

Appendix E-6
Draft Section 106 Programmatic Agreement

**DRAFT – Pre-Decisional
Conceptual Discussion Outline
PROGRAMMATIC AGREEMENT
AMONG**

**THE FEDERAL HIGHWAY ADMINISTRATION
THE NEW YORK STATE HISTORIC PRESERVATION OFFICE
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION
(OTHER INVITED SIGNATORIES IF NECESSARY)
PURSUANT TO 36 CFR § 800.14(b)(1)(ii)**

**Implementing Section 106 of the National Historic Preservation Act for
PIN 3501.60, INTERSTATE 81 VIADUCT PROJECT
ONONDAGA COUNTY, NEW YORK
16PR06314**

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
- Review of completed steps in Section 106 process (consultation, APE, identification of properties, assessment of effect, etc.)
- Stating that while no known historic properties will be adversely affected by the undertaking, all effects to historic properties (archaeological) have not been fully determined now, thus the need for a project level PA, etc.
- That the signatories, having involved consulting parties, have agreed that the PA and implementation of its terms will fulfill the requirements of Section 106 for the undertaking
- Section 106 administrative Whereas Clauses, following ACHP template

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, Nation-to-Nation consultation, legal responsibility for all findings and determinations (potential archaeological resources)
 - b. **NYSDOT** (will describe that the New York State Department of Transportation will be responsible for implementation of stipulations of the agreement and will retain qualified cultural resource 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. **SHPO** (will describe jurisdiction elements such as concurrence/comment decision points and anticipated review timelines. Advise and assist FHWA in carrying out Section 106 responsibilities. Consult on eligibility and effects for any archaeological resources that may be identified as archaeological investigations continue through construction)
 - e. **ACHP** (will describe ACHP's role as providing policy guidance and dispute resolution/comment)
 - f. **Other Invited Signatories** (if necessary)
 - g. **Concurring Parties/Public** (consulting parties invited to concur in the agreement may have ongoing opportunities to provide input; 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. **Native Nation Consultation** (will describe that Native Nation Consultation will occur with details provided in appendix to PA)
4. **Identification and Evaluation of Archaeological Properties** (The signatories in consultation shall carry out additional investigations as needed to complete the identification and evaluation of archaeological properties within the APE for direct effects by implementing the approved Phase IB *Work Plan* Appendix 2)
5. **Consultation on Archaeological Properties** (will stipulate the consultation protocols in the event archaeological resources are identified as part of the archaeological surveys identified in stipulation 4, this could be in the body of the PA or an appendix)
6. **Changes in Project Scope** (will describe the process to revise the APE in the event of design modifications / refinements and will describe how the Section 106 process will be followed)
7. **Post-Review Discoveries** (will stipulate the consultation protocols in the event archaeological resources are identified outside of stipulation 5 during construction, this could be in the body of the PA and/or Appendix 4: Native Nation Consultation. Will also reference 36 CFR 800.13(b)(3) for post-review of buildings and structures.)

8. **Post-Review Discoveries Human Remains** (NYSDOT has a standard procedure for all projects in the event of inadvertent discovery of human remains, that will be encapsulated here and reference Appendix 4: Native Nation Consultation)
9. **Confidentiality** (will describe compliance with Section 304 of the National Historic Preservation Act)
10. **Monitoring and Reporting** (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. NYSDOT is seeking input on consulting party preferences for this stipulation)
11. **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)
12. **Amendments** (will describe a standard process including consultation when amendments to the agreement are needed)
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** (due to the anticipated duration of this project, will identify the duration of this agreement or until all terms of the agreement are fulfilled or the project becomes inactive; can include provisions for extension of the agreement)

Signature Pages for each Required, Invited, and Concurring Parties to this Agreement

APPENDIX 1

Map showing Area of Potential Effects (APE)

APPENDIX 2

**Plan for Phase IB Archaeological Survey
and Archaeological Monitoring during Construction including Data Recovery**

APPENDIX 3

NYSDOT Procedures in the Event of the Inadvertent Discovery of Human Remains during Construction¹

1. If a burial site, human remains, or bones thought to be human remains, are encountered during construction for a NYSDOT undertaking, the work will be stopped immediately and rescheduled to avoid disturbing the area. The remains will be left in place and protected from further damage.
2. In accordance with the current NYSDOT Standard Specifications, Section 107-01 D. Archaeological Salvage², the Engineer-in-Charge (EIC) will, through proper channels, notify appropriate Department personnel and other authorities. The EIC will report the discovery of human remains to the local police, and the county coroner having jurisdiction, or to the medical examiner, and will arrange immediate inspection of the site³.
3. If the site is determined to be part of a criminal investigation, the police will notify the EIC when work in the area may resume.
4. If determined that the remains are not a police issue, the NYSDOT will notify the Federal Highway Administration (FHWA), the Office of Parks, Recreation and Historic Preservation/ State Historic Preservation Office (OPRHP/SHPO), appropriate Native Nation contacts, and archaeologists, and arrange site visits accordingly. Work will be temporarily suspended in the area, and measures will be taken to secure the burial site and protect the remains from disturbance, including the placement of a twenty-five foot protective buffer around the burial site.
5. The NYSDOT will arrange for a qualified physical anthropologist to examine the remains. NYSDOT in coordination with FHWA will invite designated Native Nation representative(s) to participate in the consultation process. Representatives will be determined on the basis of established contacts and identified areas of interest for Native Nations. The remains will not be removed until determined by the qualified physical anthropologist to be non-native.
6. NYSDOT, in consultation with the OPRHP/SHPO, Native Nations and other identified consulting parties, will arrange for an archeologist to establish horizontal and vertical extent of the burial(s) and assess measures for avoiding the human remains if possible. The avoidance of human remains is the preferred choice.
7. Any new location or alignment developed to avoid the burial(s) will be subject to archaeological investigation, and the results will be provided to the OPRHP/SHPO, Native Nations, and other consulting parties as appropriate for comment before the project proceeds in this area.
8. If the alignment is unchanged, a plan will be developed in coordination with FHWA, NYSHPO, the Native Nation representatives, and other consulting parties as appropriate, to preserve the site and protect the burial(s) before the project proceeds in this area.
9. If removal and reburial of the remains is necessary, it will be undertaken in a manner agreed to by all involved parties. Temporary disposition of the remains until reburial will be determined in consultation with the Native Nations, and other consulting parties as appropriate.
10. Any actions relating to the treatment, disposition, removal, or reburial of human remains will comply with all applicable State and Federal laws and regulations.

¹ Last updated April 21, 2016.

² <https://www.dot.ny.gov/main/business-center/engineering/specifications/updated-standard-specifications-us>

³ In Erie County, the discovery must be reported to the medical director.

APPENDIX 4

Native Nation Consultation

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