency Official" responsible for ensuring that the Federal-aid Highway Program in the Commonwealth of Kentucky complies with Section 106 of the National Historic Preservation Act, as amended (NHPA), and codified at its implementing regulations, 36 CFR Part 800, and effective January 11, 2001; and

WHEREAS, FHWA has determined that implementation of the Program in Kentucky 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 Kentucky State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) pursuant to 36 CFR 800.14(b); and

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

WHEREAS, FHWA has notified the public, interested organizations, and federally recognized Indian tribes with ancestral lands in Kentucky (Cherokee Nation, Eastern Band of Cherokee Indians, United Keetoowah Band of Cherokee Indians, The Shawnee Tribe, Absentee Shawnee Tribe of Indians of Oklahoma, Eastern Shawnee Tribe of Oklahoma, Miami Tribe of Oklahoma, Peoria Indian Tribe of Oklahoma and Chickasaw Nation) about this Agreement, has requested their comments, and has taken any comments received into account; and

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

NOW, THEREFORE, FHWA, the SHPO, ACHP, and KYTC agree that the Program in Kentucky shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in Kentucky 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 shall ensure that the following measures are carried out:

I. Definitions

A. Unless otherwise specified, "days" shall refer to calendar days throughout this document.

B. Small-Scale" Projects: KYTC's "Small Scale" projects are typically processed as Categorical Exclusions (CEs) as defined in the National Environmental Policy Act (NEPA), as well as in regulations of the Council on Environmental Quality (CEQ) and FHWA. KYTC and FHWA further subdivide these actions into one of four levels depending upon the degree of impact to environmental resources. For purposes of this Agreement, "Small Scale" projects shall be considered as those satisfying the criteria for processing as CE for Minor Projects (CEMP), CE Level 1 and CE Level 2. Project types that are routinely processed as "Small Scale" projects are identified in Attachments 1 and 2 of the accompanying Handbook (see III. C).

C. "Large-Scale" Projects: KYTC's "Large Scale" projects are those that involve major reconstruction or new construction, are complex or are controversial and thus have higher potential for causing environmental impacts than "Small Scale" projects. "Large Scale" project impacts are typically evaluated under NEPA using a CE Level 3, Environmental Assessment (EA) or Environmental Impact Statement (EIS).

II. Applicability

A. This Agreement sets forth the process by which the Federal Highway Administration (FHWA), with the assistance of the KYTC, will meet its responsibilities pursuant to Section 106 and Section 110 of the NHPA (16 U.S.C. 470f) for Federal-aid Highway projects (undertakings) in the Commonwealth of Kentucky . The purpose of the Agreement is to improve the efficiency of Section 106 review for roadway and bridge construction projects funded by FHWA that have little to no potential to cause effects to historic properties, or that otherwise do not warrant case-by-case consultation with the SHPO.

B. The agreement does not apply to projects developed through the KYTC Office of Local Programs.

III. Delegation of Responsibilities to the KYTC

A. Through the execution of this Agreement, FHWA delegates to KYTC, many aspects of the routine Section 106 coordination for roadway and bridge construction projects. Delegation of this responsibility may not be transferred to any other agency or party. Except as provided for in stipulation III.D, KYTC may independently perform the work and consultation described in the following sections of 36 CFR Part 800 on behalf of FHWA as follows:

36 CFR 800.3
(1) Establish Undertaking
(2) Coordinate with other reviews
(3) Identify the appropriate SHPO
(4) Plan to involve the public
(5) Identify other consulting parties
(6) Expediting consultation

36 CFR 800.4
(1) Determine scope of identification (including Area of Potential Effect - APE)
(2) Identify historic properties
(3) Evaluate historic significance
(4) Results of identification and evaluation

36 CFR 800.5
(1) Apply criteria of adverse effect
(2) Finding of no adverse effect
(3) Consulting party review
(4) Results of Assessment

B. KYTC will ensure that all cultural resources staff meet the qualifications set forth in the Secretary of Interior's Professional Qualification standards (48 FR 44716) for such work. These qualified KYTC cultural resources personnel shall have the primary responsibility for implementing this Agreement. Consultants working on projects on behalf of FHWA and KYTC must also meet these standards as well as the prequalification requirements of KYTC and SHPO.

C. Upon the written agreement of SHPO and FHWA, KYTC shall finalize a *Handbook for Implementing Section 106 of the National Historic Preservation Act for Federal Aid Highway Projects in Kentucky* (Handbook). The Handbook will be consistent with the stipulations in this Agreement, and KYTC will provide a copy of the Handbook to the ACHP, and make it available to the public. All work carried out under this agreement will be conducted in accordance with the procedures, policies, and standards in the Handbook. KYTC may from time to time revise the Handbook in consultation with FHWA and SHPO. Revisions to the Handbook will be effective upon the written agreement of SHPO and FHWA. The revised Handbook will also be provided to the ACHP for its files and made available to the public.

D. FHWA will be responsible for the following actions, which are not delegated to KYTC:

1. FHWA shall initiate consultation with federally recognized Indian tribes in accordance with federal requirements for government-to-government consultation.

2. In the event of a dispute, regardless of the nature (designation of Area of Potential Effect, suitability of consulting parties, phased identification, eligibility, and effects determinations) FHWA shall be involved in the resolution in accordance with 36 CFR Part 800.

3. Consultation for projects where adverse effects to historic properties are unavoidable.

4. Consultation on a Memorandum of Agreement (MOA).

5. Consultation on Section 4(f) *de minimis* findings.

IV. Consultation with federally recognized Indian tribes

In recognition of the unique government-to-government relationship between the Federal government and federally recognized Indian tribes, FHWA shall take the lead in identifying and establishing consultation with Indian tribes consistent with the requirements of 36 CFR 800.2(c)(2) and 36 CFR 800.3(c) – (f). FHWA shall ensure that consultation with Indian tribes is initiated early in project planning to identify

cultural, confidentiality, or other concerns and to allow adequate time for consideration of such concerns in the planning process.

V. Participation of other consulting parties and the public

A. KYTC will seek and consider the views of the public, as appropriate, in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, and the likely interest of the public in the effects on historic properties. Public involvement in planning and implementation of undertakings covered by this Agreement shall be governed by FHWA's and KYTC's policies and procedures for compliance with the National Environmental Policy Act (NEPA).

B. Certain small-scale projects covered by this Agreement may require that KYTC involve consulting parties. KYTC will identify consulting parties pursuant to, and their participation in undertakings covered under this Agreement shall be governed by, the Handbook and the requirements of 36 CFR 800.2(c)(5) and 800.3(f).

VI. "Small Scale" Projects Exempted from Review

A. Project types identified in Attachment 1 are those that would not typically result in any effect to historic properties regardless of the setting or surroundings where the work is undertaken.

B. For any project of a type listed in Attachment 1, KYTC will document the project in accordance with the procedures in the Handbook and may proceed without further review by FHWA or SHPO.

VII. Review of "Small-Scale" Projects and "Large Scale" Projects

A. For those projects not exempt from review under terms of Stipulation VI, KYTC shall review the undertakings in accordance with 36 CFR Part 800, following the procedures in the Handbook.

B. KYTC shall complete the requirements of 36 CFR 800.3 and 800.4 to initiate consultation and complete the identification and evaluation of historic properties by carrying out the requirements of the Handbook.

C. KYTC may apply streamlining procedures contained in the Handbook to "Small Scale" projects with no historic properties affected or a finding of no adverse effect.

D. If KYTC determines, in consultation with the SHPO and consulting parties, that the undertaking will have an adverse effect on historic properties, it will notify FHWA and FHWA will ensure the Section 106 process is completed in accordance with 36 CFR 800.6. FHWA will be responsible for making a finding of adverse effect and the resolution of those effects.

VIII. Emergency Situations

As defined in 36 CFR 800.12, emergencies are separated into two categories:

A. Disasters or emergencies declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. These occurrences can require emergency highway system/ facility repairs that are necessary to 1) protect the life, safety,

or health of the public; 2) minimize the extent of damage to the highway system/ facilities; 3) protect remaining highway facilities; and/or 4) restore essential traffic.

In situations where this definition applies:

1. Repairs can occur regardless of funding category, and regardless of declarations made by federal, state, or local agencies. These emergency repairs, including temporary traffic operations, are typically undertaken during or immediately following the occurrence that necessitated the action.

2. For repairs initiated within the first 30 days of the declaration, the processing of environmental documentation will happen concurrently or after the fact. In these cases, KYTC shall comply to the extent possible with the stipulations of this Agreement, but reviews will likely be conducted after the emergency work is completed. For projects taking longer than 30 days to initiate the repair, Section VIII of this Agreement will not apply.

3. Notification in writing or electronic mail (when appropriate) of an emergency action shall be provided to SHPO within 48 hours of the initial report. The notification will be clearly identified as an emergency situation and shall include an explanation of how the action meets the requirements for emergency as defined herein. The notification shall also include a brief description of the resource(s) involved, the anticipated effect of the emergency action on the resource(s), and the anticipated time frame available for comment.

4. Work required to restore the damaged resource or facility to its original condition that is beyond the scope of the emergency repair will comply with the procedures in Sections III-V of this Agreement. In these situations, KYTC may request an expedited review by SHPO and consulting parties.

B. In accordance with 36 CFR 800.12(d), emergencies that are defined by 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.

IX. Administrative Provisions

A. Dispute Resolution

If the SHPO, KYTC, or ACHP objects in writing to either KYTC or the FHWA regarding any action carried out or proposed with respect to the implementation of the Agreement, then FHWA shall consult with the objecting party to resolve the objection. If after such consultation, FHWA determines that the objection cannot be resolved through consultation, then FHWA shall forward all documentation relevant to the objection to the ACHP, including FHWA's proposed response to the objection within thirty (30) days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

1. Advise FHWA that the ACHP concurs in FHWA's proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or
2. Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection.

Should the ACHP not exercise one of the above options within thirty (30) days after receipt of all pertinent documentation, FHWA may assume the ACHP's concurrence with the proposed response to the objection.

If a consulting party or a member of the public object to actions proposed by KYTC for an undertaking carried out under this agreement, FHWA will consult with the objecting party to resolve the objection in accordance with the requirements of 36 CFR 800.4 – 800.6.

B. Amendments

Any party to this Agreement may request that it be amended, whereupon the parties shall consult to consider such amendment. The amendment will be effective on the date a copy is signed by all of the original signatories. KYTC may revise Attachment 1 of this Agreement (exempted projects) without formally amending the Agreement, provided it consults with the other signatories regarding the proposed revisions and obtains the written concurrence of the FHWA, SHPO, and ACHP.

C. Termination

Any party to this Agreement may terminate it by providing thirty (30) days written notice to the other parties, provided that the parties shall consult during the period prior to termination to seek agreement on amendments or other action that would avoid termination. In the event of termination, FHWA shall conduct individual project reviews pursuant to 36 CFR 800.

D. Duration of Agreement
This agreement shall become effective upon its approval and execution by the FHWA Kentucky Division Administrator and the ACHP, and shall remain in effect until December 31, 2012. Thereafter, this agreement shall be automatically renewed for successive two year (biennial) terms unless any party gives written notice to the other parties that the agreement will not be renewed beyond the then current term of the agreement.

E. Evaluation of the Programmatic Agreement
Once this agreement is executed, KYTC, FHWA and SHPO shall meet by October 31, 2012 to evaluate its effectiveness and, if warranted, suggest revisions to its stipulations. KYTC, on behalf of FHWA, will notify the ACHP and it may participate at its discretion. This notification may be done informally (e.g. via email).

Execution and implementation of this Agreement evidences that the Federal Highway Administration has satisfied its Section 106 responsibilities for all individual undertakings of the Federal-Aid Highway Program in Kentucky.

SIGNATORIES:

FEDERAL HIGHWAY ADMINISTRATION

5/20/2011

Jose Sepulveda, Kentucky Division Administrator **Date**

KENTUCKY TRANSPORTATION CABINET

5/10/11

Michael W. Hancock, Secretary **Date**

Approved As To Form And Legality:

5/5/11

Office of Legal Services **Date**

STATE HISTORIC PRESERVATION OFFICE

5/13/2011

Mark Dennen, Executive Director **Date**
Kentucky Heritage Council

ADVISORY COUNCIL ON HISTORIC PRESERVATION

6/2/11

John M. Fowler, Executive Director **Date**

Attachment 1 – Small Projects Unlikely to Affect Historic Properties
(All work within existing ROW)

1. General highway maintenance, including filling potholes, crack sealing, mill and resurfacing, joint grinding/milling, etc.

2. Guardrail replacement where no new bank stabilization is required.

3. The installation or maintenance of highway signs, pavement markings and/or contemporary fencing within the existing ROW.

4. General pavement marking or "line painting" projects.

5. The installation of raised pavement markers.

6. Herbicidal spraying within existing ROW.

7. Mowing or brush removal/trimming projects within existing ROW

8. Improvements to existing KYTC/County maintenance facilities.

9. Study-type projects (i.e. feasibility studies, etc.).

10. Approval of utility installations along or across a transportation facility provided no drainage of wetlands will occur.

11. Acquisition of scenic easements.

12. Transfer of federal lands to another federal agency pursuant to USC 317 when the subsequent action is not an FHWA action.