



Appendix H
Programmatic Agreement:
Implementing Section 106 of the National
Historic Preservation Act for the I-495 and I-270
Managed Lanes Study Montgomery and Prince
Georges Counties, Maryland and Fairfax
County, Virginia



U.S. Department
of Transportation

**Federal Highway
Administration**

MDOT MARYLAND DEPARTMENT OF TRANSPORTATION
STATE HIGHWAY ADMINISTRATION

Introduction

The following Section 106 Programmatic Agreement outline was shared with Section 106 consulting parties in June 2019. It was intended to communicate the general structure and content areas of a Programmatic Agreement, a preferred method for completion of the Section 106 process as identified at 36 CFR 800.14 (b), for “certain complex project situations” and/or “when effects on historic properties cannot be fully determined prior to approval of an undertaking”. MDOT SHA and FHWA have identified a Programmatic Agreement as the appropriate way to complete Section 106 for the Study, which will allow ongoing consultation and effects assessment regarding historic properties as design advances in future phases of the Study, as well as identifying mitigation for those properties where adverse effects are unavoidable.

NRHP eligibility and effect findings had not been completed at the time of the distribution to consulting parties. In January of 2020, MDOT SHA transmitted the Section 106 technical report to consulting parties, which presented NRHP eligibility and effect findings to the extent possible in a comprehensive multiple volume document (**Appendix G**). Comments were requested by Mid-March 2020 in a greater than 30 day extended review period requested by consulting parties given the size of the document and supporting materials.

Since March of 2020, in response to consulting party comments, including the State Historic Preservation Offices (SHPOs) of Maryland (Maryland Historical Trust [MHT]) and Virginia (Department of Historic Resources [DHR]), MDOT SHA and FHWA have identified several technical next steps that are necessary prior to advancing the draft Programmatic Agreement content.

These include:

- Revision of the Area of Potential Effects (APE) to include Stream and Wetland mitigation sites being submitted as part of the Joint Permit Application (**Appendix R**). Because these proposed locations have now been identified, as part of the undertaking they require additional inventory and evaluation effort for historic properties including archaeological evaluation.
- Sufficient information is now available to revise effect determinations on several of the properties listed as “properties where effects cannot be fully determined” in the January 2020 Technical Report. MDOT SHA will provide revised effect determinations for these properties.
- Multiple consulting parties provided additional information regarding the Moses Hall and Cemetery, also known as the Morningstar Tabernacle No. 88, in Cabin John. In response, MDOT



SHA has conducted additional field and documentary research and believes sufficient information is available to make an eligibility determination on this property and evaluate effects as a historic property. MDOT SHA will complete a determination of eligibility and effect for this property in consultation with MHT and consulting parties, and continue consultation regarding avoidance, minimization, and treatment of the resource, including potential burials within the limits of disturbance.

- Additionally, MDOT SHA has identified an additional resource in Maryland requiring an eligibility determination (Forest Glen Tower) and new information regarding the segment of the Metropolitan Branch of the B&O Railroad historic property within the project area. MDOT SHA will submit new and revised documentation on these resources to MHT and consulting parties.
- Virginia's Department of Historic Resources (DHR) did not concur with MDOT SHA's finding of an eligible archaeological district within the George Washington Memorial Parkway, instead recommending treating individual sites as eligible or ineligible for the National Register of Historic Places. On April 28, 2020, the National Park Service (NPS) requested additional information from DHR via letter and noted that NPS found that the archaeological district was valid. MDOT SHA will continue consultation with NPS and DHR to finalize how these resources are characterized to finalize eligibility and effect findings, and document the resolution of the consultation.

Under current schedule assumptions MDOT SHA intends to provide the above information to SHPOs and consulting parties in the spring of 2020, and advance PA development with consulting parties including a draft document and consulting party meeting in the Summer of 2020.

Resolving the above steps to the extent possible prior to drafting the PA will focus the content of the PA; Fewer uncertainties will exist, and fewer process stipulations will need to be developed regarding resolution of eligibility and effects to these resources.

MDOT SHA anticipates at least two drafts of the PA may be necessary prior to finalizing the agreement for signature. MDOT SHA may accomplish review of these drafts through in-person and/or electronic reviews as appropriate in the late summer, fall and early winter of 2020 with a goal of having a signature ready Programmatic Agreement in Winter 2020 or early 2021.

DRAFT – Pre-Decisional
CONCEPTUAL DISCUSSION OUTLINE
PROGRAMMATIC AGREEMENT

Among the
FEDERAL HIGHWAY ADMINISTRATION,
MARYLAND DEPARTMENT OF TRANSPORTATION STATE HIGHWAY
ADMINISTRATION,
MARYLAND STATE HISTORIC PRESERVATION OFFICER,
VIRGINIA STATE HISTORIC PRESERVATION OFFICER,
ADVISORY COUNCIL ON HISTORIC PRESERVATION

Implementing Section 106 of the National Historic Preservation Act for the
I-495 and I-270 Managed Lanes Study
Montgomery and Prince Georges Counties, Maryland and Fairfax County, Virginia

Recitals (Whereas Clauses)

This section will define the background of the project (“Undertaking”), and the intention of this agreement, including (but not limited to):

- Defining the Undertaking (the specific federal actions that may affect historic properties)
- FHWA is the lead federal agency, as designated by other agencies; execution of this agreement fulfills 106 responsibilities for the other federal agencies, etc.
- Involvement of Other Federal Agencies
- Defining the Public-Private Partnership (P3), and that the concessionaire will advance design under approval by the state.
- Review of completed steps in Section 106 process (consultation, APE, identification of properties, assessment of effect, etc.)
- Stating that historic properties will be adversely affected by the undertaking, however all effects to historic properties cannot be fully determined
- That the signatories, having involved consulting parties, have agreed that the PA and implementation of its terms of fulfill the requirements of Section 106 for the undertaking

Stipulations

1. Roles and Responsibilities

- a. **FHWA** (will describe that FHWA, as designated lead federal agency, is ultimately responsible for ensuring the terms of this agreement are carried out)
 - b. **MDOT SHA** (Will describe that MDOT SHA will be responsible for implementation of stipulations of the agreement)
 - i. Concessionaire (because the Concessionaire is not selected at this time, stipulation will describe what requirements MDOT SHA will place on concessionaire through the procurement process)
 - ii. Will Retain qualified CR staff responsible for fulfilling their commitments
 - c. **Other Federal Agencies** (to be determined related to level of involvement with adversely affected historic properties and mitigation implementation)
 - d. **SHPOs** (will describe jurisdiction [Maryland, Virginia] and elements such as concurrence/comment decision points and anticipated review timelines)
 - e. **ACHP** (will describe ACHP's role as providing policy guidance and dispute resolution/comment)
 - f. **Concurring Parties/Public** (consulting parties invited to concur in the agreement may have ongoing opportunities to provide input, participate in mitigation projects, etc.; will describe mechanisms for how the general public not identified as consulting parties may engage in the future and addition of consulting/concurring parties in the future)
2. **Professional Standards** (will reference applicable Secretary of Interior qualifications, SHPO, National Register, ACHP and other applicable standards for evaluation and reporting for cultural resources studies)
3. **Project-wide Mitigation and Commitments** (may describe mitigation that addresses multiple properties, or logical groupings of affected properties, general provisions for avoidance through design refinements, context-sensitive solutions, etc.) MDOT SHA is seeking consulting party input on these measures.
4. **Property-Specific Mitigation and Commitments**
MDOT SHA is seeking input on potential mitigation for the properties currently identified as experiencing an adverse effect. This section will break out mitigation or other commitments specific to each property (see the preliminary list attached to this document)
5. **Archaeological Treatment Plan**
 - a. MDOT SHA will develop an archaeological treatment plan in consultation with relevant parties that identifies:
 - i. Areas presently inaccessible for study to be evaluated
 - ii. Treatment of determined/assumed eligible sites
 - iii. Known sites requiring further evaluation for NRHP eligibility (Phase II)

- iv. Monitoring Requirements
- v. Treatment of Cemeteries
- vi. Standardized evaluation and treatment process for newly-identified project elements, process (including consultation with relevant parties) for updates and revisions to treatment plan.

(MDOT SHA's goal is to have a comprehensive but flexible archaeological treatment plan that addresses the current LOD but can be revised and updated in response to project advancement)

6. Architectural Resources

- a. Will describe evaluation of inaccessible/unevaluated properties (MDOT SHA has to date not been granted access to the Martin-Marietta Headquarters, but anticipates evaluation of all other architectural resources identified in the Gap Analysis prior to PA completion)
- b. Will describe process for effects assessment to identified historic properties currently with "unknown" effects upon further design, or should design within the APE evolve to change effect determinations.

7. Revisions to APE in response to Design Advancement

- a. Will describe the process to revise the APE for minor changes with no potential to change or cause new effects to historic properties
- b. Will describe the consultation process on substantial APE revisions where historic properties may be additionally or differently affected.
- c. Will describe the evaluation and treatment of additional architectural resources in response to APE expansion.

8. Continued Consultation

In addition to the above, there may be ongoing consultation required for properties where effects cannot yet be fully determined, design of certain elements in proximity to historic properties (such as elevated structures), where consultation may be requested to achieve context-sensitive design and minimize effects. MDOT SHA is seeking input on those project elements where further consultation is requested and appropriate.

9. Inadvertent Discovery (Including Human Remains)

MDOT SHA has a standard procedure for all projects in the event of inadvertent discovery of human remains or archaeological resources, or inadvertent adverse effects to previously identified historic properties, that will be encapsulated here.

10. Monitoring of Performance

This section will describe how the parties will understand progress on implementation of commitments and mitigation, through regularly issued summary reports (such as annual or quarterly) and/or regularly scheduled meetings for consulting parties. MDOT SHA is seeking input on consulting party preferences for this stipulation.

11. Amendment

Will describe a standard process including consultation when amendments to the agreement are needed.

12. Dispute Resolution

Will describe a standard process for resolving objections and disputes among the parties, referencing the Amendment process if the agreement needs to be altered.

13. Termination

Will describe a standard process for termination of the agreement, and subsequent steps if termination occurs. Typically this involves a “waiting period” of consultation prior to termination, and a requirement to either negotiate a new agreement, follow the standard Section 106 process, and/or take Advisory Council comments into consideration prior to FHWA determining next steps.

14. Duration

Because of the anticipated duration of this project, and that there may be additional elements that continue, a 15 year duration may be appropriate, or until all terms of the agreement are fulfilled or the project becomes inactive; can include provisions for extension of the agreement.

Signature Pages

Signatory Parties: FHWA, MDOT SHA ACHP, MD SHPO, VA SHPO, Other Federal Agencies to Be Determined

Concurring Parties: To Be Determined