

# Exhibit 2.10: Guidelines for Agreement Documents

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## Exhibit 2.10: Guidelines for Agreement Documents

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### Introduction

There are two kinds of Section 106 agreement documents: a Memorandum of Agreement (MOA) and a Programmatic Agreement (PA). An MOA stipulates the measures that must be implemented to resolve an undertaking's adverse effect on historic properties. A project-specific PA is typically used instead of an MOA when effects to historic properties cannot be fully determined prior to final approval of an undertaking.

The Advisory Council on Historic Preservation (ACHP) regulations provide for development of two-party agreement documents between a federal agency and SHPO. Typically, ACHP will not be involved in the consultation, but must be sent a copy of the agreement document for inclusion in its files. The federal agency is responsible for writing the agreement document.

The Federal Highway Administration (FHWA) assigned its National Environmental Policy Act (NEPA) responsibilities to Caltrans. As a result, Caltrans is considered "FHWA," for purposes of NEPA and also for FHWA's Section 106 responsibilities. The Section 106 Programmatic Agreement<sup>1</sup> (106 PA) documents Caltrans's FHWA role in its introductory clauses.

Agreement Documents have four basic parts:

- 1) Title: This identifies the undertaking, the signatories, and whether it is an MOA or a PA.
- 2) Preamble (Whereas Clauses): These cite the statutory authority for the undertaking; introduce the signatories (typically Caltrans as assigned by FHWA and SHPO for two-party agreement documents<sup>2</sup>); provides relevant background facts about the project; briefly describe the consultation process; and identify the consulting parties; explain that Caltrans as assigned by FHWA has determined its federal undertaking will have an adverse effect on historic properties (for MOAs) or that provides for the completion of identification and evaluation of historic properties as well as resolution of any adverse

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<sup>1</sup> First Amended Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act as it Pertains to the Administration of the Federal-Aid Highway Program in California, effective January 1, 2014.

<sup>2</sup> ACHP becomes a signatory if it decides to participate, in which case it would be a three-party agreement document.

effects (for PAs); has consulted with SHPO under Section 106, has considered alternatives (for MOAs); parties with which Caltrans as the federal agency has consulted, including the Caltrans District; and that Caltrans and SHPO agree that that the stipulations that follow will be implemented.

The “Now Therefore” clause concludes this first section of the agreement document. This is the clause in which Caltrans, as assigned by FHWA, and SHPO agree that that the stipulations that follow will be implemented, and that the agreement document is in effect until it expires or is terminated.

- 3) Stipulations: These describe in detail all the commitments that Caltrans, as assigned by FHWA, ensures will be carried out in order to avoid, minimize or mitigate adverse effects to historic properties (for MOAs), or to complete identification, evaluation and assessment of effect to historic properties (for PAs). They include standard administrative provisions for monitoring and reporting, dispute resolution, post-review discoveries, the agreement document’s expiration date and how to amend or terminate the agreement document. See 36 CFR 800.6(c)(4)-(9) for specific requirements on what should be included as stipulations in an agreement document regarding the way it can be terminated or amended.

The “Execution clause concludes the stipulations section. It comes immediately after the stipulations and explains that by the federal agency and SHPO signing the agreement document and Caltrans forwarding it to the ACHP, Caltrans as the federal agency is demonstrating that in accordance with 36 CFR 800 Caltrans has taken into account the effects of the undertaking on historic properties and has afforded the ACHP an opportunity to comment on the undertaking and its effect on historic properties.

- 4) Signatures: The parties who sign the agreement document are referred to collectively as “signatory parties.” There are three types of signatory parties. A signatory has the sole authority to execute, amend, or terminate the agreement document. The Caltrans DEA Chief, as assigned by FHWA, and SHPO (or THPO) are the signatories for Caltrans agreement documents. The ACHP, if participating, would also be a signatory. Invited signatories are those that Caltrans CSO has invited to sign because the party has a responsibility for carrying out terms of the agreement document. The Caltrans District Director is an invited signatory. A project applicant (such as a local government) would also be an invited signatory. Invited signatories may amend or terminate the agreement document but the refusal of an invited signatory to sign the agreement document does not prevent it from being executed. Concurring parties are those that have been consulted and that Caltrans has invited to sign. Concurring parties cannot amend or

terminate the agreement document. A concurring party's refusal to sign an agreement document prevent it from being executed.

The ACHP's [Guidance on Section 106 Agreement Documents](#) has more information on identifying appropriate signatory parties.

Contact the Section 106 Coordination Branch Chief in CSO for recent examples of executed MOAs or project-specific PAs.

## Agreement Document Checklist for Preparers

Below are points to consider when drafting an agreement document, adapted for Caltrans use from the ACHP's [Section 106 Agreement Checklist: Content](#).

### Title

- Is this a Memorandum of Agreement or Programmatic Agreement?
- Are all the signatories named in the title? These include Caltrans, the SHPO/THPO, and ACHP if participating.
- Is the undertaking(s) named in the title?

### Preamble – Whereas Clauses

- Is the entire undertaking and the nature of federal involvement described?
- Does a clause note the agreement was developed pursuant to Section 106 of the National Historic Preservation Act? When applicable also include reference to the 106 PA.
- Is Caltrans, as assigned by FHWA, named as the responsible federal agency?
- If there is a lead federal agency, has it been named? Also identify the role(s) of other involved federal agencies [36 CFR §800.2(a)(1)]
- Is the Caltrans District's role and responsibilities as invited signatory described?
- Is an applicant for federal-aid highway funds involved (e.g. local government)? If so, are the applicant's role and responsibilities as invited signatory described?
- Is the appropriate SHPO/THPO(s) named?
- Are all other consulting parties listed, including any Indian tribes, and representatives of local governments? See 36 CFR §800.2(c).
- In a PA, is the reason why a programmatic approach is needed described? See 36 CFR §800.14(b)(1).
- Are historic properties affected by the undertaking listed? If numerous, consider summarizing and referencing an appendix.

- Does a clause acknowledge historic properties would or may be adversely affected? If historic properties would be adversely affected by the undertaking, briefly describe how.
- Is a clause stating that the ACHP has been notified of the finding of adverse effect included?
- If the ACHP was invited to participate and is participating in the consultation, is this stated?
- Is a reference included to the agency's public involvement efforts?
- Is the clause, "Now, therefore, Caltrans, as assigned by FHWA, [when Caltrans is the federal agency] and SHPO/THPO agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties" included?

### **Stipulations**

- Are the stipulations preceded by a clear statement that the federal agency shall ensure that these terms are carried out?
- Has the Area of Potential Effects for the undertaking(s) been identified?
- In a PA, are there provisions for how the identification, evaluation and assessment of effects to historic properties will be completed?
- Are procedures for responding to the unanticipated discovery of historic properties or inadvertent adverse effects to identified historic properties included? Where appropriate; see 36 CFR §800.6(c)(6) and 36 CFR §800.13.
- Are procedures for responding to emergency situations included? See 106 PA Stipulation XVI.
- Is the need for confidentiality of sensitive information identified where appropriate? See 36 CFR §800.11(c).
- Has the use of qualified professionals been stipulated where appropriate? See 106 PA Stipulation III and Attachment 1.
- If archaeological data recovery is stipulated, is a data recovery plan attached or referenced in the agreement? See 106 PA Attachment 6 and Exhibit 5.6.
- Are procedures for public involvement included for any ongoing reviews carried out according to the agreement's terms? See 36 CFR §800.2(d) and 800.6(a)(4).
- If other federal funds, permits, or licenses may be used or required in the future for the undertaking, is an "other federal involvement" stipulation included? Has Caltrans invited that federal agency to be a signatory?
- Is compliance with other federal laws, such as the Native American Graves Protection and Repatriation Act and the Archaeological Resources Protection Act, and state and/or tribal laws, including state burial laws, acknowledged where appropriate? Note while

these other laws can be referenced in an MOA/PA, Section 106 agreements are solely for documenting an agency's compliance with Section 106 of the NHPA. As such, Section 106 agreement documents should not provide for an agency's compliance with other statutes.

- Are procedures for monitoring progress and reporting on agreement implementation included as appropriate to the project?
- Is a dispute resolution procedure included?
- Are provisions for the amendment and termination of the agreement included? See 36 CFR §§800.6(c)(7) and 800.6(c)(8).
- Is the agreement's duration specified? See 36 CFR §800.6(c)(5).
- Is there a provision stating when the agreement will take effect?
- Do the stipulations conclude with an affirmation statement that Caltrans has taken the effects of the undertaking into account and afforded the ACHP the opportunity to comment on the undertaking and its effect on historic properties?

### **Signatures**

- Are the signature blocks for signatories, invited signatories, and concurring parties clearly identified?
- Have all parties that are assigned responsibilities in the agreement been asked to be invited signatories?
- Does each signature line include a printed name, title, agency/organization, and date?

## **Agreement Document Checklist for Reviewers**

Below are points to consider when reviewing the final draft of an agreement document, adapted for Caltrans use from the ACHP's [Section 106 Agreement Checklist: Reviewers](#).

### **Editing and Mechanics**

- Are all acronyms and abbreviations identified and used consistently?
- Are all of the provisions agreed upon during consultation included? Make sure stipulations are grouped logically.
- Do the stipulations clearly identify who is responsible for carrying out each measure?
- Do all tasks have clear timeframes for initiation and completion?
- Have all terms and references been used correctly and consistent with regulatory definitions? Avoid terms like "project area" or "cultural resource" or "historical resource" that are not used in 36 CFR Part 800.
- Are all stipulations written in the active voice? This is particularly important so that the parties with responsibilities clearly understand what is being asked of them.

- Is the process for post-review decision making described in a complete, logical, and organized way? Who makes the decisions? Who is consulted? When do decisions need to be made? What information is needed?
- Are all attachments and appendices cited in the agreement document included? Confine lengthy lists of historic properties, detailed procedural instructions, maps, address lists, etc. to appendices.
- Are spelling, grammar, page numbering, section numbering, etc. accurate and consistent?
- Can a cold reader understand the agreement document and what it requires? A cold reader should not have to refer to consultation meeting minutes or other background documents to understand the agreement document's provisions.
- Are the signature blocks for signatories, invited signatories, and concurring parties clearly separated or designated on the signature page(s)?

### **Preparation**

- Are all parties to whom the agreement document has assigned responsibilities included as signatories or invited signatories?
- Does the duration of the agreement document allow adequate time for project implementation and the completion of all stipulations?
- Does Caltrans (as the federal agency) leadership support commitments made in the agreement document?
- If the agreement document is executed in counterparts, does each signature page include the title of the agreement document? Caltrans, as the federal agency, should compile the individually executed counterparts into a single document before forwarding the agreement document to the ACHP for signature or filing.<sup>3</sup>
- If the ACHP is participating in the consultation, have all the other signatories, and invited signatories with assigned responsibilities, signed the MOA before Caltrans forwards the document to the ACHP for signature?
- Once fully executed, has the agreement document been filed with the ACHP?
- Once fully executed, has a copy of the agreement document been provided to all consulting parties?
- Has the executed agreement document been made available to the public?

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<sup>3</sup> ACHP uses "counterparts" to mean "that each signatory, invited signatory, and concurring party may sign and date a separate signature page concurrently or sequentially that are then attached together to make up a single agreement with all signatures," per ACHP's online Guidance on Section 106 Agreement Documents.

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## Amendments

It is sometimes necessary to amend an executed agreement document, such as if the project scope or size changes and there are additional historic properties within an expanded APE, or different approaches are needed to avoid, minimize or mitigate adverse effects to historic properties in the APE; or if Caltrans or other signatories are not able to full the terms within the agreed upon timeframe.

When the agreement document needs to be changed, Caltrans prepares an amended agreement following the same format as for the original agreement document. Use the same project title block and add “Amendment to” before that title.

### Amended Preamble’s Whereas Clauses:

- Identify the original project title and when it was originally executed,
- Identify how the amended agreement document will be referenced, for example the “Original Project Title, as Amended Month, Day, Year,”
- Include concise explanation of the reasons for the amendment
- State that Caltrans, as assigned by FHWA and described in Stipulation VI *First Amended Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federal-Aid Highway Program in California*, executed January 2014 (Section 106 PA) will send a copy of this executed amendment to the ACHP (if ACHP is not a signatory).
- Include a clause that states, “NOW, THEREFORE in accordance with Stipulation \_\_\_ [insert the number of the amendment stipulation in the original agreement] of the MOA/PA, Caltrans and the SHPO [and any invited signatories] agree to amend the MOA/PA as follows.”
- Include the appropriate Stipulations that address the changes needed
  1. Amend Stipulation \_\_\_ [insert the number of the stipulation to be amended] so it reads as follows: [insert the amended text of the stipulation].  
If the amendment involves adding a new stipulation to the agreement, add the new stipulation.
  2. Stipulation \_\_\_ [insert the number of the new stipulation]: Insert the amended text of the new stipulation.
- Insert signature and date lines for all Signatories. If the amendments add duties to a party that did not sign the original agreement, add a signature line for that party.



Agreement document amendments are executed in the same manner as the original agreement in that the same signatories and invited signatories sign, and Caltrans files a fully-executed copy with the ACHP.