

PROGRAMMATIC AGREEMENT  
AMONG THE FEDERAL HIGHWAY ADMINISTRATION, THE U.S. ARMY CORPS OF  
ENGINEERS, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE  
PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER AND THE  
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION REGARDING  
IMPLEMENTATION OF THE NATIONAL HISTORIC PRESERVATION ACT FOR  
FEDERAL AID HIGHWAY PROJECTS AND/OR HIGHWAY PROJECTS REQUIRING A  
U.S. ARMY CORPS OF ENGINEERS PERMIT IN PENNSYLVANIA.

WHEREAS, the Federal Highway Administration (FHWA) administers the Federal-Aid Highway Program (Program) in Pennsylvania authorized by 23 U.S.C. § 101 et seq., through the Pennsylvania Department of Transportation (PennDOT) (23 U.S.C. § 315);

WHEREAS, the U.S. Army Corps of Engineers (USACE) regulates discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States under section 404 of the Clean Water Act (33 U.S.C. § 1344) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) through a permit program (hereafter referred to as USACE Permits);

WHEREAS, PennDOT must obtain USACE Permits from USACE for regulated impacts to waters of the United States from its highway projects;

WHEREAS, PennDOT and the FHWA executed a programmatic agreement (2010 PA) regarding implementation of the Federal Aid Highway Program in Pennsylvania on March 18, 2010, with the Advisory Council on Historic Preservation (ACHP) and the Pennsylvania State Historic Preservation Officer (SHPO) pursuant to 36 CFR § 800.14(b) of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108) (Section 106) and amended the 2010 PA on December 14, 2017;

WHEREAS, the signatories to the 2010 PA, as amended, desire to replace the 2010 PA in its entirety with this Programmatic Agreement (PA);

WHEREAS, for federally-funded projects, the Pennsylvania FHWA Division Administrator is the “Agency Official” responsible for ensuring that the Program complies with Section 106 of the NHPA, as amended, and codified in the implementing regulations, 36 CFR 800, as amended (August 5, 2004), and is the Lead Federal Agency for federally funded projects;

WHEREAS, for wholly State-funded projects requiring a USACE Permit, the USACE Baltimore, Philadelphia, or Pittsburgh District Commander is the “Agency Official” responsible for ensuring that the USACE Permits in the State of Pennsylvania comply with Section 106 of the NHPA and is the Lead Federal Agency for federally-permitted projects that do not involve federal funding;

WHEREAS, the FHWA and the USACE recognize that they have a unique legal relationship with Tribes and Nations set forth in the Constitution of the United States,

treaties, statutes, and court decisions, and, therefore, consultation with a Tribe or Nation must recognize the government-to-government relationship between the federal government and Tribes and Nations;

WHEREAS, in the development of this PA, the FHWA and the USACE have jointly contacted the following federally recognized Tribes and Nations with ancestral ties to Pennsylvania, which may attach religious or cultural significance to properties in Pennsylvania, provided them the opportunity to consult and to concur with this PA, and none have elected to participate as concurring parties: Absentee-Shawnee Tribe of Indians of Oklahoma; Cayuga Nation; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Oneida Indian Nation; Oneida Nation; Onondaga Nation; Pamunkey Indian Tribe; St. Regis Mohawk Tribe; Seneca-Cayuga Nation; Seneca Nation of Indians; Shawnee Tribe; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca; and, Tuscarora Nation;

WHEREAS, the Pennsylvania Department of Transportation (PennDOT) has participated in the consultation and has been invited to be a signatory to the PA;

WHEREAS, the FHWA and the USACE have invited other parties to participate in the development of the PA pursuant to 36 CFR § 800.2(c)(5), and the following parties participated in the consultation and have been invited to be concurring parties to this PA: Preservation Pennsylvania and the Pennsylvania Archaeological Council;

WHEREAS, the FHWA and the USACE have invited the public to review and participate in the development of this PA through Public Notices

WHEREAS, 36 CFR Part 800 encourages Federal agencies to fulfill their obligations efficiently under Section 106 through the development and implementation of cooperative programmatic agreements;

WHEREAS, PennDOT maintains cultural resource staff and consultants meeting the *Secretary of the Interior's Professional Qualifications Standards* in the fields of archaeology and architectural history, or related fields ([http://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](http://www.nps.gov/history/local-law/arch_stnds_9.htm));

WHEREAS, PennDOT, in consultation with the FHWA, USACE, ACHP, and the SHPO, has developed a handbook (Publication 689) containing guidance on how to implement this PA and the handbook has been made publicly available and is updated as needed;

WHEREAS the ACHP, FHWA, USACE, SHPO, and PennDOT (the signatories) agree that effective and efficient consultation is in the public interest and seek to: 1) develop a comprehensive, transparent, and efficient process for all Section 106 undertakings; 2) integrate project reviews under Federal historic preservation and environmental laws; 3) simplify procedural requirements to the maximum extent possible; and 4) reduce paperwork;

WHEREAS, in the spirit of stewardship, the FHWA, the USACE, and PennDOT are committed to the design of transportation projects that: 1) avoid, minimize and mitigate

adverse effects to historic and archaeological properties; 2) utilize context-sensitive solutions in appropriate settings; and 3) balance transportation needs with other needs of Pennsylvania communities;

WHEREAS, the FHWA, USACE, SHPO, and PennDOT support long-term planning that considers preservation of historic properties, and these agencies regularly participate in, and/or foster, the programs and processes to address historic preservation issues;

NOW, THEREFORE, the ACHP, FHWA, USACE, SHPO, and PennDOT agree that the Federal-Aid Highway Program, and PennDOT projects requiring USACE Permits, shall be administered in accordance with the following stipulations to satisfy the FHWA's, and the USACE's, Section 106 responsibilities.

### **Stipulations**

FHWA, and/or the USACE (as applicable), with the assistance of PennDOT, shall ensure that the following measures are carried out:

#### **I. Applicability and Scope**

- A. The PA among FHWA, SHPO, ACHP, and PennDOT regarding implementation of the Program in Pennsylvania dated December 14, 2017 is superseded by, and replaced in its entirety with, this PA.
- B. This PA sets forth the process by which FHWA, and/or the USACE, will meet its responsibilities under Section 106, with the assistance of PennDOT, for transportation projects under the Federal-Aid Highway Program or which require USACE Permits.
- C. This PA applies to any project under the Federal-Aid Highway Program and/or which require USACE Permits. The purpose of this PA is to delegate certain aspects of Section 106 review to PennDOT and to establish the process by which the FHWA, the USACE, ACHP, SHPO, Tribes and Nations, PennDOT, and any consulting parties will be involved in such review.
- D. If any project changes from Federal-Aid to state funding, and a USACE Permit is required, the USACE shall be the lead federal agency responsible for compliance with Section 106 of the NHPA. To the extent that the USACE deems applicable, the USACE will use studies, findings and determinations previously completed by PennDOT to document its own findings.
- E. Any other designated lead federal agency may use PennDOT studies to support their findings and determinations under Section 106 of the NHPA.

#### **II. General Requirements**

- A. In compliance with its responsibilities under the NHPA and as a condition of their award of any assistance under the Federal-Aid Highway Program, FHWA will require PennDOT to carry out certain requirements as assigned by this PA. In compliance with

its responsibilities under the NHPA, and as a condition to issuance of a USACE Permit, the USACE will require PennDOT to carry out certain requirements as assigned by this PA. This authorization does not preclude FHWA's right, or the USACE's right, to take the lead in consultation among PennDOT, the SHPO, and other consulting parties, or to consult with federally recognized Tribes and Nations on a government-to-government basis. If PennDOT cannot comply with the requirements of this PA for any undertaking under the Federal-Aid Highway Program, or which requires a USACE Permit, the lead federal agency shall complete the Section 106 process under applicable laws and regulations.

#### B. Qualifications and Training

- 1) PennDOT shall employ professionally qualified personnel sufficient to implement this PA. PennDOT personnel, hereafter referred to as Cultural Resource Professionals (CRP), are employees of the Commonwealth of Pennsylvania who meet the *Secretary of the Interior's Professional Qualifications Standards* (SOI's Standards) in the fields of archaeology or architectural history. Use of consultants will be guided by Stipulation III.E.
- 2) PennDOT, with the assistance of the USACE and/or FHWA and the SHPO, will provide training for PennDOT personnel and their consultants relative to implementation of this PA as specified in Attachment A to this Agreement. PennDOT personnel responsible for review under Stipulation III will receive such training prior to implementing activities under Stipulation III.

#### C. Tribal Consultation

- 1) Every other year after this PA goes into effect, the FHWA and the USACE shall send a joint letter to the following Tribes and Nations: Absentee-Shawnee Tribe of Indians of Oklahoma; Cayuga Nation; Delaware Nation, Oklahoma; Delaware Tribe of Indians; Eastern Shawnee Tribe of Oklahoma; Oneida Indian Nation; Oneida Nation; Onondaga Nation; Pamunkey Indian Tribe; St. Regis Mohawk Tribe; Seneca-Cayuga Nation; Seneca Nation of Indians; Shawnee Tribe; Stockbridge Munsee Community, Wisconsin; Tonawanda Band of Seneca; and, Tuscarora Nation. These letters will be individually addressed to the Tribal or Nation leaders of the listed Tribe or Nation. The letter will indicate that PennDOT has been assisting FHWA and the USACE regarding Section 106 responsibilities for undertakings, and advise the Tribes and Nations that if, at any time, they wish to consult directly with the lead federal agency on a government-to-government basis, they are available and ready to consult.
- 2) PennDOT may, on behalf of FHWA, and/or the USACE (as applicable), initiate consultation with Tribes and Nations for individual undertakings carried out under the provisions of this PA. PennDOT, on behalf of FHWA and/or the USACE, shall ensure that Tribes and Nations are provided information regarding proposed undertakings early in project planning and are invited to participate in consultation in accordance with the requirements of Section 101(d)(6) of the NHPA and 36 CFR Part 800. In consulting with Tribes and Nations, PennDOT shall follow the procedures in its Cultural Resources Handbook (Publication 689) or subsequent

guidance. However, upon receipt of a request from any Tribe or Nation, or officially designated representative of a Tribe or Nation, to consult with FHWA or the USACE (as applicable) in lieu of PennDOT, FHWA or the USACE shall consult with that Tribe or Nation for the particular undertaking or program.

#### D. Historic Bridges

- 1) Pennsylvania's State Historic and Archaeological Resource Exchange (PA-SHARE) system will be utilized for determining the National Register of Historic Places (National Register) eligibility of previously evaluated bridges. The National Register eligibility of bridges will also be guided by the ACHP's *Program Comment for Actions Affecting Post-1945 Concrete and Steel Bridges*. With the exception of stone arch bridges, and closed spandrel concrete arch bridges, all other bridges or culverts less than 21 ft. in length, as measured by waterway opening, shall not be considered individually eligible for the National Register except where a CRP determines, and/or the SHPO recommends, a bridge or culvert warrants further consideration under National Register Criterion C due to unusual, or exceptional features, or potential significance under National Register Criterion A and/or B. Stone arch bridges and closed spandrel concrete arch bridges that are less than 21 feet in length will be evaluated for National Register eligibility at the time of a project.
- 2) PennDOT, in consultation with the SHPO, will evaluate all bridge types and designs in PennDOT's Bridge Management System (BMS) not already evaluated by the SHPO and PennDOT within the last ten (10) years for loss, and according to current scholarship and, if deemed necessary by PennDOT and the SHPO, will reevaluate these bridge types and designs for National Register eligibility within four (4) years of the signing of this PA.
- 3) Every ten (10) years, PennDOT, in consultation with the SHPO, will develop a plan to review the population of bridges in BMS, which may result in the reevaluation of all, or a portion of, these bridges. PennDOT, and/or the SHPO, will prepare a written report summarizing the review, and will prepare a report for any bridge population reevaluation. PennDOT, and/or the SHPO, will provide the report(s) to the signatories to this PA and will make the report(s) available to the public.

E. PennDOT, and/or FHWA, will collaborate with the SHPO, and/or Tribes and Nations, in its transportation planning processes to develop projects and/or programs that incorporate historic preservation and tribal interests into transportation planning.

#### F. Pennsylvania Transportation and Heritage System

Pennsylvania Transportation and Heritage (PATH) is an online database and project management tool developed and managed by PennDOT to facilitate consultation with the SHPO, Tribes and Nations, consulting parties and the public. PATH is a geospatially referenced database of all projects in PennDOT's Multi-Modal Project Management System (MPMS), which consists of current and programmed PennDOT projects. All references in this PA to "submissions" and "notifications" is in reference

to provision of information through this system unless otherwise noted. Paper copies of findings, forms, and other project information, will be sent to any tribe, nation, or consulting party that is not willing, or able, to utilize PATH, or receive electronic communications.

#### G. Pennsylvania's State Historic and Archaeological Resource Exchange

To facilitate reviews conducted under this agreement and support long-term planning, the PA SHPO shall provide PennDOT, FHWA, and USACE staff operating under this agreement with access to PA-SHARE. PA-SHARE is the SHPO's online system for consultation and also provides access to available information on historic resources, archaeological sites, and surveys. In order to access PA-SHARE, PennDOT, FHWA, and USACE staff operating under this agreement will need to agree to the terms and conditions of the PA-SHARE Public Service Subscription Agreement. The PA-SHARE Public Service Subscription Agreement will coincide with the expiration date of the PA. Archaeological privileges will be granted to individual professionals based on those who meet the Secretary of the Interior's Professional Qualification Standards as an archaeologist. This access will allow a user to see archaeological site locations and the pre-contact probability model.

### III. Project Review Responsibilities

PennDOT, the lead federal agency, and the SHPO, will observe the following requirements for all projects covered under this PA.

#### A. Level 1 Projects

Projects meeting the Criteria listed in Appendix A to this Agreement, and listed under "Appendix A: Level 1 Activities", have little potential to affect historic properties pursuant to 36 CFR 800.14(c) and may be reviewed by PennDOT District environmental staff (District Designee(s)). In the absence of a District Designee, or at the request of a District Designee, PennDOT CRPs may review projects listed in Appendix A: Level 1 Activities.

If a project, or an activity within the project, does not meet the criteria listed under Appendix A: Level 1 Activities, the project will be forwarded to the PennDOT CRPs for further review and evaluation.

- 1) Training – District Designees shall receive training in accordance with Attachment A prior to receiving authorization to review Level 1 project activities defined in Appendix A.
- 2) District Designees will exercise their best judgment to confirm that the conditions in Appendix A are being met and will document that no further review is necessary under Section 106. District Designees may consult with the PennDOT CRPs in reaching a decision. District Designee will document their decision in PennDOT's Categorical Exclusion Expert System (CEES), as part of the appropriate National Environmental Policy Act (NEPA) documentation.

- 3) Reporting of Appendix A: Level 1 Projects – PennDOT will create an electronic report of projects reviewed by the District Designees that meet the conditions in Appendix A; the report will be included in the annual report (see Stipulation X.D).

B. Level 2 Projects:

PennDOT CRPs will review the projects that meet the Criteria listed in Appendix A: Level 2 Activities. PennDOT CRPs may exempt such projects from further review under Section 106 pursuant to 36 CFR 800.14(c).

- 1) CRPs will document their decision in PennDOT’s CEES as part of the appropriate NEPA documentation.
- 2) Reporting of Appendix A: Level 2 Projects – PennDOT will create an electronic report of projects reviewed by the CRPs that meet the conditions in Appendix A; the report will be included in the annual report (see Stipulation X.D).

C. For projects that do not meet the conditions of Stipulation III.A and III.B, and Appendix A, the PennDOT CRPs will be responsible for carrying out the following requirements.

- 1) FHWA, and/or the USACE (as applicable), authorize PennDOT to consult with the SHPO and other consulting parties on their behalf for the following purposes:
  - a) soliciting and identifying consulting parties;
  - b) conducting public involvement activities;
  - c) establishing the area of potential effect (APE);
  - d) determining the National Register eligibility of properties within the APE;
  - e) determining effect; and initiating consultation on the resolution of adverse effects.

2) Non-Exempt Project Responsibilities

a) Early Notification

Prior to making a finding of effect for an undertaking, the PennDOT CRP will provide the SHPO and relevant Tribes or Nations with an Early Notification form for those projects that have the potential to affect historic properties where additional studies are needed prior to making a determination of effect. The Early Notification form will include a brief project description and a map location, as described in PennDOT’s Cultural Resources Handbook.

b) Consulting Parties

In consultation with the SHPO, Tribes, and Nations, and pursuant to 36 CFR 800.2(c), PennDOT CRPs will identify consulting parties and invite them to participate in the Section 106 process. PennDOT shall also seek and consider the views of consulting parties. Consulting parties may include local governments, owners of properties affected by the undertaking, or other individuals or organizations with a demonstrated interest in the undertaking. As used in the stipulations of this PA, the term “consulting parties” refers to the consulting parties for an individual undertaking.

c) Tribal Consultation

PennDOT CRPs will initiate consultation with appropriate federally recognized Tribes and Nations following the protocol in Stipulation II.C and the procedures in PennDOT’s Cultural Resources Handbook (Publication 689).

d) Involving the Public

Consistent with current state and federal laws and regulations and PennDOT policy, including PennDOT’s Public Involvement Handbook (Publication 295), the Lead Federal Agency, and the PennDOT CRPs shall, through the opportunities afforded by the PennDOT project development process, seek and consider the views of the public, including municipalities and other interest groups. Public outreach will be conducted in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, the confidentiality and concerns of property owners, who are either private individuals and/or businesses, and the relationship of the federal involvement to the undertaking.

PennDOT will make the Lead Federal Agency and the SHPO aware of any and all public interest, and/or controversy, as it relates to the historic properties potentially affected by the proposed undertaking, including properties of religious and/or cultural significance to Tribes and Nations.

For projects that require an individual permit from USACE, the USACE public notice will contain a statement of the district engineer's current knowledge on historic properties and solicit comments and information necessary to evaluate the probable impact on the public interest (See 33 C.F.R. 325.3).

e) Area of Potential Effect

PennDOT CRPs will define the undertaking’s area of potential effect (APE) as defined in 36 CFR 800.16(d). The APE will be established during a project field scoping. The APE established during a scoping field view may be a preliminary APE which will be developed and refined as the project progresses through preliminary engineering, in consultation with the SHPO, Tribes and Nations,



and other consulting parties. The Lead Federal Agency may be consulted, or may request to be consulted with, in development of the APE.

The APE will be documented per Stipulation IV of this PA and the Cultural Resources Handbook.

- (1) As a streamlining measure, PennDOT may combine consultation with the SHPO on the APE with consultation on determinations of eligibility and/or effect for projects classified as Categorical Exclusions (CE) and Environmental Assessments (EA) under NEPA.
  - (2) For projects requiring the preparation of an Environmental Impact Statement (EIS) under NEPA and the provisions of federal transportation legislation, the PennDOT CRP will consult with the SHPO on the APE early in project development prior to determinations of eligibility or effect.
- f) Determine the Appropriate Level of Identification
- (1) Based upon the best available background information gathered via a literature search, including but not limited to PA-SHARE, and a project scoping field view, the PennDOT CRP shall assess the likelihood that as yet unidentified historic properties exist within the APE. The PennDOT CRP will make a determination as to the need for further field survey to identify historic properties. In making such a determination, consistent with 36 CFR 800.4(b)(1), the CRP will take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the APE. PennDOT will also seek information from consulting parties, as appropriate.
  - (2) When the PennDOT CRP determines that a field survey is necessary to identify historic properties, the CRP shall conduct, or cause to be conducted, a survey to identify historic properties. Such surveys will be conducted in a manner consistent with the Secretary of Interior's Standards and Guidelines for Identification (48 FR 44720-23), and, where appropriate, applicable SHPO guidelines, and the PennDOT Cultural Resources Handbook.
  - (3) Pursuant to 36 CFR 800.4(b)(2), and in consultation with the SHPO and other consulting parties, PennDOT may use a phased process to identify and evaluate above ground historic properties. In such cases, PennDOT will prepare, or cause to be prepared, a reconnaissance (also known as a "windshield") survey. Reconnaissance surveys are general project area reviews which establish the likely presence of historic properties within each alternative under consideration and will be documented in accordance with Stipulation IV and the Cultural Resources Handbook.
  - (4) Pursuant to 36 CFR 800.4(b)(2), and in consultation with the SHPO, Tribes

and Nations, and other consulting parties, PennDOT may use a phased process to identify and evaluate archaeological sites. In such cases, PennDOT will prepare, or cause to be prepared, an archaeological predictive model or archaeological sensitivity study to establish the likely presence of archaeological properties within each alternative under consideration and/or within inaccessible areas. A phased approach for the identification of archaeological properties may include deferral of archaeology under the following conditions utilizing a Deferral of Archaeology Testing form:

- large or complex projects where multiple alternatives are under consideration;
- when access to property is restricted; or
- when the specific location of ground disturbance will not be known until later in project development for the locations of items typically included as part of final design and permitting, such as bridge piers, storm water detention facilities, or wetland mitigation sites.

Once an alternative has been selected or access to property is gained, PennDOT shall comply with Stipulations III.C.2.e.(2), and III.C.2.f through III.C.2.i herein, as appropriate to determine the National Register eligibility of, and the effects of the project on, archaeological properties. If an adverse effect is determined, PennDOT will consult with the SHPO, Tribes and Nations, and consulting parties to seek ways to avoid adverse effects. If adverse effects cannot be avoided, PennDOT, in conjunction with the Lead Federal Agency, will consult to determine appropriate mitigation. Where a Deferral of Archaeology Testing form was utilized, PennDOT will capture the agreed upon mitigation in a Letter of Agreement or Memorandum of Agreement and share it with the Lead Federal Agency, the SHPO, Tribes and Nations and consulting parties.

When PennDOT wishes to use a phased identification and evaluation process for archaeological properties utilizing a deferral of archaeology form, but none of the above conditions apply, and/or the project will be having an adverse effect on above ground historic properties, a project-specific programmatic agreement will be prepared for the undertaking pursuant to 36 CFR 800.14(b).

g) Determination of Eligibility

- (1) When PennDOT CRPs identify properties that may be eligible for the National Register of Historic Places, the CRPs will apply the National Register criteria following National Register Bulletin 15, *How to Apply the National Register Criteria for Evaluation* and the Secretary of the Interior's *Standards for Evaluation* (48 FR 44723-26). The PennDOT CRPs may consult with the SHPO and the Lead Federal Agency for the project in making a determination of eligibility. The PennDOT CRPs will consult with Tribes and Nations that may attach

religious and cultural significance to properties in the APE, in accordance with the procedures in the Cultural Resources Handbook and any tribal agreements that are in place at the time. PennDOT will also seek information from consulting parties, as appropriate. Where eligible or listed historic properties have previously been identified but boundaries have not been established, the CRPs may identify boundaries following the guidance in National Register Bulletin 21, *Defining Boundaries for National Register Properties*. Due to the passage of time, the CRPs may also reevaluate properties.

- (2) PennDOT CRPs will prepare documentation according to Stipulation IV and the Cultural Resources Handbook. For undertakings that will not affect historic properties, consultation with the SHPO on determination of eligibility is not required. However, PennDOT will seek and consider the views of any Tribe or Nation that ascribes traditional cultural and religious significance to a property. The documentation will be made available to the SHPO, Tribes and Nations, consulting parties, and the public. For undertakings that may have an effect on historic properties, PennDOT CRPs shall consult with the SHPO and any Tribe or Nation that ascribes traditional cultural and religious significance to a potential historic property on determinations of eligibility when any of the conditions under Stipulation III.C.2.i.(2) apply or when Stipulation III.C.2.j applies. This consultation may be completed as a separate step or combined with the finding of effect. The documentation will be provided to the Tribes and Nations, consulting parties, and made available to the public.

h) No Historic Properties Affected

If the PennDOT CRPs determine that either there are no historic properties within the APE, or historic properties are present but will not be affected by the undertaking, the PennDOT CRPs shall issue a finding of No Historic Properties Affected through PATH. The PennDOT CRPs will document their finding according to Stipulation IV and the Cultural Resources Handbook and will notify the SHPO, the Lead Federal Agency, Tribes and Nations, and other consulting parties that a finding has been made, and make the documentation available for public inspection prior to approving the undertaking. Except when dispute resolution in Stipulation XI is invoked, PennDOT may consider Section 106 concluded.

i) No Adverse Effect

- (1) For those undertakings where historic properties may be affected, the PennDOT CRPs shall apply the criteria of adverse effect in accordance with 36 CFR 800.5. If the effect of the undertaking will not be adverse, the PennDOT CRPs will propose a finding of No Adverse Effect and will document their finding according to Stipulation IV and the Cultural Resources Handbook. The CRPs will submit the finding into PATH.

PennDOT shall seek and consider the views of the Tribes and Nations, and other consulting parties, and will make its finding available for inspection by the public. If a Tribe or Nation, a consulting party, or member of the public objects to the finding within 30 days, the dispute resolution process in Stipulation XI will be applied. Except when dispute resolution in Stipulation XI is applied, PennDOT may consider Section 106 concluded.

- (2) The PennDOT CRP will notify the Lead Federal Agency and will request the concurrence of the SHPO on findings of No Adverse Effect if they prefer but always under the following conditions:
  - (a) Rehabilitation projects where the finding of No Adverse Effect is based on the proposed work being consistent with Secretary of Interior's Standards for rehabilitation,
  - (b) When there is public controversy on historic preservation issues,
  - (c) When a consulting party, FHWA, the USACE, a tribe, or nation requests the SHPO's concurrence.

If the SHPO objects to an adequately documented finding of No Adverse Effect within the review time specified in Stipulation III.C, the dispute resolution process in Stipulation XI will be applied. If the SHPO fails to respond within the review period PennDOT may consider the Section 106 concluded, except where consulting party or public comments are received.

j) Adverse Effect

- (1) If the PennDOT CRPs determine that the undertaking will have an adverse effect on historic properties, PennDOT will issue a finding of Adverse Effect into PATH and will document the finding according to Stipulation IV and the Cultural Resources Handbook. PennDOT CRPs will consult with the SHPO, Lead Federal Agency, Tribes and Nations, and any other consulting parties, to evaluate the Adverse Effect finding and/or discuss options that would avoid or minimize adverse effects. These parties will have 30 days to provide comment.
- (2) PennDOT will notify the ACHP of the adverse effect finding through PATH. The ACHP will notify the CRP and the Lead Federal Agency within 15 days if they wish to participate in consultation; if the ACHP does not respond, the Lead Federal Agency and PennDOT will presume they do not wish to participate.
- (3) The Lead Federal Agency will invite the ACHP to participate in consultation under any of the following conditions:
  - (a) When the undertaking will adversely affect a National

Historic Landmark, as defined in 36 CFR 65,

- (b) When the effects to historic properties are highly controversial or there is substantial public interest in the undertaking's effects on historic properties,
  - (c) When PennDOT, the SHPO, the USACE, and/or FHWA are not able to reach agreement on the resolution of adverse effects.
  - (d) When a programmatic agreement under 36 CFR 800.14 is proposed.
- (4) If, after consultation, PennDOT determines that adverse effects cannot be avoided, PennDOT will consult with the Lead Federal Agency, SHPO, Tribes and Nations, the ACHP if participating, and other consulting parties, as appropriate, to resolve the adverse effect.
- (5) Resolution with a Letter of Agreement:  
If the Lead Federal Agency, SHPO, and PennDOT agree to measures to resolve adverse effects, and other consulting parties, including Tribes and Nations, do not object to the proposed resolution and/or do not have a role in fulfilling the mitigation, PennDOT may prepare and execute a letter of agreement (LOA; Attachment B). The execution of a LOA, and implementation of its terms, will document the FHWA and/or the USACE's compliance with Section 106 for that undertaking. The letter of agreement shall be signed by the authorized representatives of the Lead Federal Agency, SHPO, and PennDOT, and approved as to form and legality by PennDOT's Office of Chief Counsel. If the ACHP is participating in the project a LOA cannot be used.
- (6) Resolution with a Memorandum of Agreement:  
FHWA and/or the USACE shall resolve adverse effects through a Memorandum of Agreement in the following circumstances:
- (a) When one, or more, of the concurring parties has a role in fulfilling the mitigation and, therefore, would need to sign the agreement.
  - (b) If a consulting party objects to the proposed resolution of adverse effects.
  - (c) If the ACHP is participating in the project.
- (7) Resolution with a project Programmatic Agreement:  
As per Stipulation III.C.2).f(4), a project Programmatic Agreement must be prepared when PennDOT wishes to use a phased identification and evaluation process but none of the conditions for deferral of archaeology in Stipulation III.C.2).f.(3)

apply. When adverse effects have been determined for above-ground historic properties in conjunction with use of a phased identification and evaluation process for archaeological resources, documentation of the phased approach and resolution of adverse effects must be through a project Programmatic Agreement.

#### D. Review by SHPO

- 1) The SHPO will have 30 days to respond to any request for review made by PennDOT under Stipulations III.C.2.e(2), III.C.2.g.(2), and III.C.2.i.(2), unless the following Stipulations III.D.2 or III.D.3 apply.
- 2) The review times specified in any FHWA/PennDOT/SHPO interagency funding agreement will supersede III.D.1 above.
- 3) Provided that consulting Tribes and Nations, other consulting parties, and the public have an adequate opportunity to express their views as provided in 36 CFR 800.2(d) of the regulations, PennDOT may request an expedited review by the SHPO. PennDOT and the SHPO will negotiate a review time that is mutually agreeable to both parties.

#### E. Use of Consultants in Project Review

- 1) Consistent with 36 CFR 800.2(a)(3), PennDOT may use consultants to gather information, analyze data, and prepare documentation. Consultants performing work for PennDOT, FHWA, and/or the USACE pursuant to this agreement must meet, or be supervised by, a person or persons meeting the *Secretary of the Interior's Professional Qualifications Standards* in the fields of archaeology and architectural history, or related fields. PennDOT, or FHWA or the USACE, where applicable, will be responsible for all findings and determinations made under this PA.
- 2) Consultant staff meeting the *Secretary of the Interior's Professional Qualifications Standards* may be qualified to assume the role of PennDOT CRP by written approval from the PennDOT Cultural Resources Unit Manager, and upon completion of the training specified in Attachment A.
- 3) Consultant staff may assume the role of a PennDOT CRP in a temporary capacity (defined as less than two years) only in the following circumstances: temporary vacancies of permanent staff; temporary fluctuations in workload; or, temporary specialized expertise that cannot be found within existing permanent staff.
- 4) Consultant staff may constitute no more than 25% of PennDOT cultural resource staff at any one time as defined under this PA, unless PennDOT obtains the written approval of FHWA, the USACE, and the SHPO, and provided the circumstances of Stipulation III.E.3 are met.

## **IV. Documentation**

With the exception of projects covered under Stipulation III.A, III.B, and Appendix A, all findings and determinations made under this PA will be documented in accordance with 36 CFR 800.11 and consistent with the Cultural Resources Handbook developed to implement this PA. The level of documentation will be determined by the nature and complexity of the undertaking and magnitude of effects to historic properties.

### **A. Confidentiality**

Consistent with all applicable laws, regulations, ordinances, Section 304 of the NHPA, and 36 CFR 800.11(c), PennDOT will ensure that PennDOT staff, and any consultants assigned to act on behalf of PennDOT, will not disclose to the public any information on the location, character, or ownership of historic properties when such disclosure may cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners.

### **B. Archaeology Site Location**

The location of archaeological sites will typically qualify as exempt from the federal Freedom of Information Act (FOIA) and the state Right-to-Know-Law (RTKL). PennDOT, and any consultants assigned to act on behalf of PennDOT, will ensure that the location of all sites recorded during the course of project development will remain undisclosed to the public.

## **V. Standard Treatments**

PennDOT, in consultation with FHWA, the USACE, the SHPO, ACHP, and consulting parties, may develop standard treatments for certain types of historic properties that would be affected by projects reviewed under this PA. Once FHWA, USACE, SHPO, and ACHP have agreed, in writing, to a standard treatment, PennDOT shall incorporate it into Appendix B of this PA, and the Cultural Resources Handbook, and may implement it, as appropriate, to avoid or resolve adverse effects. When the standard treatment would apply to properties of traditional cultural and religious significance to Tribes or Nations, PennDOT shall consult with appropriate Tribes or Nations in developing the standard treatment. A list of standard treatments is found in Appendix B.

## **VI. Treatment of Human Remains**

If human remains, graves, or grave-associated artifacts are encountered during any archaeological investigations conducted under this PA, or during project construction, all work shall cease in the area of the encounter and PennDOT will ensure that the remains, graves, or grave-associated artifacts are secured and protected. Within 24 hours of the discovery PennDOT will notify the Lead Federal Agency and commence consultation to evaluate applicability of Section 106 of the NHPA. If Section 106 might apply, the Lead Federal Agency, or PennDOT, will concurrently notify the SHPO and any federally

recognized Tribes and Nations that may attach religious or cultural significance to the affected property. If historic burials or cemeteries are encountered, PennDOT will follow procedures consistent with 9 Pa.C.S. § 101 et seq. PennDOT will also take into account the requirements of the Native American Graves Protection and Repatriation Act (NAGPRA), any guidance provided by Tribes or Nations, guidance in the National Register Bulletin 41, Guidelines for Evaluating and Registering Cemeteries and Burial Places, and the 1993 Pennsylvania Historical and Museum Commission (PHMC) Policy for the Treatment of Burials and Human Remains. For human remains discovered or potentially affected on Federal lands, PennDOT will notify the Federal land managing agency and follow the requirements of the NAGPRA. No activities which might disturb or damage the remains, graves, or grave-associated artifacts, will be conducted until the Lead Federal Agency, in consultation with consulting parties and other appropriate parties, has determined an appropriate course of action. When Native American graves are discovered under this provision, the Lead Federal Agency will consult with the appropriate Tribe or Nation in determining an appropriate course of action.

## **VII. Preparation of Archaeological Materials for Final Disposition**

For all archaeological investigations conducted under this PA, FHWA shall ensure that artifacts and records are prepared in accordance with 36 CFR 79 and consistent with the guidelines of the PHMC.

- A. Artifacts recovered from Commonwealth property and all associated records will be curated at PHMC through its bureau of the State Museum of Pennsylvania (State Museum) or its designee. A copy of the appropriate final archaeological report prepared according to the SHPO's Guidelines for Archaeological Investigations in Pennsylvania will be included in the submission.
- B. When artifacts are recovered from property not owned by the Commonwealth, PennDOT will explain to the property owner the importance of artifact donation and will request that the owner sign a gift agreement donating the artifacts to the State Museum. If the property owner does not wish to donate the artifacts, PennDOT will complete the necessary analyses prior to returning the artifacts, and will submit all records to the State Museum. A copy of the appropriate final archaeological report will be included with the submission.
- C. FHWA, to the degree the project is federally funded, will fund activities necessary to prepare collections for disposition; PennDOT will fund activities necessary to prepare collections for disposition for state funded projects and will be responsible for any fees relevant to long term curation regardless of federal funding.
- D. Requests by Tribes or Nations, or local institutions to curate archaeological collections will be considered on a case-by-case basis by the FHWA (for federally funded projects) and/or PennDOT in consultation with the State Museum.

## **VIII. Post-Review Discoveries**

If previously unidentified historic properties are discovered after PennDOT has completed its



review under this PA, or if an undertaking affects previously known historic properties in an unanticipated manner, the procedures under 36 CFR 800.13 will be followed. If the discovery is made during construction, the contractor shall immediately cease work in the area of the discovery and shall follow PennDOT Publication 408. When the discovery consists of human remains, graves, or grave-associated artifacts or other properties that may be of interest to federally recognized Tribes or Nations with ancestral ties to Pennsylvania, PennDOT will follow the procedures in Stipulation VI. Construction shall not resume in the area of the discovery until the Lead Federal Agency has complied with the requirements of 36 CFR 800.13.

## **IX. Emergencies**

Pursuant to 36 CFR 800.12 for federally funded emergency projects, and 33 C.F.R. Appendix C, para. 14 for emergency projects with the USACE as the lead federal agency: in the event of an emergency declared by the President of the United States and/or the Governor of Pennsylvania, PennDOT and the Lead Federal Agency shall follow the procedures below.

A. Applicability – Emergency projects are defined as those projects defined in 23 CFR § 668.103 and 23 CFR § 668.109 and eligible for Emergency Relief (ER) funds.

### **B. Covered Activities**

- 1) Type 1 activities are emergency work activities and include immediate rescue and salvage operations conducted to preserve life and property, repair to existing infrastructure, and other activities necessary to restore or maintain essential traffic, minimize the extent of damage, and/or protect remaining facilities. This includes, but is not limited to, temporary bridges, roads, barriers, and Maintenance and Protection of Traffic (MPT) devices. Immediate rescue and salvage operations conducted to preserve life and property are exempt from the provisions of Section 106 [36 CFR § 800.12(d)]. Type 1 emergency activities must be completed within 180 days of the event and are 100% federally funded.
  - a) If possible, the CRP will visit the project site and provide advice on measures to avoid adverse effects, or to minimize or mitigate adverse effects to historic properties (properties listed in, or eligible for listing in, the National Register of Historic Places).
  - b) The CRP shall work closely with the work crews to ensure all reasonable measures are implemented.
- 2) Type 2 emergency activities are permanent work activities, and defined as all other emergency projects not covered under Type 1 where the repair or reconstruction work will be commenced within two years of the declaration, as specified under the emergency repairs provisions of the Federal-Aid Highway Program (Title 23 United States Code §125). Pursuant to Title 23 CFR 771.117(c)(9), this includes the repair, reconstruction, restoration, retrofitting or replacement of any road, highway, or bridge in operation or under construction

when damaged, and the action occurs within the existing right-of-way, and in a manner that substantially conforms to the preexisting design, function, and location as the original. If the NEPA approval for an emergency project includes a permanent repair under CE 1a Item 9, and is otherwise not exempt, PennDOT may request an expedited review by the SHPO. Notifications will clearly indicate that the project is an emergency action pursuant to a declared emergency. PennDOT and the SHPO will negotiate a review time that is mutually agreeable to both parties; such negotiation can include groups of projects. PennDOT will make reasonable effort to consult with the public and property owners.

## **X. Annual Review and Monitoring**

- A. The USACE and/or the FHWA will monitor activities carried out pursuant to this PA within their jurisdiction in consultation with the ACHP and SHPO. PennDOT shall cooperate with any party in carrying out any monitoring effort.
- B. PennDOT, the ACHP, and/or the SHPO may each establish its own internal monitoring program.
- C. PennDOT will meet with the SHPO annually, or as requested by either the SHPO or PennDOT, to review the implementation of this PA, to discuss projects, or to suggest improvements. Any unresolved issues or recommendations for improvement or modifications to the implementation of this PA will be forwarded to the FHWA, the USACE, and ACHP for consideration.
- D. PennDOT will prepare an annual report on the activities carried out under this PA. The report will include a list of projects and findings made by PennDOT and a list of projects exempted under Appendix A. The report may also identify issues and make recommendations for improving the implementation of this PA. PennDOT will submit the report to the signatories of this PA within 90 days from the end of the reporting year and make the report available on its cultural resources website. The report will serve as the basis for any annual review of this PA that is conducted.
- E. Within three months of receipt of the annual report, the FHWA, the USACE, ACHP, SHPO, and PennDOT will consult, if desired by any of the parties, to review implementation of the terms of this PA. The review, to the degree undertaken, will include an assessment of PennDOT qualified staff to ensure that adequate staffing is maintained to implement this PA. The parties may conduct an assessment of the program. Should the assessment result in evidence that the requirements of this PA are not being met, the parties will meet to develop corrective measures. If an individual PennDOT District fails to meet the requirements of this PA, the USACE and/or the FHWA may suspend that District from participating in this PA; in that case the USACE and/or the FHWA, or the PennDOT Central Office Cultural Resource Unit will be responsible for carrying out the requirements of 36 CFR Part 800 pursuant to this PA for that District, for the duration of the suspension.

## **XI. Dispute Resolution**

- A. Except as provided in Stipulation XI. B (below), should any party to this PA, or a consulting party on an individual undertaking covered by this PA, object within 30 days to any actions proposed or findings submitted for review, PennDOT shall notify the Lead Federal Agency and continue to consult with the objecting party(ies) to resolve the objection. If PennDOT determines that such objection(s) cannot be resolved, it shall request the Lead Federal Agency's assistance in resolving the objection. If the Lead Federal Agency determines that the objection remains unresolved, the Lead Federal Agency will:
- 1) Forward all documentation relevant to the dispute to the ACHP in accordance with 36 CFR Section 800.2(b)(2). Upon receipt of adequate documentation, the ACHP shall review and advise the Lead Federal Agency on the resolution of the objection within 30 days. Any comment provided by the ACHP, and all comments from the parties to this PA, will be taken into account by the Lead Federal Agency in reaching a final decision regarding the dispute.
  - 2) If the ACHP does not provide comments regarding the dispute within 30 days after receipt of adequate documentation, the Lead Federal Agency may render a decision regarding the dispute. In reaching its decision, the Lead Federal Agency will take into account all comments regarding the dispute from the parties to this PA.
  - 3) The Lead Federal Agency's, and PennDOT's, responsibility to carry out all other actions subject to the terms of this PA that are not subject of the dispute remain unchanged. The Lead Federal Agency will notify all parties of its decision in writing before implementing that portion of the undertaking subject to dispute under this stipulation. The Lead Federal Agency decision will be final.
- B. If the SHPO objects to a National Register eligibility determination made by PennDOT or the Lead Federal Agency pursuant to this PA, and that objection cannot be resolved through consultation among the Lead Federal Agency, SHPO, and PennDOT, or if the ACHP so requests, the Lead Federal Agency will obtain a determination of eligibility from the Keeper of the National Register in accordance with 36 CFR 800.4(c)(2). If a consulting party, or a member of the public, objects to a National Register eligibility determination pursuant to this PA and the objection cannot be resolved through consultation with that party, the Lead Federal Agency, in consultation with PennDOT and the SHPO, will determine whether to request a Determination of Eligibility from the Keeper of the National Register of Historic Places.

## **XII. Amendment**

- A. Any of the signatories of this PA, may request that it be amended, whereupon the signatories shall consult to consider such amendment. Authorized representatives of all the signatories shall sign the amendment; PennDOT's Office of Chief Counsel, PHMC's Office of Chief Counsel, the Pennsylvania Governor's Office of General

Counsel, and the Pennsylvania Office of Attorney General shall approve it as to legality and form.

- B. The lists of exempt activities in Appendix A and the Cultural Resources Handbook may be modified by the mutual written consent of all signatories to the PA and shall not require a formal amendment to this PA. Upon such agreed upon revisions, PennDOT shall provide the revised appendix to all the parties to this PA.
- C. Any Attachment in this PA may be modified by the mutual written consent of the FHWA, USACE, PennDOT, and the SHPO and shall not require a formal amendment to this PA. Upon such agreed upon revisions, PennDOT shall provide the revised Attachment to all the parties to this PA.
- D. Written consent of PennDOT may be provided by the Director of the Bureau of Design and Delivery or designee.

### **XIII. Termination**

Any signatory to this PA, 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, the Lead Federal Agency shall conduct individual project reviews pursuant to Section 106

### **XIV. Duration of the PA**

This PA shall not become legally binding and effective until all signatories, including those signing their approvals for form and legality, have signed the Agreement and the ACHP provides a fully signed copy to all signatories. For purposes of this PA, the effective date shall be the date the last signing party has affixed their signature (the Effective Date).

FHWA, the USACE, PennDOT, SHPO, and the ACHP will review this PA every ten (10) years from the Effective Date for modifications or termination. If no changes are proposed and no party objects, the term of the PA will be extended for another ten years by written agreement of all signatories.

### **XV. Severability**

The provisions of this PA shall be severable. If any phrase, clause, sentence or provision of this Agreement is declared to be contrary to the Constitution of Pennsylvania or of the United States or to the laws of the Commonwealth or the United States, or if the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Agreement and the applicability thereof to any other government, agency, person or circumstance shall not be affected thereby.

## **XVI. Assignment**

Except as provided herein, the responsibilities included in this PA may not be assigned by any party to this Agreement either in whole or in part, without the written consent of the signatories.

## **XVII. Signatures**

This PA may be executed in counterparts, each of which shall be deemed an original and shall have the full force and effect as an original but all of which shall constitute one and the same instrument. This PA may be executed electronically.

## **XVIII. Notices**

- A. The contact person for each of the signatories of the PA shall be the following:
- 1) For ACHP: Director, Office of Federal Agency Programs, 401 F Street NW, Suite 308, Washington DC 20001-2637, Telephone Number: (202) 517-0200.
  - 2) For FHWA: Director of Program Development, 228 Walnut Street, 5<sup>th</sup> Floor, Harrisburg, PA 17101, Telephone Number: (717) 221-4545
  - 3) For PennDOT: Deputy Secretary for Highway Administration, 400 North Street, 8<sup>th</sup> Floor, Harrisburg, PA 17112, Telephone Number: (717) 787-6875.
  - 4) For SHPO: Deputy SHPO, 400 North Street, 2<sup>nd</sup> Floor, Harrisburg, PA 17120, Telephone number (717) 787-4215.
  - 5) For USACE, Baltimore District: Commander, Baltimore District, 2 Hopkins Plaza, Baltimore, MD 21202.
  - 6) For USACE, Philadelphia District: Commander, Philadelphia District, The Wanamaker Building, 100 Penn Square East, Philadelphia, PA 19107-3390.
  - 7) For USACE, Pittsburgh District: Commander, Pittsburgh District, 2200 William S. Moorhead Federal Building, 1000 Liberty Avenue, Pittsburgh, PA 15222-4186.
- B. Any signatory may change its designated contact person by providing written notice to the other signatories.

Execution and implementation of this agreement evidences that FHWA and the USACE have delegated certain Section 106 responsibilities to PennDOT, and have afforded ACHP a reasonable opportunity to comment on the Federal-Aid Highway Program and its individual undertakings in Pennsylvania, including undertakings that require a federal permit from the USACE; that FHWA and the USACE have taken into account the effects of the program and its individual undertakings on historic properties, and that they have complied with Section 106 of the NHPA and 36 CFR 800 for the program and its individual undertakings.

SIGNATORIES:

ADVISORY COUNCIL ON HISTORIC PRESERVATION

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Reid Nelson, Executive Director, Acting

FEDERAL HIGHWAY ADMINISTRATION

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Alicia Nolan, Division Administrator

UNITED STATES ARMY CORPS OF ENGINEERS, BALTIMORE DISTRICT

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Colonel Esther S. Pinchasin, Commander and District Engineer

UNITED STATES ARMY CORPS OF ENGINEERS, PHILADELPHIA DISTRICT

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Lieutenant Colonel Ramon Briganti, P.E., District Commander

UNITED STATES ARMY CORPS OF ENGINEERS, PITTSBURGH DISTRICT

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Colonel Adam J. Czekanski, District Engineer

PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Andrea MacDonald, Director  
State Historic Preservation Office

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

BY: \_\_\_\_\_ DATE: \_\_\_\_\_  
Christine Spangler, P.E., Director  
Bureau of Design and Delivery

OTHER CONCURRING PARTIES:  
PENNSYLVANIA ARCHAEOLOGICAL COUNCIL

BY: \_\_\_\_\_  
Ira Beckerman, President

DATE: \_\_\_\_\_

PRESERVATION PENNSYLVANIA

BY: \_\_\_\_\_  
Mindy Crawford, Executive Director

DATE: \_\_\_\_\_

Approved as to Legality and Form

BY: \_\_\_\_\_  
For PennDOT Chief Counsel

DATE: \_\_\_\_\_

BY: \_\_\_\_\_  
For SHPO (PHMC) Chief Counsel

DATE: \_\_\_\_\_

BY: \_\_\_\_\_  
Deputy General Counsel

DATE: \_\_\_\_\_

BY: \_\_\_\_\_  
Deputy Attorney General

DATE: \_\_\_\_\_



## APPENDIX A

### Exempted Activities

PennDOT District Designees and/or Cultural Resource Professionals (CRP) may review and determine that undertakings are exempt from further review under Section 106 of the National Historic Preservation Act, provided that the undertakings meet all the criteria below, and are limited to the activities listed under Level 1 and Level 2. District Designees may only review Level 1 project activities. If a District lacks a Designee, or at the preference of a District, the CRPs will review Level 1 activities. Level 2 project activities may only be reviewed and exempted by the CRPs.

#### Criteria for all Exempted Activities

The undertaking must be classified as categorically excluded under FHWA's National Environmental Policy Act Regulations and the following criteria must apply:

- The undertaking is limited to the activities specified under Level 1 and 2 below;
- The undertaking is on an existing transportation facility;
- The undertaking is not within or adjacent to a National Historic Landmark or National Park, or property under the jurisdiction of the National Park Service;
- The undertaking has no known public controversy based on historic preservation issues; and
- The undertaking requires no more than 3.6 meters (12 feet) of new right-of-way and/or new permanent easement beyond the existing right-of-way and/or existing permanent easement at its widest point, on each side of the road, rail bed, existing trail or pedestrian facility.

#### Level 1 Activities

##### A. Projects which may be determined Exempt by District Designee or CRP

- 1) Activities within the Existing Roadbed, Disturbed Median or Disturbed Interchange
  - a) Reconstruction of the existing roadbed (including existing shoulders), provided in-kind or compatible modern materials are used. Reconstruction may include, but is not limited to: resurfacing; restoration; rehabilitation; surface treatments; milling and grooving; installation of new drainage pipes within the roadbed. This includes all pavement preservation, maintenance betterments and roadway rehabilitation activities under Stipulation 1 of the Programmatic Agreement between the FHWA and PennDOT for Bridge, Roadway and Non-Complex Projects (BRPA). This also includes installation of pavement markings (both normal and raised) and snow and ice detectors.
  - b) Creation of turning lanes or crossovers within the existing roadbed or disturbed median.
  - c) Removal or replacement of existing guide rail.

- d) Installation of new guiderail provided that all standing structures visible to and from the work limits are less than 50 years old, or all properties over 50 years old were previously determined not eligible for listing on the National Register of Historic Places (NR).
  - e) Installation of new, or replacement of, median barriers or median guide rail.
  - f) Activities within existing disturbed highway interchanges.
- 2) Rehabilitation of existing at-grade railroad crossings provided there is no change in grade.
  - 3) Drainage improvements, including installation, replacement or rehabilitation, and cleaning activities associated with existing drains, dikes, headwalls, culverts with an opening 8 feet or less in width, pipes and storm sewers.
  - 4) Bridge Projects

Rehabilitation or preservation of bridges (including culverts over 8 feet), that are less than 50 years old, previously determined not individually eligible, or categorically not individually eligible pursuant to Stipulation II.D of the Statewide FHWA and USACE delegation programmatic agreement (Delegation PA). This includes all preservation activities under Part B, Stipulation 2 of the BRPA and all bridge rehabilitation activities under Part B, Stipulation 1 of this agreement (activities 2 through 10) except for activity 2 as it relates to the replacement of bridge parapets and activity 9 as it relates to bridge beautification activities. Bridge rehabilitation projects involving the replacement of parapets on bridges that are over 50 years old, regardless of the individual NR eligibility status of the bridge, must be reviewed by the District CRP and may only be exempted by the CRP. Bridge beautification activities must be reviewed by the District CRP. In-kind bridge curb and gutter replacement activities, however, are exempt activities.

- 5) Minor widening or minor changes in alignment provided that all standing structures visible to and from the work limits are less than 50 years old, or all properties over 50 years old were previously determined not NR eligible, and there are no known archaeological sites within the project area of potential effects, as determined from PA-SHARE, or visible evidence on the ground surface in the APE.
- 6) Signs, Lighting, Traffic Signals, and other Roadway Appurtenances
  - a) Installation or upgrade of regulatory signs, and railroad warning signs and devices; or upgrade of advisory signs.

Upgrade or replacement of modern (estimated to be less than 50 years old) lighting (mast heads and/or poles), fencing, retaining walls, traffic signals, barriers and/or noise walls. Exception: when in a city, borough,

or town, the area must have been previously determined to be ineligible as a historic district.

- b) Installation of new lighting, fencing, retaining walls, traffic signals, advisory signs, barriers and/or noise walls, provided that all standing structures visible to and from the work limits are less than 50 years old, or all properties over 50 years old were previously determined not NR eligible.
  - c) Installation or replacement of Intelligent Transportation System (ITS) cameras and devices, and electronic advisory signs, including Dynamic Variable Message Sign structures.
- 7) Sidewalks and Curbing
- a) Replacement of concrete curbing and sidewalks.
  - b) Installation of new sidewalks and/or curbing, and/or bulb-outs, provided that all standing structures visible to and from the work limits are less than 50 years old, or all properties over 50 years old were previously determined not NR eligible.
  - c) Construction of sidewalk improvements in the form of drainage cuts or curb cuts made under the American Disabilities Act and guidance in PennDOT Design Manual 2 Publication 13M), provided that there is not a NR eligible or listed historic district present.
- 8) Transportation Enhancement/Safe Routes to School Projects
- a) Streetscape improvement activities limited to planting of trees and installation of non-permanent amenities such as bike racks, trash receptacles, and benches.
  - b) Construction of bicycle and pedestrian lanes, paths, and facilities, and multi-use paths and facilities.
  - c) Rail-to-Trail projects, provided: the project does not require the removal of the railroad bed or existing bridges, and there are no known archaeological sites within the project area of potential effects (APE), as determined from the PA-SHARE system, or visible evidence on the ground surface in the APE.
  - d) Acquisition of scenic or preservation easements.
- 9) Alterations to facilities less than 50 years old to make them accessible for disabled persons.
- 10) Rehabilitation of existing safety rest areas and truck weigh stations.

Creation of Park-and-Ride/parking lots on existing parking lots or within existing disturbed right-of way.

- 11) Stream restoration and stabilization activities within the existing active channel banks (e.g., channel cleaning and placement of riprap, etc.), provided there are no additional ground disturbing activities and access to the stream is located within a previously disturbed area. Replacement of existing gabion baskets can be used under this exemption where all standing structures visible to and from the work limits are less than 50 years old, or all properties over 50 years old were previously determined not NR eligible. This exemption does not include placement of new gabion baskets where gabion baskets did not exist.
- 12) Lease renewals and acquisition of previously leased PennDOT Maintenance sites.
- 13) Disposal of excess ROW provided that there are no known historic properties and/or archaeological sites within the property to be disposed, as determined from PA-SHARE .
- 14) Clean-up and restoration of roadway to pre-existing conditions for hillside slumps and slides; slope stabilization activities within existing right-of-way.

#### Level 2 Activities

##### B. Projects Exempted by the Cultural Resource Professional

The District CRP may review and determine exempt the projects below provided they meet the overall criteria outlined above.

The CRP exemptions will be based upon a scoping field view and/or the PennDOT “video log” of the project area and/or background research (including, but not limited to PA-SHARE, and historic maps).

- 1) Bridge Replacement/Removal Projects  
The District CRP may review and exempt bridge replacement projects (including culverts over 8 ft.) provided that:
  - a) The structure is less than 50 years old, the structure is categorically not NR eligible per Stipulation II.D, or previously determined not NR eligible, and remains not NR eligible in the documented opinion of the CRP;
  - b) The structure is being replaced on existing alignment;

- c) All standing structures within the project APE are less than 50 years old, or all properties over 50 years old were previously determined not NR eligible and remain not NR eligible in the opinion of the CRP, or all properties over 50 years old are not NR eligible in the opinion of the CRP, and the project is not within, or immediately adjacent to, a NR eligible, or potentially NR eligible, historic district;
- d) There are no known archaeological sites within the project area of potential effects, as determined from PA-SHARE , or visible evidence on the ground surface in the APE; and
- e) The District CRP for Archaeology has determined that any temporary construction easements associated with the project have been previously disturbed. If any temporary construction easement is determined to have a high probability for archaeological sites, and geotextile and fill will be used as a protective measure in lieu of archaeological testing, the exemption cannot be applied. The CRP must follow the procedures in Appendix B of the Delegation PA for application of the standard treatment.

2) Bridge Rehabilitation or Preservation Projects

The District CRP may review and determine exempt bridge rehabilitation and preservation activities under Part B, Stipulation 1, category 2 and category 9 of the Bridge and Roadway Programmatic Agreement, including projects consisting of the replacement of bridge parapets, provided that the bridge is not individually eligible for, or listed on, the NR, and the bridge does not contribute to a NR eligible or listed historic district; or, for bridges that do contribute, the replacement parapets will replicate the existing parapets or parapets in place during the period of significance. The CRP can exempt bridge beautification activities, such as lighting, provided the bridge beautification activities do not affect the character defining elements of an historic district.

3) Activities within the Existing Roadbed, Disturbed Median or Disturbed Interchange

Installation of new guiderail, provided that any structures over 50 years old in the APE are not NR eligible in the opinion of the CRP.

4) Minor widening or minor changes in alignment provided that any structures over 50 years old in the APE are not NR eligible in the opinion of the CRP and there are no known archaeological sites within the project area of potential effects, as determined from PA-SHARE, or visible evidence on the ground surface in the APE.

5) Signs, Lighting, Traffic Signals, and other Roadway Appurtenances

- a) Upgrade or replacement of modern (estimated to be less than 50 years old) lighting (mast heads and/or poles), fencing, retaining walls, traffic signals, barriers, and/or noise walls in an historic district, and/or where other historic properties are present

in the APE, provided that the upgrade or replacement is in-kind in general appearance.

- b). Upgrade or replacement of over 50-year-old lighting (mast heads and/or poles), fencing, retaining walls, traffic signals, barriers, and/or noise walls provided, in the opinion of the CRP, none of these aforementioned elements being upgraded/replaced are individually eligible and there is neither an historic district nor other historic properties in the APE.
  - c) Installation of new lighting (mast heads and/or poles), fencing, retaining walls, traffic signals, barriers, and/or noise walls, as well as new advisory signs, provided that any structures over 50 years old in the APE are not NR eligible in the opinion of the CRP.
- 6) Sidewalks and Curbing
- a) Installation of new sidewalks and/or curbing, and/or bulb-outs provided that any structures over 50 years old in the APE are not NR eligible in the opinion of the CRP.
  - b) Construction of sidewalk improvements in the form of drainage cuts or curb cuts made under the Americans With Disabilities Act and guidance in PennDOT Design Manual 2 Publication 13M), provided that the curb cuts are determined to have no effect on any eligible or listed historic district or other NR eligible or listed property in the APE.
- 7) Stream stabilization and restoration activities involving the replacement of, or placement of new (not previously in place), gabion baskets where all standing structures in the APE are not NR eligible in the opinion of the CRP.
- 8) Appendix A activities of the Federal Railroad Administration Section 106 Program Comment for Rail Rights-of-Way. This includes, but is not limited to, Activity B.8: “Removal or replacement of any bridge or tunnel material or added-on element that is not part of the original construction”. This also includes Activity E.5: “in-kind rehabilitation or replacement of grade-separated crossings of other transportation modes (highways, local roads, pedestrian underpasses). This does not include modifications to existing grade separation structures (e.g., bridges, overpasses) that would result in a substantial increase in height or overall massing or substantial change in appearance. Replacements must be substantially the same appearance and size as existing.”
- 9) Emergency Activities involving repair to existing infrastructure and other activities necessary to restore and maintain essential traffic and minimize the extent of damage and protect remaining facilities. This includes, but is not limited to, temporary bridges, roads, barriers, and Maintenance and Protection of Traffic (MPT) devices.

## APPENDIX B

### Standard Treatments

#### A. Standard Treatment Options to Avoid Adverse Effects

##### 1. Activities within or Adjacent to Historic Districts or Historic Properties

A standard treatment may be applied for the following activities when historic properties or historic districts are present, as determined by the PennDOT Cultural Resource Professional. The CRP will issue a finding of effect and may apply the standard treatment without further consultation with the SHPO.

- a) Installation of new lighting (in-kind, or historic replica).
- b) Replacement of curbs, curbing, and sidewalks provided in-kind or compatible modern materials are used.
- c) Installation of new curbing and sidewalks using brick, slate, granite or other stone; or concrete when already present within a historic district.

##### 2. Archaeology

- a) Geotextile and fill in temporary construction areas – PennDOT may use protective geotextile fabric or timber matting and fill in temporary construction areas such as bridge run-arounds, haul roads, and other work areas when the temporary construction area is located in a high probability area for archaeological sites. PennDOT must calculate the level of protection needed based on the characteristics of the existing soils, and the size and weight of vehicles to be used within the temporary construction area. Installation and removal of the fill and geotextile material must ensure that disturbance to the ground surface or soil compaction does not occur. The CRP will issue a finding of no adverse effect. No additional consultation will be required.

#### B. Standard Treatment Options to Mitigate Adverse Effects

When the PennDOT Cultural Resource Professional issues a finding of adverse effect, a standard treatment may be applied to mitigate adverse effects, provided that the FHWA, the USACE, SHPO, and consulting parties have been given the opportunity to provide their views.

##### 1. Historic Bridges

- a) Marketing Historic Bridges
- b) Replacement of Bridges Only Significant as Contributing to a Historic District - The District CRP will work with the project team and consulting parties on a replacement

design that is in keeping with the scale, materials, and massing of the historic (contributing) bridge and may incorporate design elements which are in keeping with the characteristics that make the historic district eligible for the National Register (i.e. a Context Sensitive Design). Although the project would have an adverse effect, no other mitigation will be necessary for projects in which the only adverse effect is the replacement of a contributing bridge, except as negotiated with the community/consulting parties.



## ATTACHMENT A

### Training Requirements

Note: To the extent possible, the training requirements will be offered as webinars.

#### 1. **Training for District Designees**

a) Basic Training - A District Designee, specifically PennDOT environmental staff, must successfully complete the following training prior to receiving authorization to review activities covered under Appendix A of this PA:

- Section 106 course provided by National Highway Institute (Beyond Compliance: Historic Preservation in Transportation Project Development, NHI 142049), ACHP Section 106 Essentials, or equivalent;
- PennDOT training on Application of the PA, and the Cultural Resources Handbook, including an overview on tribal consultation; and
- SHPO training on Pennsylvania History Code, SHPO's online data management systems, and other Pennsylvania-specific topics (taken within 1 year of delegation).

b) Refresher – In order to maintain delegation, District Designees must successfully complete the following training every two years:

- PennDOT's Cultural Resources Handbook Refresher. PennDOT and SHPO PA Refresher training will be offered annually, such as at the PennDOT Environmental Managers (EM) meeting. The refresher will address changes to guidance, regulations, and delegated responsibilities as well as current topics. This training will be made available as a webinar for those who cannot travel.

#### 2. **Training for PennDOT Cultural Resource Professionals (CRPs) and Consultants under Management Contract.**

a) **Basic Training.** Prior to receiving authorization to review activities under Stipulation III.B of this PA, new PennDOT Cultural Resource Professionals, and consultants under management contract per Stipulation III.D of this PA, must successfully complete the following training:

- Section 106 course provided by National Highway Institute (Beyond Compliance: Historic Preservation in Transportation Project Development, NHI 142049), ACHP Section 106 Essentials, or equivalent;
- PennDOT training on the Application of this PA and Cultural Resources Handbook, including Tribal consultation; and

- SHPO training on Pennsylvania History Code, SHPO’s online data management systems, relevant historic context, and other Pennsylvania-specific topics. The training will allow for interaction with SHPO staff.

b) Refresher – In order to maintain delegation, CRPs and Consultants under Management Contract must successfully complete the following training **every year**:

- PennDOT refresher on the Application of the PA and Cultural Resources Handbook and/or special topic meetings/webinars relevant to the application of this PA as determined/documented by PennDOT’s Cultural Resources Section Manager.

In order to maintain delegation, CRPs, and Consultants under Management Contract must successfully complete the following training **every two years**:

- Attend a joint PennDOT and SHPO staff meeting. These meetings usually occur annually.
- Attend a minimum of two (2) PA SHPO and PennDOT approved sessions at the Statewide Conference on Heritage (when held) or other conference or training relevant to historic preservation, as determined/documented by PennDOT’s Cultural Resources Section Manager.

### **3. Changes to the Section 106 regulations and guidance**

Whenever major changes to 36 CFR 800 become effective, or the ACHP updates relevant guidance, or issues relevant program comments, District Designees and Cultural Resource Professionals will participate in training on the new regulations or guidance within a year of when it goes into effect.

## ATTACHMENT B

Letter of Agreement Template  
(FHWA lead example;  
USACE to be substituted for  
FHWA for USACE lead  
projects)

### LETTER OF AGREEMENT

BETWEEN THE FEDERAL HIGHWAY ADMINISTRATION, THE  
PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, AND  
THE PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER,  
REGARDING THE \_\_\_\_\_ PROJECT IN  
township/borough/City, \_\_\_\_\_ COUNTY, PENNSYLVANIA

WHEREAS, the Federal Highway Administration (“FHWA”), the U.S. Army Corps of Engineers (“USACE”), the Advisory Council on Historic Preservation (“ACHP”), the State Historic Preservation Officer (“SHPO”) and the Pennsylvania Department of Transportation (“PennDOT”) on \_\_\_\_\_2022 executed a Programmatic Agreement (“PA”) regarding implementation of the Federal Aid Highway Program in Pennsylvania;

WHEREAS, PennDOT proposes to describe project (hereafter referred to as “the Project”);

WHEREAS, pursuant to Stipulation III.C.2.g of the PA, PennDOT has determined that the name of historic properties is/are eligible for listing on the National Register of Historic Places;

WHEREAS, pursuant to Stipulation III.C.2.j of the PA, PennDOT has determined that the Project will have an adverse effect on name of historic properties;

WHEREAS, pursuant to Stipulation III.C.2.b of the PA, PennDOT has made an effort to seek consulting parties and the following have been accepted as consulting parties: name consulting

*parties;*

WHEREAS, Stipulation III.C.2.j.5 provides for the preparation and execution of a Letter of Agreement (“LOA”) where there is agreement about measures to be taken to resolve adverse effects among the required parties;

WHEREAS, the FHWA has notified the Advisory Council on Historic Preservation (“ACHP”) of the adverse effect finding and the ACHP has declined to participate in resolving the adverse effects of the Project;

NOW, THEREFORE, the FHWA, SHPO, and PennDOT agree that PennDOT will complete the following stipulations in order to mitigate the adverse effects of the Project on *name adversely affected historic properties*.

## **Stipulations**

### **Personnel Qualifications:**

PennDOT shall ensure that all archaeological work carried out pursuant to this LOA is carried out by, or under the direct supervision of, a person or persons meeting, at a minimum, the Secretary of the Interior’s Professional Qualifications Standards for Archaeologists, and that all historic preservation work is carried out by, or under the direct supervision of, a person or person meeting, at a minimum, the Secretary of the Interior’s Professional Qualification Standards for Architectural Historian Professionals (see [http://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](http://www.nps.gov/history/local-law/arch_stnds_9.htm)).

### **Review and Documentation**

Drafts of reports, brochures, pamphlets, posters, recordations, text, exhibit design, videos, or any other product prepared as mitigation of adverse effects will be submitted to FHWA, the SHPO and consulting parties for review in accordance with Stipulation IV of the PA. PennDOT will consider any comments in the preparation of a final product.

### **Duration**

This LOA will expire if its terms are not carried out within \_\_\_ years from the date of its execution. Prior to such time the FHWA may consult with the other signatories to reconsider the terms of the LOA and amend it.

**Termination**

Any signatory may terminate this LOA by providing notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. Termination of this LOA will require compliance with 36 CFR Part 800.

If at any time during the course of the Project, PennDOT cancels the Project or withdraws its request for federal funding, PennDOT will so notify the FHWA. The FHWA will notify the other signatories to the LOA, and the ACHP, that they are terminating the LOA. The FHWA, in consultation with those parties, will consider the effects of any Project-related activities undertaken prior to Project cancellation or withdrawal of the funding request, and the FHWA will assess its responsibilities and obligations pursuant to 36 CFR Part 800 and determine steps to terminate the LOA.

*This letter agreement does not supersede other provisions of the Amended PA, specifically:*

- VI. Treatment of Human Remains;
- VII. Preparation of Archaeological Materials for Final Disposition;
- VIII. Post-Review Discoveries;
- XI. Dispute Resolution;

FEDERAL HIGHWAY ADMINISTRATION (or U.S. ARMY CORPS OF ENGINEERS)

By: \_\_\_\_\_ Date: \_\_\_\_\_

Name & Title: \_\_\_\_\_

PENNSYLVANIA STATE HISTORIC PRESERVATION OFFICER

By: \_\_\_\_\_ Date: \_\_\_\_\_

Name & Title: \_\_\_\_\_

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

By: \_\_\_\_\_ Date: \_\_\_\_\_

Name & Title: \_\_\_\_\_

*Approved as to Legality and Form*

By: \_\_\_\_\_ Date: \_\_\_\_\_