

DETAILED OUTLINE OF THE PROPOSED TERMS FOR THE

**PROGRAMMATIC AGREEMENT AMONG THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER, AND THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT, AS IT PERTAINS TO THE ADMINISTRATION OF THE DRINKING WATER STATE REVOLVING FUND PROGRAM**

**I. Applicability**

- a. This Agreement will be a "programmatic agreement for agency programs" pursuant to 36 Code of Federal Regulations (CFR) § 800.14(b)(2).
- b. This Agreement will reference the [September 3, 2015 letter](#), by which the United States Environmental Protection Agency (EPA) has authorized the California State Water Resources Control Board (SWRCB) to act as federal lead agency for most of the Section 106 process. This Agreement will replace that delegation letter.
- c. This Agreement shall apply to all Drinking Water State Revolving Fund Program (DWSRF) projects funded by the SWRCB that have the potential to cause effects to historic properties for which the EPA or the SWRCB is the lead federal agency for the purposes of Section 106
- d. This Agreement shall not apply to projects (or portions thereof) located on Tribal lands as defined under 36 CFR § 800.16(x) unless otherwise specified.
- e. Other federal agencies, who may issue permits or otherwise provide assistance for projects covered by this Agreement including those involving federal land, may rely on the Section 106 determinations that the SWRCB makes under this Agreement.
- f. This Agreement shall be overseen by the Senior Cultural Resources Officer in the Division of Financial Assistance.
- g. The definitions provided in 36 CFR § 800.16(a) through (y) shall apply.

**II. Roles and Professional Qualification Standards**

- a. The SWRCB's Senior Cultural Resources Officer is responsible for oversight of the SWRCB's performance and all consultations with the SHPO and tribes under this Agreement.
- b. All actions under this Agreement shall either be carried out or overseen by Principal Investigator(s) who meet the Secretary of the Interior's Professional Qualification Standards (SIPQS; 36 CFR Part 61) in the appropriate discipline. This is applicable to DWSRF funding applicants, their consultants, and other parties subject to this Agreement.

**III. Consultation with Indian Tribes and other California Native American tribes**

- a. As set forth in the [Guidelines for Applicants and Their Consultants on Preparing Historic Property Identification Reports for the Clean and Drinking Water State Revolving Fund \(SRF\) Programs](#) (HPIR Guidelines; will be included as Attachment 1), DWSRF funding applicants or their consultants will conduct initial outreach to all tribes and individuals identified on the Native American Heritage Commission contact list for the project's area of potential effects (APE). They will use the "[Applicant Section 106 Template Letter for Tribal Outreach](#)" available on the SWRCB website and make a minimum of two attempts to contact all parties. This should include at least one written communication by mail and/or email and one follow-up attempt by email or phone.
- b. The SWRCB shall be responsible for follow-up consultations with tribes that express interest in the undertaking based on the initial outreach.
- c. When a project is located on Tribal lands and the tribe has a designated Tribal Historic Preservation Officer (THPO) pursuant to Section 101(d)(2) of the National Historic Preservation Act (NHPA), 54 U.S.C. § 302702, the SWRCB will consult directly with the THPO for the portion of the project on Tribal lands. If there is no THPO, the SWRCB will consult with the SHPO on such projects.
- d. The EPA shall continue to be responsible for government-to-government consultation with Indian tribes, if such tribes choose not to consult with the SWRCB.

**IV. Participation of Other Consulting Parties and the Public**

- a. Outreach with historical societies will be conducted during production of the HPIR as set forth in the HPIR Guidelines.
- b. Other consulting parties, such as but not limited to other State agencies, local organizations, and other members of the public, will be identified and consulted as appropriate depending on the scope of the project

**V. Lead Agency**

- a. Under the current delegation prior to implementation of this Agreement, the EPA retains responsibility for consultation with the SHPO when a project will have an adverse effect. This Agreement will allow the SWRCB to be responsible for all parts of the Section 106 compliance process, including but not limited to defining the APE and the identification, evaluation, and resolution of effects for historic properties.
- b. The EPA shall continue to be responsible for government-to-government consultation with Indian tribes, only if such consultation is requested (see III.d. above).

**VI. Review Procedures**

- a. Identification and Evaluation of Potential Historic Properties

- i. DWSRF funding applicants shall submit HPIR in accordance with the HPIR Guidelines that will be included as Attachment 1. The HPIR will include a delineation of the APE (to be further described in Attachment 2), and the identification and recommended evaluation of cultural resources for the National Register of Historic Places. The *Drinking Water and Wastewater Treatment Facilities in California: Historic Context Development and Evaluation Procedures* (to be included as Attachment 3) will be used to guide evaluations of built environment (architectural) properties.
  - ii. The SWRCB will review all HPIRs to ensure the delineation of the APE and identification and evaluation efforts are adequate.
  - iii. The SWRCB will consult with the SHPO regarding determinations of eligibility of cultural resources for the National Register of Historic Places.
- b. Findings of Effect
- i. Finding of No Historic Properties Affected
    - 1. When the SWRCB has determined that there are no cultural resources located in the APE and makes a finding of “no historic properties affected,” no consultation with the SHPO will occur. The SWRCB will document and retain records of the finding (protocol to be included as Attachment 4)
    - 2. The SWRCB will consult with the SHPO regarding findings of “no historic properties affected” when there is a cultural resource in the APE and the SWRCB has made determinations of eligibility for the National Register of Historic Places.
  - ii. Finding of No Adverse Effect
    - 1. Finding of No Adverse Effect with Standard Conditions
      - a. When the SWRCB has determined that an undertaking can completely avoid effects to historic properties located in the APE and makes a finding of “no adverse effect with standard conditions,” no consultation with the SHPO will occur. The SWRCB will document and retain records of the finding to file. Such findings may use the following standard conditions to avoid adverse effects to historic properties in accordance with Attachments 4 and 5 (which are under development and are forthcoming):
        - i. For archaeological resources: assuming a resource is eligible for the National Register of Historic Places, designating it as an “Environmentally Sensitive Area,” and avoiding it in its entirety during construction of the project.
        - ii. For built environment resources: ensuring that the project scope is consistent with the

Secretary of the Interior's Standards for the Treatment of Historic Properties (SOIS; 36 CFR Part 68).

2. Standard Finding of No Adverse Effect

- a. When the SWRCB proposes a finding of "no adverse effect", other than a finding of "no adverse effect with standard conditions," the SWRCB will consult with the SHPO on the finding (to be described in Attachment 4)

iii. Adverse Effect

1. When a historic property will be adversely affected by a project and the SWRCB proposes a finding of "adverse effect," the SWRCB will consult with applicable tribes, the SHPO, and the ACHP on the finding and the resolution of the adverse effect, such as development of a Memorandum of Agreement (MOA)

c. Consultation with the SHPO

- i. The SWRCB may provide its APE discussion, identification, and evaluation of historic properties, and assessment of effects in a single transmittal to the California SHPO.
- ii. The SHPO will respond within 30 days of receipt.
- iii. If no response is received within 30 days, the SWRCB will proceed with the project as planned.

**VII. Phased Approach to Identification, Evaluation, and Findings of Effect**

- a. The SWRCB will consult with the SHPO and the ACHP as applicable regarding preparation of undertaking-specific programmatic agreements when identification, evaluation, or effects analysis cannot be completed prior to implementation of a project pursuant to 36 CFR § 800.4(b)(2), 800.5(a)(3), and 800.14(b)(3). Such project types may include large, complex projects with multiple project alternatives, multiple construction phases, or restricted access.
- b. In consultation with the SHPO, the SWRCB may use phasing when minor access restrictions preclude completion of identification efforts, evaluation of a potential historic property, and/or effects determination until after a DWSRF financing agreement is signed but prior to construction of a project. The SWRCB shall establish that a "no historic properties affected" or "no adverse effect" finding is likely based on documentation of identification and evaluation efforts within the accessible portion(s) of the APE and background research on the inaccessible portion(s). In addition to the above documentation, the SWRCB shall submit a plan for completion of identification and evaluation that includes a schedule and provisions for consultation with the SHPO and any other applicable consulting parties.

## **VIII. Emergency Situations**

- a. Applies to projects that will be implemented within 30-calendar days after the disaster or emergency has been formally declared. The President, California Governor, SWRCB Board, or California Regional Water Quality Control Boards may declare an emergency, defined as a situation that “causes immediate threats to life or property.”
- b. The SWRCB will notify consulting parties and request comments within seven days of notification, or within the timeframe allowed by the emergency.
- c. The SWRCB will provide the SHPO and any other consulting parties a narrative report documenting the actions taken in accordance with this expedited consultation process within six months following the initiation of expedited consultation.

## **IX. Post-Review Discoveries and Unanticipated Effects to Historic Properties**

- a. Planning for Subsequent Discoveries
  - i. When the SWRCB’s identification efforts indicate that historic properties are likely to be discovered during construction of a project, the SWRCB shall include in any finding of “no adverse effect” or MOA a plan for treatment of such properties, should they be discovered. The SWRCB shall consult with applicable consulting parties, such as tribes, the SHPO, the ACHP, and other members of the public, in developing, modifying, and implementing the plan.
- b. Discoveries Without Prior Planning
  - i. The SWRCB’s DWSRF financing agreements include provisions for notification to the SWRCB within 24 hours of any post-review discovery. The SWRCB will notify the SHPO and the ACHP within 48 hours of the discovery and consult regarding the eligibility of the discovery and the resolution of adverse effects, if necessary.
- c. If human remains are discovered, DWSRF funding applicants shall follow all applicable federal, state, and tribal burial laws and ordinances.

## **X. Documentation**

- a. All documentation that supports findings and determinations made under this Agreement shall be consistent with 36 CFR § 800.11 and shall be reviewed by SWRCB staff that meet the Secretary of the Interior’s Professional Qualification Standards (SIPQS; 36 CFR Part 61).
- b. All documentation prepared under this Agreement shall be kept on file at the SWRCB headquarters office and made available to consulting parties and the public as stipulated by this Agreement, consistent with applicable confidentiality requirements.

## **XI. Dispute Resolution**

- a. Resolving Objections

- i. If there is an objection to the SWRCB's implementation of this Agreement, the EPA and the SHPO will be notified in writing.
    - ii. If the objection cannot be resolved, the ACHP will be notified to help resolve the dispute.
    - iii. The SWRCB will take into account the ACHP's response prior to proceeding.
  - b. Public Objection
    - i. A public party may notify the SWRCB of its objection in writing. The SWRCB will notify the EPA and the SHPO of the objection. The SWRCB will take the comments of all parties into account and render a decision in writing to all parties.

**XII. Duration of this Agreement**

- a. This Agreement will be valid for ten (10) years.
- b. Five (5) years from the date of execution, a comprehensive review will be conducted by the SHPO and the EPA to determine the effectiveness of the Agreement and to determine if there are any issues that need to be addressed.

**XIII. Annual Review and Reporting**

- a. At the end of each calendar year, the SWRCB will prepare an annual report within 60 days and send it to the EPA and the SHPO for review. The contents of the annual report will include a summary of actions taken under this Agreement, including but not limited to all findings and determinations.
- b. All project files supporting this Agreement will also be available for review.
- c. An annual meeting between the SWRCB, the EPA, and the SHPO will occur to discuss the implementation of the Agreement. These parties can propose to cancel the annual meeting if it is determined to be unnecessary.

**XIV. Amendments and Termination**

- a. The SWRCB, the EPA, and the SHPO may propose amendments. Amendments must be signed by all parties to be effective.
- b. Only the SWRCB, the EPA, and the SHPO may terminate this Agreement. Consultation, in an effort to resolve the dispute, will occur prior to termination.

**XV. Confidentiality**

- a. All parties to this Agreement acknowledge that information about historic properties, prospective historic properties, or properties considered historic for purposes of this Agreement may be subject to the provisions of section 304 of the NHPA, 54 U.S.C. § 307103, and 36 CFR § 800.11(c) and California Government Code section 7927.005 and 7927.000 (Public Records Act). Such information will not be shared except where it may be subject to disclosure under the Freedom of Information Act, 5 U.S.C. §

552, and EPA regulations at 40 C.F.R. Part 2, or as otherwise authorized by law.

**Proposed Attachments (Attachments 2-5 are in development)**

1. [HPIR Guidelines](#)
2. Area of Potential Effects Delineation (similar to Attachment 3 of Caltrans' Section 106 [Programmatic Agreement Among the Federal Highway Administration](#))
3. *Drinking Water and Wastewater Treatment Facilities in California: Historic Context Development and Evaluation Procedures*
4. Procedures for Findings of No Historic Properties Affected and No Adverse Effect
5. Findings of No Adverse Effect with Standard Conditions