

DRAFT
PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
HAWAI‘I STATE HISTORIC PRESERVATION OFFICER,
AND THE
ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING THE
HONOAPI‘ILANI HIGHWAY IMPROVEMENTS,
MAUI COUNTY, HAWAI‘I

RECITALS

The Recitals (“Whereas” clauses) provide background information on the project, including defining the undertaking, identifying the lead federal agency and nature of involvement of other federal agencies; local project sponsor; and Section 106 review process steps to date including consultation, identification of historic properties, and results of effects assessments.

WHEREAS, the Federal Highways Administration plans to fund the Honoapi‘ilani Highway Improvements Project (Undertaking), pursuant to Pub.L. 116-260, FY 2021 Appropriations Act, known as the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) Grants, which would realign Honoapi‘ilani Highway between Ukumehame and Launiupoko on Maui; and

WHEREAS, the undertaking is intended to address existing coastal erosion and flooding, as well as future coastal erosion and flooding caused by anticipated sea level rise, as delineated by the Hawaii Climate Change Mitigation and Adaptation Commission (HCCC)’s Sea Level Rise Exposure Area (SLR-XA); and

WHEREAS, the Project constitutes an undertaking subject to review under Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. § 306018) and its implementing regulations, 36 C.F.R. Part 800, *Protection of Historic Properties*, as amended; and

WHEREAS, FHWA is combining its National Environmental Protection Act (NEPA) documentation in coordination with the 106 process and subsurface archaeology will be done only on the preferred alternative which will be documented in the combined Draft Environmental Impact Statement (DEIS)/Record Of Decision (ROD); and

WHEREAS, FHWA, in coordination with HDOT and in consultation with the Hawaii State Historic Preservation Division (SHPD) , will document agreements to address effects to historic properties with a Programmatic Agreement (PA) in accordance with 36 C.F.R. § 800.4(b)(1)(ii) because the Project’s effects on historic properties cannot be fully determined prior to approval of the Project; and

WHEREAS, the Advisory Council on Historic Preservation (ACHP), at the invitation of FHWA, is participating in the Section 106 consultation for this Project; and

WHEREAS, HDOT participated in the consultation, has responsibilities for implementing stipulations under this PA, and is an invited signatory to this PA; and

WHEREAS, the FHWA has consulted with the following Native Hawaiian Organizations, for which the Ahupua'a of Olowalu and/or Ukumehame have religious or cultural significance and has invited them to be a concurring party; and,
[LIST] or reword to create an appendix or several "whereas" clauses.

WHEREAS, FHWA has consulted with the Historic Hawaii Foundation and _____ regarding the effects of the undertaking on historic properties and has invited them to sign this MOA as a concurring party; and

WHEREAS, FHWA in coordination with HDOT, and in consultation with the SHPD, established an Area of Potential Effects (APE) (**Appendix 1**) in accordance with 36 C.F.R. § 800.4(a)(1) to consider potential direct and indirect effects associated with Project alternatives evaluated in the DEIS

Additional clauses related to the PA's approach and known information at time of execution will be added as investigations and consultation proceeds.

...

NOW, THEREFORE, FHWA, SHPO and ACHP 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.

STIPULATIONS

FHWA, in coordination with HDOT, shall ensure that the following measures are carried out.

I. Roles and Responsibilities

Describe that FHWA is ultimately responsible for ensuring the terms of the PA are fulfilled; describe role of local project sponsor HDOT and its responsibilities in implementing the PA's stipulations; describe roles of other federal agencies (if applicable); and describe responsibilities of SHPD, ACHP, and concurring parties to the PA.

The section can also include information on professional standards (Secretary of the Interior Professional Qualifications Standards) and other standards for evaluating and reporting. Curation standards for archaeology should be identified.

II. Identification and Protection of Archaeological Sites and Burials

The development of an Archaeological Inventory Survey (AIS) plan is integral to this project. The PA can provide information on what archaeological survey and identification efforts have occurred to date and describe how the AIS plan is developed, time frames for completion, reviews, and fieldwork requirements.

Once a plan is developed, fieldwork may commence in order to complete the AIS. The PA may stipulate based on fieldwork results:

Treatment plans

Archaeological monitoring during construction

Data recovery

It is expected the PA will describe how HDOT will consult with the MLIBC, Lineal and Cultural Descendants, and NHOs during AIS plan development and monitoring. The PA can include information on the timing and frequency of this consultation. In addition, the PA will include information on consultation with these groups when mitigation measures are discussed and how consultation will occur during project construction.

Importantly, the PA will include a provision on steps to avoid, minimize, or mitigate Adverse Effects on archaeological sites and burials.

III. Treatment to Avoid, Minimize, or Mitigate Adverse Effects to Aboveground Historic Properties

It is anticipated that aboveground historic properties will be identified prior to PA implementation. Any measures required to avoid, minimize, or mitigate adverse effects will be included in the PA, as well as procedures for evaluations and assessing effects on aboveground historic properties that may become historic during project construction.

IV. Changes in Project Scope

It is possible during design or construction that changes may occur to the project. The PA will provide a process for project changes that include APE revisions, historic property identification, new project effects, and consultation.

V. Post-Review Discoveries

Describes the process for unanticipated discoveries or unanticipated effects on historic properties, including archaeological sites, as well as human remains.

If properties are discovered that may be historically significant or unanticipated effects on historic properties found, the FHWA shall implement the discovery plan included as attachment [insert number of attachment] of this MOA

VI. Confidentiality

Sensitive information concerning the location, character, or ownership of archaeological resources may be withheld from public disclosure in accordance with Section 304 of the National Historic Preservation Act (54 U.S.C. § 307103).

VII. Monitoring and Reporting

Each year following the execution of this PA until it expires or is terminated, FHWA, in coordination with HDOT, shall provide all parties to this PA a summary report detailing work undertaken pursuant to its terms. Such report shall include any scheduling changes proposed, any issues encountered, any disputes and objections received in the FHWA's efforts to carry out the terms of this PA.

HDOT will submit to FHWA an annual a written status of each stipulation included herein. HDOT will provide written notification to FWHA for concurrence once all stipulations have been completed. Upon FHWA concurrence, the Section 106 process will be deemed completed.

VIII. Dispute Resolution

Should any signatory or concurring party to this PA object at any time to any actions proposed or the manner in which the terms of this PA are implemented, FHWA shall consult with such party to resolve the objection. If FHWA determines that such objection cannot be resolved, FHWA will:

A. Forward all documentation relevant to the dispute, including the resolution proposed by FHWA to the ACHP. The ACHP shall provide the FHWA with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, FHWA shall prepare a written response that takes into account any timely advice or comments regarding the dispute from ACHP, signatories, and concurring parties and provide them with a copy of this written response. FHWA will then proceed according to the final decision.

B. If the ACHP does not provide its advice regarding the dispute within the 30-day time period, FHWA may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FHWA shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to this PA and provide them and the ACHP with a copy of such written response.

C. The responsibilities of FHWA to carry out all other actions subject to the terms of this PA that are not the subject of the dispute remain unchanged.

IX. Amendments

This PA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all signatories is filed with the ACHP.

X. Termination

If any signatory to this PA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation IX. If an amendment cannot be reached within thirty (30) days, any signatory may terminate the agreement upon written notification to the other signatories.

Once the PA is terminated, and prior to work continuing on the Project, FHWA must either (a) execute an agreement pursuant to 36 C.F.R. § 800.6 or (b) request, take into account, and respond to the comments of the ACHP under 36 C.F.R. § 800.7. FHWA shall notify the signatories as to the course of action they will pursue.

XI. Duration

This PA will be null and void if its terms are not carried out within ten (10) years from the date of its execution. Prior to such time, the FHWA may consult with the other signatories to reconsider the terms of the PA and amend it in accordance with Stipulation IX.

APPENDICES

Appendix 1. Area of Potential Effects Map

Appendix 2. 6E Compliance Plan: A plan or memorandum describing how to coordinate 6E compliance with the Section 106 process and this PA.

DRAFT