



Center for
Environmental
Excellence

ROADMAP FOR DEVELOPING AND IMPLEMENTING

PROGRAMMATIC AGREEMENTS

AMERICAN ASSOCIATION
OF STATE HIGHWAY AND
TRANSPORTATION OFFICIALS
AASHTO



U.S. Department
of Transportation
**Federal Highway
Administration**

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ROADMAP FOR DEVELOPING AND IMPLEMENTING PROGRAMMATIC AGREEMENTS

Programmatic Agreements (PAs) reduce project delivery time by specifying the roles and responsibilities of all parties involved. PAs also standardize coordination and compliance procedures, facilitate trust relationships between a Department of Transportation (DOT) and regulatory agency staff, and help limited staff and resources to be more focused and productive by promoting better project decisions and more positive outcomes. Using PAs also improves compliance efficiency by establishing consistent expectations for review times and processing options. They also encourage communication and are instrumental in building cooperative relationships

Despite these benefits, and their availability for many years, not everyone takes advantage of them. The Federal Highway Administration's (FHWA) **EVERY DAY COUNTS (EDC) INITIATIVE** has identified PAs as a focus for expanded adoption and implementation. Expanded use of PAs can improve and expedite transportation project delivery processes across the Nation as well as improving environmental outcomes.

PAs are encouraged to eliminate repetitive discussions of the same issues between relevant Federal agencies and State resource agencies, State Departments of Transportation, and tribal governments. PAs previously implemented by FHWA include, but are not limited to:

- Programmatic agreements that address process related to consultation, coordination, and decision-making;
- Review of individual impacts of a particular resource at a regional/national level for certain categories of projects for reference in subsequent project-level environmental reviews;
- Resource-focused agreements (e.g., mitigation for wetland, water quality, and endangered species impacts); or
- Section 404/NEPA merger agreements.

Expanding the use of PAs requires creating a usable guidebook or roadmap to their development and implementation. This document does just that, providing examples and recommendations on developing various types of PAs.

WHAT'S IN THE ROADMAP? The roadmap consists of six sections:



The content of the roadmap is presented in a sequential manner with each section informing the next, providing a tutorial on considering, developing and implementing a PA. However, each section can stand on its own should the reader have questions about specific topics. Just click on a section above to go directly to that content.

1

WHAT IS A PROGRAMMATIC AGREEMENT?

As their name implies, PAs are agreements that define the terms or the process for certain reviews or the treatment of identified resources. PAs are part of a larger collection of Programmatic Approaches that include Regional Permits, Programmatic Consultations and other alternative arrangements with resource and regulatory agencies regarding environmental process reviews, data collection, and regulatory compliance. A PA is a document that spells out the terms of a formal, legally binding agreement between a State DOT and other state, tribal and/or federal agencies. A PA establishes a process for consultation, review, and compliance with one or more federal laws. PAs accomplish one primary goal: efficiently handling projects that meet the conditions stipulated in the agreement and its agreed-upon procedures. These procedures typically reduce the number of steps and time required for review and approval.

PAs have been developed over the years by State DOTs and/or FHWA in partnership with resource agencies to streamline compliance with federal environmental laws (e.g., the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and Section 106 of the National Historic Preservation Act (Section 106)). The process established in a PA may govern consultation, review, and compliance for a whole category of transportation projects, or all projects affecting a particular kind of resource. Successful PAs are those where a state DOT has demonstrated the capacity and capability through their procedures and staff competencies to ensure compliance. This demonstrated capability provides the necessary assurance to the reviewing agencies that streamlining the process will not limit the protections afforded to the resources under their jurisdiction.

PAs can either be proactive, setting procedures to avoid possible challenges in the future or reactive, addressing an identified problem. Based on feedback from State DOTs, which have successfully developed and implemented PAs, various scenarios where PAs are useful include:

- Repetitive and predictable processes or activities
- A large volume of similar projects and a known timeline for their completion

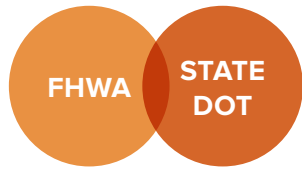
- Opportunities to codify and streamline project review
- Issues with agency consultation based on limited staff and/or resources

PA TYPES

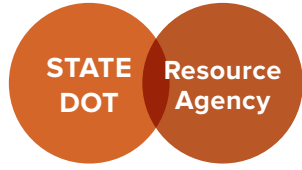
There are several ways to structure a PA. States can develop bilateral PAs with only FHWA or only a resource agency, or they can develop multilateral PAs with multiple parties, such as regulatory and resources agencies. Each agreement is designed to reflect the needs of the agencies or entities signing the agreement and to achieve specific objectives. The following presents a brief discussion of the common types of PAs.

Bilateral PAs between the FHWA and the State DOT only, stipulate how the State DOT will satisfy FHWA's requirements in routine reviews or projects. Examples include PAs for CEs under NEPA or delegating certain FHWA responsibilities under Section 106 to States.

These PAs are the most common. Considerable resources are available to help States develop PAs for CEs under NEPA and Section 106. Throughout this Roadmap, the user will be referred to outside resources addressing CEs under NEPA and Section 106 PAs.



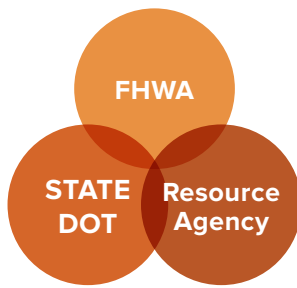
Bilateral PAs between State DOTs and Resource agencies are similar in form and function to the three-party PAs described below including FHWA but without including FHWA as a signatory. These sort of PAs are useful when there are routine actions that do not require FHWA's oversight or input such as compliance with State resource laws or when States have assumed or have been delegated responsibility on behalf of FHWA for compliance with federal laws.



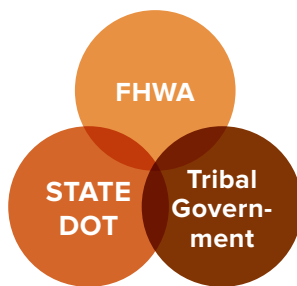
“We looked at the existing workload, the effect of those projects and the timeline to complete versus the regulatory requirements. This allowed us to determine if the timelines were problematic and if a PA would reduce the workload of the regulatory agency and DOT.”

Oregon DOT

Multilateral PAs between the FHWA, State DOT, and resource agencies establish a process for complying with federal requirements for an agency program, category of projects or a particular type of resource. Examples include PAs for consultation under ESA for a particular species or a merger agreement with US Army Corps of Engineers for compliance with Section 404 of the CWA and NEPA.



PAs developed between the FHWA, State DOTs and Tribal Governments, describe the process and coordination necessary for engaging the tribe(s) when construction activities may impact tribal lands or may affect tribal resources.



BENEFITS OF DEVELOPING A PROGRAMMATIC AGREEMENT

As previously discussed, PAs can help provide greater efficiency to project development and delivery by providing a standardized approach to project reviews. Other benefits include:

- Elimination of individual federal and state agency review of certain projects;
- Quicker project turnaround with better environmental outcomes
- Greater predictability on large or complex projects by following an agreed upon method or process to determine and address impacts;
- Increasing trust among State DOTs and regulatory agencies;
- Minimizing potential “piecemeal” effects to resources that can occur when evaluating individual projects rather than a program of projects;
- Streamlined review of routine transportation projects; and
- Freeing agency resources to address other high priority environmental issues and projects.

“For both the resource agency and the DOT, working through the PA development process has consistently yielded a better understanding of each other’s process, mission, perspective and agency needs. The relationships have consistently improved through the development process.”

Kentucky DOT

In addition to the broad benefits described above, States enjoy flexibility when developing PAs that work for them as well as their partners. When developing a PA, a State may:

- Tailor the compliance process to unique agency requirements;
- Establish timeframes appropriate for the program of projects under the PA;
- Create an up-front agreement about projects that may become contentious;
- Move decision-making earlier in the planning process;
- Adopt creative solutions; and
- Provide opportunities for additional PAs or focus on other non-related initiatives of the DOT.



PROGRAMMATIC AGREEMENTS AND LEGAL AUTHORITIES

PAs are legally binding agreements between the parties and establish process and procedures for compliance with certain laws and regulations. It is important to understand where the authority lies that enables each of the agencies to enter into these agreements.



TRANSPORTATION AUTHORITY

The *Moving Ahead for Progress in the 21st Century Act* (MAP-21), signed into law in July 2012 contained several provisions targeting the environmental review and compliance process for transportation projects. Section 1305 of MAP-21 directed the Secretary of Transportation to initiate a rulemaking to allow for the use of programmatic approaches to conducting environmental reviews that eliminate repetitive discussions of the same issues, focus on the actual issues ripe for analysis at each level of review and are consistent with NEPA and other applicable laws.

Section 1311 of Map-21 promoted the use of programmatic mitigation plans as part of the statewide or metropolitan planning process. These programmatic plans would address the potential environmental impacts of future transportation projects (23 U.S.C. 169(a)).

On December 4, 2015, the *Fixing America's Surface Transportation Act* (FAST Act) was signed into law. The FAST Act includes additional changes to Federal law intended to streamline the environmental review process for many transportation projects and continues the focus on programmatic reviews.

PROGRAMMATIC AGREEMENTS AND NEPA

Since 1989, FHWA Division Offices and State Departments of Transportation (DOTs) have entered into programmatic agreements that establish procedures for expeditious and efficient approval of Categorical Exclusions (CE), many found under 23 CFR Part 771.117(d) (commonly known as d-list CEs). Section 1318(d) of MAP-21 enshrined this practice into law and FHWA, through rulemaking, codified it in 23 CFR 771.117(g). The FHWA Division Office, by agreement with the State DOT, does not require individual project-by-project and approval for the projects which meet the conditions stipulated in the agreements and the State DOT may make a CE approval on FHWA's behalf. These agreements also establish expectations and responsibilities for the FHWA and State DOT parties involved and can usefully identify processing and documentation expectations for all CE actions, quality control and quality assurance, and FHWA oversight.

You can read more about Programmatic Categorical Exclusion Agreements in the FHWA Environmental Review Toolkit [HERE](#).

SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

Section 106 requires each federal agency (in this case, USDOT) to identify and assess the effects of its actions on historic resources. The agency must consult with appropriate state and local officials, Indian tribes, applicants for federal assistance, and members of the public and consider their views and concerns about historic preservation issues when making final project decisions. Effects are resolved by agreement, usually among the affected state's State Historic Preservation Officer (SHPO) or the Tribal Historic Preservation Officer (THPO), the FHWA, Advisory Council on Historic Preservation (ACHP) and any other involved parties.

The implementing regulations for Section 106 (36 CFR 800) provide for developing PAs to "govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings" (36 CFR 800.14(b)).

The ACHP has additional resources addressing the use of PAs on their site [HERE](#).

CLEAN WATER ACT ALTERNATIVE PROCEDURES

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities).

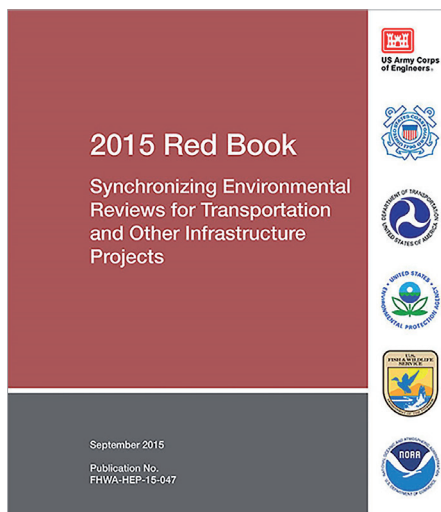
Under Section 404(e) of the CWA and 33 CFR Parts 325 and 330, the U.S. Army Corps of Engineers (USACE) has the authority to issue general permits for categories of similar activities that have a minimal impact on the aquatic environment, both individually and cumulatively. These general permits are analogous to the PAs discussed throughout this Roadmap. USACE issues three types of general permits: Nationwide Permits (NWP), Regional General Permits (RGPs), and programmatic general permits (PGPs). NWPs apply across the country while USACE districts develop RGPs and PGPs that may apply district-wide or to a particular geographic area.

RGPs and PGPs are also for categories of work with minimal impacts to the aquatic environment but used within a smaller geographic area such as a USACE district, a watershed, or a county. Similar to NWPs, USACE highly recommends using RGP and PGP for project types with minimal impacts to the aquatic environment, and that appear to meet the terms and conditions of an existing RGP or PGP.

Development of an RGP or PGP is most appropriate when a transportation agency recognizes that they must frequently seek authorization for a particular activity, like culvert replacement or ditch maintenance, which usually results in minimal impacts to the aquatic environment. Either a USACE district may decide to develop an RGP or PGP, or a transportation agency may request their local USACE district to develop one. These could be activities already covered by another RGP or NWP, for which there is a desire to modify the acreage limits or the notification thresholds to allow for broader applicability. For a transportation agency, demonstrating a track record of frequently reoccurring projects/actions with generally minimal impacts and predictable results helps the USACE district to determine more quickly if an RGP or PGP is feasible.

The process of developing an RGP or PGP requires a public notice, requesting comments from the public, and then comments are addressed while completing any necessary consultations (such as those required for protected species or historic and cultural resources). After complying with NEPA, (as well as obtaining any other necessary approvals), the District Engineer makes the determination to issue or deny the RGP or PGP. Also similar to NWP, RGP and PGP are valid for a five-year period in which a project sponsor may seek approval from USACE for an activity under the RGP or PGP. In the case of a PGP, a project sponsor may work with another entity, frequently a State or municipal agency, which administers the PGP on USACE's behalf. If a transportation agency is interested in pursuing development of an RGP or PGP, it should consider a proposed scope of activities to be covered by the RGP or PGP, and then contact the local USACE district office. FHWA Division offices can help facilitate this outreach.

Beyond programmatic permits such as RGPs or PGPs, programmatic agreements that merge the requirements of NEPA and CWA can also provide a more predictable and efficient review on transportation project. In September 2015, FHWA in partnership with USACE, the United States Coast Guard, Environmental Protection Agency, U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, released the **2015 RED BOOK**. The Red Book provides a “how to” guide for synchronizing NEPA and other federal reviews, including developing a merger agreement, a PA that establishes a process for satisfying the requirements of the permitting agencies through a synchronized NEPA and permitting review process.



ENDANGERED SPECIES ACT

Under Section 7(a)(2) of the ESA, each Federal agency must, in consultation with the US Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NMFS), ensure that any action it funds, authorizes, or carries out will not jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Also, under Section 7(a)(4) of the ESA, each Federal agency shall confer with the USFWS or NMFS on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. In recent years, the Section 7 consultation workload for USFWS and NMFS has increased dramatically, leading to the need to develop techniques to improve the efficiency of the consultation process. One of the most efficient methods of accomplishing this has been the implementation of “programmatic consultation” in the formal and informal consultation processes.

The term “programmatic consultation” encompasses several different types of ESA Section 7 consultations. A programmatic consultation may cover an action agency’s program or plan such as a Statewide Transportation Improvement Program; a large group of similar actions (e.g., a transportation agency’s routine operation activities and USACE permit activities); or different types of projects proposed within a large geographic area (e.g., a transportation agency’s new construction projects within a particular State or regional area). Standards

and guidelines or project design criteria are sometimes developed to delineate the scope of actions proposed to be covered by the programmatic consultation. Such standards and guidelines provide predictability to action agencies.

Find additional information and USFWS guidance for Department of Transportation consultations [HERE](#).

ESSENTIAL FISH HABITAT

Under Section 305(b) of the Magnuson-Stevenson Act, each Federal agency shall consult with the Secretary of Commerce on any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may adversely affect any Essential Fish Habitat (EFH). “Programmatic consultations” have been used to increase the efficiency of consultation processes.

As per implementing regulations Subparts J and K of 50 CFR Part 600, programmatic consultation provides a means for NMFS and a Federal agency (and their State partners) to consult regarding a potentially large number of individual actions that may adversely affect EFH. Programmatic consultations will be the most appropriate option to address funding programs, large-scale planning efforts, and other instances where sufficient information is available to address all reasonably foreseeable adverse effects on EFH of an entire program, parts of a program, or some similar individual actions occurring within a given geographic area.

A Federal agency may request a programmatic consultation by providing NMFS with an EFH Assessment. The description of the proposed action in the EFH Assessment should describe the program and nature and approximate number (annually or by some other appropriate time frame) of the actions. NMFS may also initiate programmatic consultation by requesting pertinent information from a Federal agency.

NMFS will respond to the Federal agency with programmatic EFH Conservation Recommendations and, if applicable, will identify any potential adverse effects that could not be addressed programmatically and require project-specific consultation. NMFS may also determine that a programmatic consultation is not appropriate. NMFS will defer all EFH Conservation Recommendations to project-specific consultations in those instances. If necessary, NMFS’ response may include a General Concurrence, for activities which no further consultation is required.



2 IS A PROGRAMMATIC AGREEMENT NEEDED?

Before committing resources to develop a PA, State DOTs should consider whether the need exists. Developing a PA is time and labor intensive though the benefits typically outweigh the cost of the up-front investment. Key questions to ask include:

<p>What do you want to accomplish?</p>	<p>It is important to have a clear goal in mind before engaging the partner agencies to develop a PA. Establishing the ideal outcome will help inform the process for getting there and determine if a PA is the right vehicle to accomplish it.</p>
<p>Is the process reasonably predictable?</p>	<p>If the process you are addressing in the PA is reasonably predictable, the opportunities for cost/time savings are increased. PAs may not be as useful for processes or projects with varying impacts and unpredictable outcomes.</p>
<p>Are the reviews frequent or project types common?</p>	<p>PAs are most useful when they are used often either because the types of projects are frequently administered or the required reviews occur often. If project types or reviews are infrequent there may not be benefit in developing a PA.</p>
<p>How are the existing relationships with the agencies?</p>	<p>If relationships are strained, there could be significant effort to reach agreement – but ultimately the process of developing the PA may improve relationships overall. Consider all the outcomes when determining if a PA is the appropriate next step.</p>
<p>What is the Cost/Benefit of creating this PA?</p>	<p>Are there measurable efficiencies through time savings that are achievable through a routinized process? PAs take time and effort to develop so you should be clear on the outcomes and their benefits before engaging.</p>

Photo by Karl Nielsen Photography



3

PRINCIPLES OF DEVELOPING A PROGRAMMATIC AGREEMENT



Photo by Karl Nielsen Photography



BE PREPARED TO DEDICATE SUFFICIENT RESOURCES AND TIME

Developing and implementing a PA can be a lengthy process sometimes taking multiple years. After development and implementation, there is still considerable “care and feeding” of the agreement to ensure that it remains useful and reflects changing needs and requirements. State DOTs should initiate the PA development with a full understanding of the level of effort it will likely take to complete the process. Without an up-front dedication of staff and resources, and a well thought-out plan, PA development will languish and be difficult to achieve.

For example, the Kentucky Transportation Cabinet established a programmatic biological opinion (BO) addressing potential impacts to the Indiana Bat in 2006. The PA was in place for five years and upon expiration, they pursued a new, more flexible and inclusive agreement. The new agreement took over a year to complete with one salaried biologist dedicating four months of their time to its development.

The table below summarizes the costs associated with developing ESA Section 7 PAs as reported by the Volpe Center in their analysis of the benefits and costs of PAs ([LINK TO REPORT](#)).

Kentucky Indiana Bat PA	Oregon Programmatic BA and BO	Washington Section 7, Essential Fish Habitat PA
Cost estimated at \$43,000 and one calendar year	Cost estimated at \$350,000 and two calendar years	Cost estimated to be over \$216,000 and two calendar years

Older PAs have taken much longer; the Illinois NEPA 404 merger agreement took several years to initiate, ratified in 1996 and formally updated in 2008. The North Carolina NEPA/404 merger agreement started work in the early 1990s with an official agreement signed in 1998. These durations are likely extreme by today’s standards but provide context on the historical effort necessary to bring the parties to agreement on the PA.

Expertise and skills necessary to negotiate PAs vary widely from resource to resource and even within resources (e.g. species considerations or unique historic elements). This makes development and implementation of standardized or programmatic procedures readily delegated to state DOT's difficult, and approaches that work in one state may not apply to other states. Due to their complexity, programmatic type solutions that cover multiple projects may take considerable time and effort to develop, but are often worthwhile where an agency encounters particular endangered species or habitat on a frequent basis.

In making your decisions about whether all parties to the PA can devote the necessary resources to development, it may be useful to develop a preliminary assessment including:

- Personnel who will need to be involved
- Roles and responsibilities
- Meeting schedule
- Interim goals and deadlines
- Process for legal, peer, and public review

Once everyone understands what time and resources are required, management can make an informed decision about whether to proceed.

It may be useful to quantify the long-term benefits of PA development, especially regarding reducing project delays and cost. Quantifying such “payoffs” will help convince management to support the upfront dedication of staff and resources needed in developing PAs. From the same Volpe report, the table below summarizes the cost savings for the same ESA PAs:

Kentucky Indiana Bat PA	Oregon Programmatic BA and BO	Washington Section 7, Essential Fish Habitat PA
Estimated savings of \$150,000 from projects in last year alone	Estimated savings of approximately \$1.23M over 18 months	Estimated total savings of \$103,000 annually for BA completion alone

KEEP AN OPEN MIND

Understand that there are multiple ways to achieve the desired outcome and be willing to entertain different approaches from the other agencies as part of developing the PA. Constraining the development process to only one-way of thinking can derail negotiations, create disputes and most likely delay the overall process. Remember that each agency has a different fundamental mission and the purpose of the PA is to satisfy the requirements of all parties in a more efficient and effective manner. Focusing on only the transportation elements minimizes the concerns of the sister agencies and is counterproductive. Remaining flexible in interpretation and execution as long as the result achieves the ultimate goal will enable discussions to proceed without unnecessary obstacles. Be prepared to think outside the box and encourage others to do the same.

SET A SCHEDULE

Several DOTs noted that absent a schedule with clear milestones, PA negotiations could drag on. At the outset, the parties should agree to a timeline to complete the process and identify the interim steps needed to get there, with dates associated with critical decision points. Accountability across all the parties is essential to maintaining progress towards completion.

EXECUTIVE SUPPORT IS CRITICAL

Management has a significant role in successfully developing PAs. FHWA, State DOT, and resource agency officials must:

- Provide the leadership needed for creating the PA and guiding and motivating agency staff.
- Demonstrate a commitment to building and maintaining interagency trust through their actions and words.
- Demonstrate a commitment to developing the PA by dedicating the resources needed to complete the PA, including staff time to work on the PA.
- Set the tone for positive and constructive negotiations among all parties.

Leadership must be involved in all key components of a PA's development. Agency staff should also keep management informed at all times as the day-to-day aspects of PA development move forward.

DO NOT REINVENT THE WHEEL

DOTs have used PAs since the 1990s, and considerable lessons learned have evolved over that time as more and more states develop PAs for a variety of resources. As a State is considering a PA or is in the process of drafting a PA, look to others with implemented PAs and learn from their experiences. There are a number of avenues to find example PAs:

1. The [PROGRAMMATIC AGREEMENTS LIBRARY \(PAL\) DATABASE](#) is an organized, accessible, examples of executed PAs compiled in 2010. The PAL summarizes agreement information; contains a link to the full agreement; and provides on-going access for practitioners to research agreements that meet specific requirements. The PAL includes PAs in eight categories ranging from Air Quality to Land Management.
2. FHWA compiled an inventory of over 500 programmatic agreements in 2014. This inventory can be accessed through FHWA Division Offices.
3. FHWA maintains a [STATE PRACTICES DATABASE](#) on the [ENVIRONMENTAL REVIEW TOOLKIT](#) that contains examples of streamlining and stewardship practices, including some programmatic agreements, used by States to efficiently and effectively fulfill their NEPA obligations.
4. Some DOTs have made their programmatic agreements available on their own state websites. Using an internet search engine with key terms, one can find a variety of resources to help inform PA development.

PRIORITIZE BETTER ENVIRONMENTAL OUTCOMES

When drafting a PA, one should also ensure not to “short-change” vital protections to our nation’s critical resources. Faster, more efficient reviews facilitate greater predictability to both sponsor and reviewing agency, but these accelerated reviews should not come at a cost to the resources the reviews were intended to protect.

The regulatory or permitting agencies who sign the agreement will ensure that they maintain adequate protections, but it should also be the goal of the DOT as well to establish a faster process that maintains or improves the environmental outcomes of projects. For example, PAs can provide unique opportunities to address mitigation measures or consider cumulative impacts.

FOSTER TRUST AND COOPERATION AMONG THE PARTIES

The single most essential requirement for successfully developing a PA is a relationship of trust and cooperation among the parties. All good PAs involve give and take among the participants. Some parties agree to relinquish control that they currently have over parts of the legal compliance process. Other parties agree to accept standards of performance or tighter timeframes or participation by parties who are not currently involved in their project. Agencies agree to fund substantial preservation efforts. In the most effective PAs, everyone gives up something, and everyone gets something in return, and the Big Winners are the resources and the public.

If there is no relationship of trust between the parties, it is very challenging and often impossible to negotiate a quality PA. The biggest obstacles to successful PA development are turf battles, an inability to compromise, and lacking a “win-win” mentality. In the absence of trust, no one wants to concede authority, and everyone focuses on preserving process rather than innovating strategies that achieve the goal of a faster review while protecting the resources. PAs generated in an atmosphere of mistrust often are never fully implemented, and if implemented, they often fail to achieve their stated objectives as the parties never embrace the abbreviated process created in the PA.



Photo by Dan Luedert

BUILDING TRUST



DEVELOPING PROGRAMMATIC AGREEMENTS WITH NO EXISTING RELATIONSHIP OR TRUST

Start small – if everyone has a good experience with a small agreement, they will be more willing to enter into larger ones later.

- Develop a simple agreement covering some small, discrete part of the compliance process (a particular resource type, a type of project).
- Make sure the agreement saves time and work and focuses on preservation.
- Ensure that all parties get something out of the agreement that they really want.

Make sure that your agency not only performs well under the agreement, but goes the extra mile.

Acknowledge the problem

- Sit down with the other agencies and candidly discuss the situation
- Ask everyone to work toward a new relationship and identify some possible trust-building steps that you might take to become better partners.

Bring in a neutral party as a negotiator early in the PA development process

- Choose a person who understands the process governed by the PA (e.g., Section 106) but has no stake in whatever problems there are among the parties
- Secure at least general agreement from all parties on the choice of the negotiator.
- Arrange for the negotiator to meet with each of the parties separately in their own offices.
- The negotiator should:
 - assure all parties of absolute confidentiality for any comments made at these meetings
 - elicit from each party what (in a perfect world) they would most like to have happen in the PA
 - determine what (in the current, very imperfect world) each party is most afraid will happen if the PA is developed and implemented
 - discuss with each party measures that might be included in the PA to “bomb-proof” it against the things that they fear will go wrong

- With the “most desired” and “least desired” outcomes of all parties in mind, the negotiator then facilitates discussions and negotiations among the parties to develop the PA, offering the “bomb-proofing” suggestions where appropriate, unless those measures would tend to undermine the purpose of PA.

Include “comfort” measures in the PA. Consider including some of the following:

- A relatively short term for the initial PA, with concurrence of all parties required for renewal.
- Opportunities for monitoring of performance under the terms of the PA
- Incremental delegation of authority, with parties assuming increasing responsibility or autonomy at specific points during the life of the PA if all parties agree that things are working well

- Regular meetings among the parties to assess the operation of the PA and identify and solve any problems
- A modular structure for the PA, such that if one part of the PA doesn’t work well it can be terminated while the rest of the PA remains in force
- Efforts designed to build a trust relationship that can be included as part of the PA process

As a last resort, if personality conflicts are a major issue, agree to find roles for those individuals that will limit the effects of the conflict (or limit their interaction with the other party(ies)).



4 STEPS IN DEVELOPING A PROGRAMMATIC AGREEMENT



STEP 1. IDENTIFY THE PURPOSE AND GOALS

Identifying the purpose and goals is the first step in the PA development process helping to establish and clearly define the intent of the agreement, and what it plans to accomplish. Agencies can identify the destination and provide a process for getting there.

Important items to keep in mind is that the stated purpose and goals must be obtainable, and all parties must buy-in to the objectives. PAs should have a clearly defined purpose and goals statement that avoids ambiguity, does not raise issues during implementation or does not address the need itself.

EXAMPLE PURPOSE AND GOALS

Please keep in mind the following examples of purpose and goal statements from existing PAs are for reference only and that each PA should have purpose and goals unique to the needs of the agencies involved.

EXAMPLE 1 – ILLINOIS – SECTION 404 OF THE CLEAN WATER ACT AND NEPA MERGER PA

The purpose of the merger process is to establish a system to coordinate the review among resource agencies of transportation projects that impact waters of the United States to:

- Expedite construction of necessary transportation projects, with benefits to mobility and the economy at large, and
- Enable more transportation projects to proceed on budget and on schedule, while
- Protecting and enhancing the chemical, physical, and biological integrity of the waters of the United States in Illinois.

The signatory agencies commit to:

- Considering the potential impacts to waters of the United States in Illinois at the earliest practicable time in the planning phase of project development;
- Avoiding adverse impacts to such waters to the extent practicable;
- Minimizing the mitigating unavoidable adverse impacts and for wetlands, striving to achieve a goal of no overall net loss of values and functions; and
- Pursuing interagency cooperation and consultation diligently throughout the integrated NEPA/404 process to ensure that the concerns of the signatory agencies are given timely and appropriate consideration and that those agencies are involved at key decision points in project development.

The resource agencies will also provide input on the adequacy of the avoidance, minimization, and mitigation analysis of the project alternatives.

EXAMPLE 2 – OREGON – PROGRAMMATIC CATEGORICAL EXCLUSION PA

The purpose of this Agreement is to authorize ODOT to determine and approve on behalf of FHWA whether a project qualifies for a CE listed in 23 CFR 771.117 provided it does not exceed the thresholds described in Section IV.A.1.b [hereinafter "programmatic categorical exclusion" (PCE) approvals]. This Agreement does not delegate any other FHWA responsibility under environmental or other Federal laws. This Agreement applies to all ODOT projects using Federal-aid funds.

EXAMPLE 3 – MINNESOTA – SECTION 106 PA

The objective of this Programmatic Agreement (PA) was to create more efficient methods for FHWA and the Minnesota DOT Cultural Resource Unit staff to review indi-

vidual undertakings that may affect historic properties under federal statute. The agreement establishes the process by which FHWA, the State Historic Preservation Office, the Advisory Council on Historic Preservation, the US Army Corps of Engineers, Minnesota DOT, and interested persons will be involved in any such reviews. The agreement covers any Federal-Aid Highway Program funded undertaking, including those sponsored by local agencies and the National Recreational Trails Program, as well as requests for interstate access modifications.

STEP 2. CONSIDER AND EVALUATE THE RELATIONSHIPS AMONG THE POTENTIAL PARTNERS

At this point in the process, it is important to reflect on the existing relationship between the DOT and the agencies and between the agencies themselves. It is equally important to be honest in the assessment of current relationships as it will contribute to developing and implementing the PA. It is at this point that trust and cooperation among the parties becomes more critical.

Assessing the current level of trust should be done both among agencies and between agencies and Indian tribes or other parties to the agreement. If the parties have a good working relationship and trust is strong, the PA is likely to be more ambitious in scope. If the parties have no existing relationship and trust building has not occurred, it could prove difficult to negotiate a PA that involves the substantial delegation of responsibility or authority. In the latter case, it may be appropriate to scale back aspirations and build a foundation. One option could be to develop a procedural PA that would address some of the existing issues and not exceed the comfort level of the involved parties. A collaborative, well-thought out PA can work well in dealing with part of a problem and serve as the foundation for future scope expansion.

Similarly, the level of trust between potential parties may be overestimated and not realized until the development of the PA. Should an unexpected resistance over proposed measures occur during the PA's development, it may be beneficial to draw back and have some candid discussions about expectations and concerns. Depending on the level of tension over the issues, it may be useful to bring in a neutral third party to help sort out the problems and develop solutions as discussed in the section on developing PAs in the absence of trust.

THIRD-PARTY NEGOTIATIONS: OHIO CASE STUDY

The Ohio DOT, in partnership with the USFWS and FHWA, developed a Programmatic Consultation Agreement for the Indiana Bat. The agreement helped streamline compliance with the ESA. It did this by creating a tiered programmatic consultation approach to ODOT's Statewide Transportation Program.

The first tier analyzes the program as a whole for impacts to the Indiana bat. Specific projects are not analyzed at this level. As ODOT proposes projects under the program, ODOT provides USFWS with project-specific information for review. During the project-specific review, if USFWS determines that an individual project is not likely to adversely affect listed species, the USFWS will complete its documentation with a concurrence letter referencing the BO (ODOT has the responsibility for making appropriate determinations regarding the level of impact). If a project is likely to adversely affect listed species, the USFWS and ODOT will engage in formal consultation for the project. The BO identifies categories of projects that are not likely to adversely affect the Indiana bat and those that are likely to adversely affect the Indiana bat.

The PA development included assistance from a third-party facilitator, supporting the relationship and trust-building between parties that previously had little to no existing relationship. However, the presence of a third-party was not the only key to success, ODOT noting that third-party negotiators are only as good as the efforts and commitment by the agencies involved. This is particularly the case since third-party negotiators cannot mandate or force an agency into discussions and/or cooperation.

You can read more about Ohio's Indiana Bat programmatic consultation [HERE](#).

DEVELOPING A PROGRAMMATIC AGREEMENT BASED ON RELATIONSHIPS – CASE STUDY

The following case studies describe agreements tailored to the relationship between the parties.

EXAMPLE 1 – LIMITED SCOPE BASED ON LIMITED RELATIONSHIP

The Alaska DOT, in partnership with the FHWA, ACHP, and Alaska SHPO, developed a PA for Section 106 review. Before the PA, there was only a limited existing relationship between the agencies. This limited relationship manifested in the PA a few ways – the first being the amount of time need to develop the agreement, a

total of 10 years in this case. The DOT noted this was due to several factors including staff turnover, which led to a re-building of trust each time. Also, all agencies wanted to be involved despite the limited time that staff could be dedicated to the agreement, thus limiting the effectiveness of building the PA.

Since that time, Alaska DOT has reported success with the PA and the trust building that occurred, signified by updating the agreement in only one year, rather than the ten it took to develop the first one.

EXAMPLE 2 –BROAD SCOPE BASED ON LONG-STANDING RELATIONSHIP

The New Mexico DOT developed a Section 106 PA in partnership with the FHWA, ACHP, New Mexico SHPO and over 30 Indian tribes. New Mexico DOT credited a long-standing relationship between the agencies for the PA development’s short timeframe of approximately one year. The long-term relationship and trust generated from the relationship contributed significantly to the PA’s effectiveness. It also serves as a foundation for future efforts.

STEP 3. CREATE THE INITIAL DESIGN

Most PAs are legally binding agreements and, as a result, often have complex legal clauses assigning responsibility and conditioning actions on various stipulations. Although limiting the amount of legal jargon making the PA more accessible and comprehensible to practitioners is recommended, some level of contractual language is unavoidable. However, the first drafts of the PA need not include all of the conditions and stipulations. Instead, begin the process by outlining what all of the parties want to accomplish in the compliance process. Through discussions among the parties, develop a plan and commit that plan to paper in some simple, logical fashion. If flowcharts or other visual displays work well for the parties, those methods should be encouraged.

One must consider issues such as timeframes and contingencies, and clearly define roles and responsibilities. If the process requires active participation by other parties, those parties must be involved in the consultations about the agreement, and be signatories to the document. Based on the evaluation of trust as part of Step 2, consider checks and balances that increase the parties’ comfort level.

Before including each clause or requirement consider the following questions:

- Will this help to achieve the PA’s purpose and goals?
- Will this fit the compliance process more appropriately to the requirements of the project or the program?

- Does this make less work or more work for everybody?
- If it results in more work, why is it important enough to the preservation of the resources to include it?

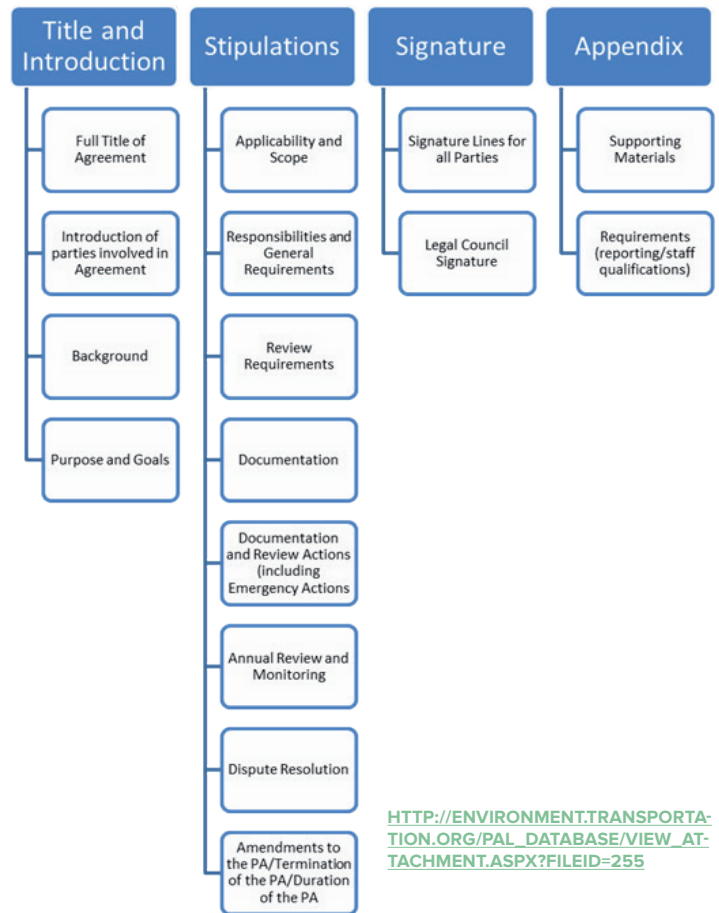
When developing a legally-binding PA, bring attorneys in early to make sure the proposed process works for compliance, but take care not to let it become too dense with legalese. The PA is a tool for practitioners and should be accessible to a broad audience.

After considering all of the issues, write out a description of the proposed compliance process in plan English or in a flow chart. Avoid writing a formal agreement document at this point, and instead, use this description of the proposed process as the basis for consultation and negotiation with the other parties.

DIAGRAMMING A PROGRAMMATIC AGREEMENT

The following diagram of a sample PA identifies the various components and steps discussed in this roadmap. Please note, this is only an example, and each PA is specific to its circumstances, based on factors such as agencies involved, scope, resources, and materials.

Pennsylvania DOT Section 106 PA



[HTTP://ENVIRONMENT.TRANSPORTATION.ORG/PAL_DATABASE/VIEW_ATTACHMENT.ASPX?FILEID=255](http://environment.transportation.org/pal_database/view_attachment.aspx?fileid=255)

DESIGNING A PA FOR ENDANGERED SPECIES ACT COMPLIANCE

The USFWS, in cooperation with the FHWA, has developed guidance on programmatic approaches to ESA compliance (<http://endangered.fws.gov/consultations/dot-guidance.html>). This guidance includes strategies for the design of programmatic consultations (i.e., the development of programmatic biological assessments). These strategies include such items as:

- Identify the general locations of future projects and the schedules for completion of the projects.
- Identify listed and proposed listed species and critical habitat likely to be impacted by these future projects
- Identify recovery plans, biological studies, and biological opinions conducted within the geographic area of these projects that may help establish range-wide status of the species
- Identify relevant regional guidance that has undergone section 7 consultation
- With the USFWS, jointly develop general strategies for addressing species conservation needs
- Develop avoidance and minimization procedures, such as seasonal restrictions or erosion-control measures, to remove or reduce the risk of direct impacts to listed and proposed listed species and their critical habitat
- Group future projects and associated actions according to the appropriate effects categories (e.g., “no effect,” “not likely to adversely affect,” etc.)
- Develop methods to offset impacts to listed species and their critical habitat

It is recommended that the appropriate USFWS field office be involved early in designing a programmatic consultation process when using the above strategies.

In addition to the above, another valuable strategy for designing these programmatic consultations is to group or “batch” individual future projects. For example, one approach is to batch a number of similar projects to be implemented over a multi-year period, or batch similar projects that encompass a large geographic area. Following this approach, projects are grouped into one proposed action. A second approach is to batch a broad range of projects falling within a limited area, such as a watershed. Commenting on these two approaches, the US Fish & Wildlife Service notes, The former approach is particularly effective in addressing projects whose effects are predictably similar and whose applicable mitigation and conservation measures are repetitive: the latter approach lends itself well to analysis demonstrating how a comprehensive suite of actions will lead to specific effects (Alternative Approaches for Streamlining Section 7 Consultation on Hazardous Fuels Treatment Projects, (<http://endangered.fws.gov/consultations/streamlining.pdf>.)

STEP 4. CONSULT AND NEGOTIATE TERMS

A PA is not only a legally binding document; it is a social contract between the parties – agencies, tribes, and others agree to work together in a particular process to preserve cultural and natural resources. Like all social contracts, successfully implementing a PA tends to depend on the degree of buy-in by the parties.

Step 3 recommends that you write a plain English description of the proposed provisions of the PA and use that as the basis for discussion and consultation rather than writing a draft PA in the formal, legal language and consulting on that draft. This provides a baseline to start consulting with the other parties – identify gaps, change terms, discuss challenges or objections. It is important to strive for balance in the PA's description so that it contains enough detail for all parties to understand the PA's intent but also avoids narrowly defining the parameters such that the consulting parties do not feel excluded.

OTHER NEGOTIATING TIPS

What happens if one of the parties proposes an idea or provision that may not be possible to implement? This will likely occur at some point while developing the PA and there are several actions to consider.

- Focus on areas of agreement first and then turn attention to areas of concern.
- Omit the proposed provision for initial implementation but commit to revisiting the issue once the PA is in place.
- Look to other PAs and DOT experience.

Regardless the resolution, spend time examining the problem, developing potential solutions, and considering possible consequences. By keeping all parties engaged, an alternative solution may develop. Throughout the process, all parties must maintain an open mind and work collaboratively – each agency has their processes and procedures; consider them as partners, not adversaries in the negotiations.

CONSULT IN A SENSITIVE FASHION

When consulting with Indian tribes and other traditional communities, take the time to find out how information is managed in that culture and how negotiations are traditionally carried out.

If a meeting is usually held in the tribal council chamber and the whole community is invited, do that. If people in a dispersed community usually get their information from the tribal radio station, do that. If food is always part of a negotiation session in that culture, bring food. If elders are always allowed to talk without interruption, don't set time limits on their statements at a public meeting.

CASE STUDY

DESIGNING A PROGRAMMATIC BIOLOGICAL ASSESSMENT

In preparing a programmatic biological assessment (PBA) for statewide drilling, survey and stormwater programs, the Oregon DOT, for example used the following strategies:

- Assembling geotechnical, hazardous materials, biological and survey staff to review typical drilling and survey operations that would be covered under the PBA.
- Meeting with regulatory biologists to determine the program scope and the resource agency's expectations for best management practices.
- Reviewing scientific literature and agency reports on federally listed fish within the region to be covered by the PBA.
- Reviewing similar PBAs, completed biological assessments for individual projects and other applicable documents for identification of best management practices.

Based on these efforts, the **FINAL PBA** contained Oregon DOT's commitment to use a set of agreed-upon best management practices during future drilling or surveying near waterways and wetlands.

STEP 5. DRAFT AND EXECUTE

Converting the plain English draft into a formal agreement that binds each signatory to specific actions requires input from legal advisors and others to ensure compliance and enforceability. However, the agreement need not be so dense that practitioners, who will routinely use the process, cannot understand or interpret intent. Consider the following as suggestions for developing a PA but be mindful that each PA must reflect the unique needs of the parties involved.

WHAT ARE THE PARTS?

A PA can take many forms. There are no standard formats or legal language requirements for PAs dealing with natural resources or environmental compliance and permitting procedures. Because of this, review existing PAs as an initial step in developing a new PA. Keep in mind that it is not a good idea to take an agreement that another State created and just fill in the blanks (see [CREATING THE INITIAL DESIGN OF THE PA](#)). One possible PA format is below. Each agency may add or subtract elements from this template as appropriate for the PA they are developing.

SAMPLE PROGRAMMATIC AGREEMENT FORMAT

What is this document?

Interagency Agreement/Memorandum of Agreement

Who is involved?

among
Lead Agency
Other agency

Why create this PA?

I. PURPOSE

Provide a basic description of why this PA is necessary and what it seeks to achieve.

What legal authority do the agencies have to enter into this agreement and what statutory authorities is it intended to cover?

II. Authorities

Ex. Clean Water Act 33 U.S.C. 1251 et seq.), Section 404 and 401

Ex. Endangered Species Act, as amended {16 U.S.C. 1531 – 15434}

What have we agreed to do and who is going to do it?

III. Applicability

Includes descriptions of the types of projects or program(s) covered by the agreement, a description of the parties to the agreement, and the extent of their participation.

IV. Roles & Responsibilities

Describe what each signatory agrees to do as part of the programmatic agreement. These could include such elements as implementation procedures or concurrence points. This is the meat of the agreement.

V. Dispute Resolution

Identify the process for handling disagreements among the agreement parties. Some processes such as 404 permitting have specific elevation and resolution procedures that must be considered. This section is important to ensure that as issues arise that they are handled promptly and not allowed to go unresolved and jeopardize the efficient review of the project.

VI. Monitoring and Evaluation Procedures

Provide the process for monitoring and evaluating effectiveness of the PA.

VII. Procedures for Revisions and Termination

If monitoring and evaluation process determines that the PA needs updated, extended or terminated, this section will provide the process for completing those changes.

Making it legal

This (MOA/Programmatic Agreement) is approved and authorized on behalf of each party by:

Name _____ Title _____
Agency _____ Date: _____

The format above is generic and could be applied to a variety of PA types. However, it is important to note that regulations drive Section 106 PAs, which follow a specific format. Visit the ACHP's site to see [TEMPLATE AGREEMENT DOCUMENTS](#). Similarly, the FHWA has a model [PCE AGREEMENT HERE](#).

CLARITY AND SIMPLICITY

- Don't use jargon words. This document will be read and interpreted by a variety of people who are not specialists in historic preservation, natural resources, engineering, transportation, etc.
- If technical terms are unavoidable, include a definitions section. In a Section 106 PA, this often appears between the "now therefore" clause and the first stipulation.
- For any acronyms, spell out the entire phrase or title the first time at first use, followed by the acronym in parentheses - e.g., "the U.S. Army Corps of Engineers (USACE)."
- Use consistent terminology – It is unimportant how the document references the action, whether as "the project" or "the undertaking" or "Highway 295." If it is called "the project" in one place and "the undertaking" somewhere else, a reader unfamiliar with the document may not understand that they are the same thing.
- Include everything that the parties have agreed to. When all the parties agree on some things but disagree on some others, there is a tendency to focus the PA on the solutions that were worked out for the contentious issues and to slight or omit the things about which there was substantial agreement. This can cause serious problems in the future if there are legal challenges, changes in administration for tribes or local communities, or changes in personnel at agencies.

LOGICAL ORGANIZATION

Clarity of language is critical, but the logical organization of the document may be even more so. A programmatic agreement describes a process. One should organize it, as much as possible, to reflect the temporal sequence in which the process will occur – otherwise, it will be hard to follow and understand, undermining its effectiveness. After circulating a plain English draft, go back over each step and be sure that you have everything in logical order and that there are no gaps or conflicts in time or contingencies.

Within each phase in the process, as outlined in the PA, you may wish to order things by temporal sequence or by historic property types or natural resource types or by geographic area or some other principle. The important thing is to pick one logical organizing strategy and stick to it.

CREATIVE APPROACHES

The purpose of a PA is to create an alternative to standard operating procedure. If the PA establishes a process that merely mimics the regulations, little efficiency is achieved. A PA is an opportunity to do a better job of preserving and conserving resources with less wasted effort. It should focus limited time and resources on the things that make a difference for preservation and conservation, and it should be mindful of the mission and purposes of the agencies involved. Think creatively about better things to do and better ways to do them; get rid of the pointless process and stay focused on important outcomes.

RESPONSIBILITIES OF THE PARTIES

When drafting the PA, check carefully to ensure that every action described in the agreement indicates who will be responsible for carrying out that action or making sure that it happens. Watch out for passive constructions like: "All ancillary facilities will be surveyed to identify archeological sites." Who is going to be in charge of making that happen? "No blasting will be permitted during the Threatened & Endangered species closure period." Who is going to make sure the guys with the blasting caps know about this?

If a non-federal party has primary responsibilities under the terms of the PA, somewhere, the document must indicate which federal party has ultimate responsibility for compliance with the federal laws in question. In a Section 106 PA, this usually involves a statement at the very beginning of the stipulations to the effect that "FHWA shall ensure that the following requirements are carried out." (see **WHAT ARE THE PARTS?**) Even if, from that point onward, all responsibility is going to be delegated to the state DOT, the agreement document needs to recognize that, ultimately, compliance with Section 106 is the responsibility of the FHWA.

PAs cannot assign responsibility to parties who are not signatories to the document. If a person or entity that is not a party to the PA must complete an action under the PA, one of the signatories must take responsibility for that action. For example, NEPA/404 merger agreements often do not include state agencies responsible for issuing water quality certifications that are required before USACE can issue a 404 permit. In those instances, the State DOT would assume responsibility for acquiring that necessary approval before USACE issues a permit decision.

TIMEFRAMES

One of the most challenging aspects of accommodating transportation projects and protection of environmental resources is the issue of timelines. Because some federal environmental laws emphasize consultation with stakeholder and public involvement, it is often difficult to establish absolute schedules for those components of the environmental review process that rely on input from the public and stakeholders. While project design and construction have immutable and expensive scheduling constraints, the time required for consultation and negotiation is difficult to predict.

The most important solution to this problem is to complete as much of the environmental compliance as early as possible in the planning process. Beyond that approach, take advantage of every opportunity to establish timeframes within the PA. With all of the critical parties involved in negotiating and reviewing the agreement; get them to agree to time limits and absolute dates wherever possible.

TRAINING, STAFFING, AND PERFORMANCE STANDARDS

Frequently, PAs that involve the substantial delegation of decision-making responsibility establish specific levels of staffing and training. Make these requirements somewhat flexible and provide for alternatives – e.g., the ability to substitute years of experience for a graduate degree – and allow a reasonable time for the upgrading of skills and training.

Other standard provisions call for work completed by individuals meeting recognized professional standards – the Secretary of the Interior (SOI) standards for preservation professionals, for example, or biologists or wetland scientists. PAs may also require that the work itself be done consistent with commonly adopted professional standards, such as the SOI standards for restoration of historic buildings.

Discussions of training, staffing and performance standards may be included as stipulations or as supporting materials

EXECUTING THE AGREEMENT

Once the negotiations are complete and the formal, legally sufficient agreement document is drafted, the next step is to secure signatures. Signatories for PAs must be authorized to act on behalf of their agency/entity so allowing sufficient lead time to obtain signatures from agency leadership is critical. For example, FHWA may identify the Division Administrator, State DOTs may delegate to the environmental manager, and USFWS may require a signature from the Regional Director. Whoever has the responsibility; it will likely need some lead time to secure their signature. Make sure to coordinate with each signatory agency to identify the right individual and estimate the timing of their signature.

TRIBAL INVOLVEMENT IN SECTION 106 PAS

By federal law and regulation, PAs concerning cultural resources must be developed in consultation with Native American groups who attach religious and cultural significance to cultural resources that may be affected by the project. The legal requirements for tribal consultation about natural resources are by no means so comprehensive, but provisions for tribal consultation, where appropriate, should be a standard component of natural resource PAs as well. Provisions for tribal consultation and involvement in the process developed in the PA should recognize the sovereignty of federally recognized tribes and the trust responsibility of federal agencies toward those tribes. The consultation process required by the PA should recognize cultural differences and be compatible with tribal values and organization.

Although federal agencies do not have the same legal relationship to non-federally recognized Native American groups, these groups frequently have cultural or natural resource concerns, and provisions should be made for consulting with them as interested parties.



5 SUPPORTING MATERIALS FOR PROGRAMMATIC AGREEMENTS

Supporting materials provide the PA with the detail and guidance on implementing the particular actions stipulated in the agreement. These materials are the “nuts and bolts” of the agreement itself. Supporting materials also serve as a “transparent” guidebook on how state DOTs will make decisions.

Supporting materials are given titles such as “Manual of Standards and Guidelines,” “Operations Manual,” “Operating Procedures,” “Handbook,” or simply “Appendices,” and can be somewhat voluminous - 50 to 100 pages compared to the 2 to 10 pages of a PA. (Examples of Supporting Materials).

WHAT DO SUPPORTING MATERIALS INCLUDE?

Materials supporting PAs include items such as:

- For Programmatic CE Agreements, lists of the classes of environmental actions and documents covered by the PA
- Steps for conducting the actions stipulated in the PA (often portrayed in a flowchart or other graphic)
- Descriptions of data and documentation generated while carrying out the PA
- Steps for preparing documentation related to the actions covered by the PA
- Descriptions of the responsibilities of signatory agencies and organizations
- Standard forms, templates and checklists for carrying out the PA
- Glossaries of terms, acronyms, and abbreviations

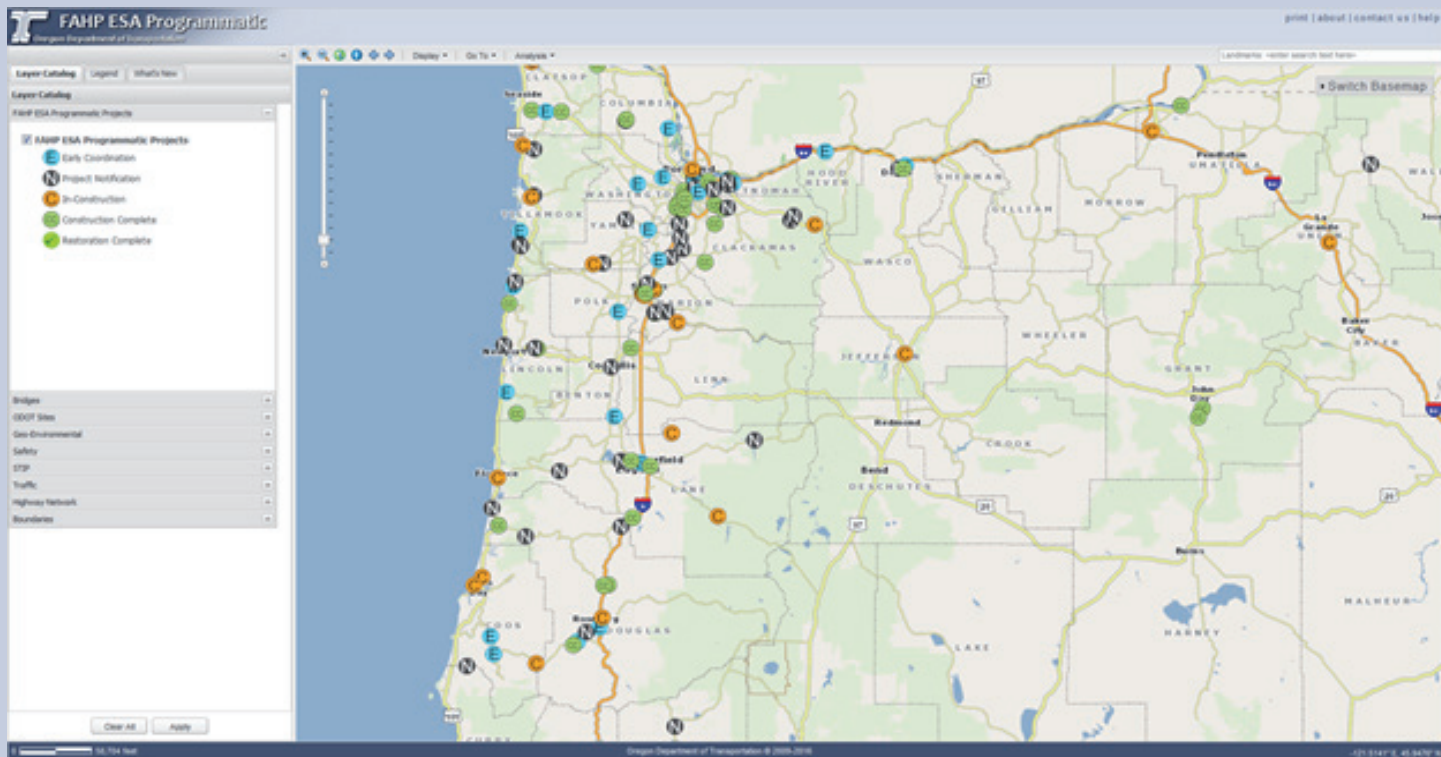
Supporting materials can also include additional items focused on the resource itself or is specific to the type of PA being developed such as the following used for Section 106 PAs:

- Descriptions of discovery and emergency situations and how to handle them
- Descriptions of actions to required for the treatment of human remains
- Lists of agency programs and activities, noting levels of consultation for each
- Supplemental agreements
- Standard mitigation or treatments
- Performance Measures, Tracking, and Metrics used for Evaluation

DEVELOPING SUPPORTING MATERIALS

Creating the manuals, guidelines, handbooks, and operating procedures for implementing a PA generally follow the same steps in developing the PA and can be just as much time intensive, if not more than, creating the actual PA. It is essential to consider supporting materials early and often during the PA development process. When developing the supporting materials, it is also important to focus on how the materials will aid in the implementation of the PA – this is likely to expand the materials beyond just definitions and other technical information. Additionally, by focusing on implementation, you will be able to identify potential roadblocks or areas of ambiguity in the PA itself.





[HTTPS://GIS.ODOT.STATE.OR.US/FAHP_ESA_PROGRAMMATIC/](https://gis.odot.state.or.us/fahp_esa_programmatic/)

CASE STUDY – OREGON DOT ESA PA SUPPORTING MATERIALS.

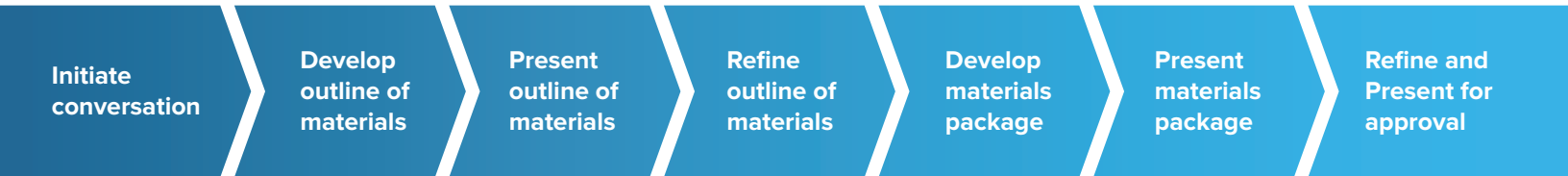
Aside from the supporting materials found in most PAs, the Oregon DOT moves beyond by creating a repository of information related to their ESA PA. One item includes training videos regarding the PA and its application on projects. What makes this supporting material helpful is the presenter provides not only narrative information about the PA but it supplemental information regarding examples. The videos simulate a “live training” event and are always available for review.

An additional supporting material provided by the Oregon DOT is the ESA PA Project Map, which is GIS-based and provides the location and real-time status updates of projects covered under the ESA PA. (More information can be found on Oregon DOT’s ESA PA Supporting Materials [HERE](#).)

TIMEFRAME FOR DEVELOPING SUPPORTING MATERIALS

Supporting materials, like the PA itself, will need to be drafted and refined throughout the development of the PA. It is important to begin to discuss these elements during the various phases of PA development so that the supporting materials have a logical and critical fit/role. The supporting materials should be considered as part of the PA, and not as an afterthought; this can be accomplished by carefully discussing and building throughout the process. Below is a possible sequence that illustrates how States may develop materials supporting their PA; a State may need to modify this sequence depending on the PA type and the agencies involved in its development.

PROCESS FOR DEVELOPING SUPPORTING MATERIALS



WHAT TO CONSIDER WHEN DEVELOPING SUPPORTING MATERIALS

Developing supporting materials must be a deliberate, well thought-out process. It is important to include items you feel will help facilitate the success of the PA, but not so much as to make it cumbersome and difficult to apply/relate. It also provides an opportunity to explain certain sections/statements in the PA or other guidance that is important, but not appropriate for inclusion in the PA itself. Based on feedback of DOTs that have successfully developed and implemented PAs, there are several ideas to consider when developing supporting materials:

- **Idea #1** – Provide an Outline of the PA and its contents
- **Idea #2** – Provide a Background and User Guide
- **Idea #3** – Define the Applicability and Scope of the PA
- **Idea #3** – Provide a Definitions Section
- **Idea #4** – Provide a Frequently Asked Questions Section
- **Idea #5** – Provide the General Requirements for those who use the PA
- **Idea #6** – Consider your Audience

Also, some “lessons learned” are presented below based on those DOT’s involved with developing supporting materials for their PA.

LESSONS LEARNED

Avoid interpretation problems by clearly defining actions and providing examples (correct and incorrect)

Take advantage of using supporting materials for information that is not crucial to the agreement itself – allows the PA to be concise, and provides flexibility in updating/modifying materials without re-writing the PA

In addition to making the supporting materials accessible to the agencies, also provide a location where they could be easily accessed by new staff members or future users



Implementation is the process of putting a decision or plan into effect or applying the process in the PA and what ultimately determines a PA's effectiveness. This section provides several steps in the implementation process, including guidance on implementing the PA, modifying existing PAs, and measuring effectiveness. Through several surveys and phone interviews, State DOT's shared insights from their implementation experiences providing the basis for this content.

Before the day-to-day implementation, most State DOTs establish a training program to get staff up to speed on the PA process. The training can vary in length and subject matter, but it is important to provide an early opportunity to educate staff, consultants and others who will be involved – both now and in the future. Training is beneficial for all parties because it provides everyone with a baseline of knowledge, ensures consistency, and builds trust amongst all parties.

DAY-TO-DAY IMPLEMENTATION OF THE PA

The PA or the supporting materials should outline day-to-day implementation actions and responsibilities. Several State DOTs recommended identifying the person or persons who will lead the effort and ensure they have the availability to handle the task. Implementation activities typically include project review, inter/intra-agency coordination, database development, maintenance, monitoring, and preparing reporting materials and scheduling meetings. It may also involve the development of reference materials, consultant oversight, scheduling and financial reporting.

EXPANSION, REDUCTION, REVISION OF EXISTING AGREEMENTS

A PA is effective as soon as all required signatories have signed it though some DOTs include a specific future start date to get staffing and process controls in order. Regardless of when the “clock starts” for implementing the PA, determining an “expiration date” is important. This forces an opportunity to review and reevaluate the PA and implementation. By including an expiration date, the partner agencies may feel more comfortable in the PA's provisions since there is a future opportunity to review and revise as needed. Should the PA also include periodic reviews before its expiration, consider linking those periodic reviews to other predictable occurrences— an annual permit renew process, for example. Absent some external trigger; parties may not adhere to the established review cycle.

Kentucky DOT expanded their Section 106 PA to include additional projects determined to not have significant effects, which further streamlined the process. This expansion also targeted documentation requirements and reduced their reliance on consultant-developed reports.

During these reviews, the parties may agree to revise, reduce or expand the PA. Agencies often base this determination on a variety of factors, ranging from an effective (or ineffective) PA, change in leadership amongst the parties involved, or discovering a new issue. Expansion can also occur as a result of legislative or regulatory changes, similar to what took place following changes to Programmatic Categorical Exclusions under MAP-21.

For many DOTs expanding the PA reflects its effectiveness. Many first-time PAs are conservative in their reach. After agencies cooperate on implementation, the original scope is revisited and expanded further reducing streamlining the process. Other modifications may include revising language due to changes in interpretation or changes in the affected environment. Considering changes in interpretation, Alaska DOT successfully added materials in an appendix of the PA providing flexibility to modify PA elements without having to redevelop the entire PA.

COST/BENEFIT OF A PA AND METRICS FOR EVALUATING EFFECTIVENESS

Few DOTs conduct robust benefit-costs analysis before initiating a PA. That does not mean that the PA should not be cost-effective, however. States approach metrics in PAs differently but most focus on time savings. Louisiana DOT, for example, did not conduct a formal analysis on their Section 106 PA but understood the long-term benefits of establishing a PA rather than carrying out a statewide historic bridge inventory. Oregon, alternatively, recommends tracking costs associated with PA development and implementation to measure their investment and compare with the ultimate outcomes.

Clearly-defined and mutually-agreed upon performance measures are critical to a successful PA. All parties should provide clear and mutually agreeable measures that determine whether the PA achieved the desired outcomes. Developing these measures should be included in the overall schedule and should inform future modifications to maximize the benefits of the agreement.

Refer to the PA template supporting these measurements [HERE](#).

7 OTHER USEFUL STUFF

HELPFUL WEBSITES AND OTHER RESOURCES

FHWA EDC-1: Programmatic Agreements

<https://www.fhwa.dot.gov/innovation/everydaycounts/edc-1/programmatic.cfm>

FHWA EDC-2: Programmatic Agreements

<https://www.fhwa.dot.gov/innovation/everydaycounts/edc-2/programmatic.cfm>

FHWA Accelerating Project Delivery: Programmatic Categorical Exclusion Agreements

https://www.environment.fhwa.dot.gov/strmlng/programmatic_ce.asp

FHWA Accelerating Project Delivery: Benefits and Costs of Programmatic Agreements

https://www.environment.fhwa.dot.gov/strmlng/PA_Case_Study.asp

FHWA Environmental Excellence Awards: Programmatic Agreements: First Amended Programmatic Agreement Regarding Compliance with Section 106 of the National Historic Preservation Act

http://www.fhwa.dot.gov/environment/environmental_excellence_awards/eea_2015/page12.cfm

FHWA Environmental Review Toolkit: Statewide Section 106 Programmatic Agreements: A Streamlining Initiative

<https://www.environment.fhwa.dot.gov/histpres/section1.asp>

FHWA Environmental Review Toolkit/Accelerative Project Delivery: A Practitioner's Guide to FHWA Programmatic Agreements for Categorical Exclusion

https://www.environment.fhwa.dot.gov/strmlng/documents/pce_guidance.asp

AASHTO Agency Use of and Approach to FHWA Approved Programmatic Agreements

[http://onlinepubs.trb.org/onlinepubs/archive/Notes-Docs/25-25\(13\)_FR.pdf](http://onlinepubs.trb.org/onlinepubs/archive/Notes-Docs/25-25(13)_FR.pdf)

AASHTO Center for Environmental Excellence: Programmatic Agreements Library (PAL)

http://environment.transportation.org/pal_database/

Advisory Council on Historic Preservation's (ACHP) Guidance on Section 106 Agreement Documents

<http://www.achp.gov/agreementdocguidance.html>

National Park Service: Nationwide Programmatic Agreement for Section 106 of the National Historic Preservation Act Toolkit

<https://www.nps.gov/history/howto/PAToolkit/index.htm>

U.S. Department of Transportation: The FAST Act: Accelerating Project Delivery

<https://www.transportation.gov/fastact/project-delivery-factsheet>

EXAMPLE MATERIALS

This PA Roadmap reflects the feedback of several State DOTs that volunteered to participate in written and phone surveys. The example materials provided below reflect the PAs referenced by those states in their responses.

EXAMPLE PAS

Alaska

Section 106 - http://www.dot.alaska.gov/stwddes/desenviron/assets/pdf/106/pa106_complete.pdf

Kentucky

Section 7 Indiana Bat - <http://transportation.ky.gov/Environmental-Analysis/Environmental%20Resources/KYTC%20FWHA%20Programmatic%20CMOA%202012-B-0854.pdf>

Louisiana

Section 106 - http://wwwapps.dotd.la.gov/administration/public_info/projects/docs_test/48/documents/Executed_Programmatic_Agreement.pdf

Minnesota

Section 106 - <http://www.dot.state.mn.us/winon-abridge/docs/ea/section-106-programmatic-agreement.PDF>

New Hampshire

Section 106 - <https://www.nh.gov/dot/org/projectdevelopment/environment/units/program-management/documents/ProgrammaticAgreementFINALFINAL.pdf>

New Mexico

Section 106 - http://environment.transportation.org/pal_database/view_attachment.aspx?fileID=265

Ohio

Section 106 - https://www.dot.state.oh.us/Divisions/Planning/Environment/Cultural_Resources/Documents/Sec106PA-signed.pdf

NEPA PCE - https://www.dot.state.oh.us/Divisions/Planning/Environment/NEPA_policy_issues/EnvironmentalDocumentation/Documents/CE_PA.pdf

Oregon

NEPA PCE - https://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/NEPA/ODOT-FHWA_PCE_Agreement_March_11_2015.pdf

Section 106 - https://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/cultural_resources/archaeology/Signed_2011_ODOT-FHWA_Programmatic_Agreement.pdf

Section 7 - <ftp://ftp.odot.state.or.us/techserv/Geo-Environmental/Environmental/Regulatory%20Documentation%20Forms%20and%20Examples/Biology/Programmatic%20Biological%20Opinions/OTIA%20III%20Bridge%20Replacement%20Biological%20Assessment/Biological%20Opinion.PDF>

EXAMPLES OF SUPPORTING MATERIALS**Oregon DOT Programmatic Agreement Supporting Materials**

Section 106 – http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/Pages/guidance_resources.aspx#Cultural_Resources

- [2011 PA White Paper \(outlining differences between 2001 and 2011 PAs, what language to include in CEs, what things need tribal consultation\)](#)
- [A Guide to the 2011 Programmatic Agreement \(a 15-minute video\)](#)

Section 7 – <http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/Pages/FAHP.aspx>

- Templates and Forms, User's Guide, Training Videos, web links

Categorical Exclusions –

- Agreement - http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/NEPA/ODOT-FHWA_PCE_Agreement_March_11_2015.pdf
- QA/QC Procedures - [http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/NEPA/PCE-QAQC-Procedures\(final-signed\)\(10-27-15\).pdf](http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/NEPA/PCE-QAQC-Procedures(final-signed)(10-27-15).pdf)



ROADMAP FOR DEVELOPING
AND IMPLEMENTING
PROGRAMMATIC
AGREEMENTS

