

# Writing Effective Agreement Documents

State Historic Preservation Office

March 26, 2009



# Why Write Agreements?

- Section 106 of the National Historic Preservation Act
- South Carolina Coastal Zone Management Act



# Section 106

- Federal Agency/Involvement
- Historic Properties
- Consultation with multiple parties
  - SHPO/THPO
  - Applicant for federal assistance
  - Local governments
  - Historical societies
  - Public



# Advisory Council

- Notify Advisory Council on Historic Preservation of:
  - Adverse effect determination
  - Invitation to participate in consultation for an agreement



# When is Agreement Needed?

- Adverse effect to historic properties
- Potential for adverse effects/unknown effects
- Future work on historic properties

# Types of Agreements

- MOA = Memorandum of Agreement  
(36 CFR 800.6)
- PA = Programmatic Agreement  
(36 CFR 800.14)
- Restrictive covenant



# MOAs vs. PAs

- MOAs are appropriate when:
  - Recording resolutions for *specific undertaking*
- PAs are appropriate when:
  - Undetermined effects of a project
  - Complex undertakings
  - Routine management
  - Tailored Section 106 process for a specific agency or program



# Four Parts of an Agreement

1. Title
2. Preamble ("whereas" clauses)
3. Stipulations
4. Execution clause and signatories

# Consultation

- Who should be consulted?
  - SHPO
  - THPO
  - Advisory Council on Historic Preservation
  - Local government
  - Native American tribes
  - Citizen groups
  - All of the above?



# Consultation/Signatories

- Required signatories
  - Execute
  - Amend
  - Terminate
  
- Invited signatories
  - Amend
  - Terminate
  
- Concurring parties



# Preamble

- What is the federal agency involvement?
  - Authority, Acts, etc.
  - Ex: Section 10 of the Rivers and Harbors Act
  
- Who has been consulted?
  - SHPO?
  - THPO?
  - Others?
  
- What historic properties will be affected?
  - Official state site numbers
  - Official title in National Register



# Preamble

- Logical Structure:
  - Federal undertaking
  - Consulting parties
  - Area of Potential Effect
  - Historic Properties
  - Determination of Effect



# Stipulations

- Include all provisions
  - Avoid “side agreements”
  
- Think ahead: what may happen later?
  
- Cover the entire undertaking
  - No multiple agreements for one project



# Stipulations

- Avoid using the passive voice—Assign responsibility for completing work
  
- Avoid these terms:
  - May
  - Should
  - If feasible
  - If funding permits



# Stipulations

A set of measured drawings depicting the existing conditions of the Woodside I and II dams will be prepared.

*What's wrong with this stipulation?*



# Stipulations

Should the Foundation choose to preserve in place one or more of the potentially eligible archaeological sites listed above, then a preservation plan will be developed and implemented.

*What's wrong with this stipulation?*



# Stipulations

- Include clear, set time frames
- Reference the execution of the MOA
- Reference beginning of work on the project



# Stipulations

Within six months, a covenant will be placed on the historic property.

*What's wrong with this stipulation?*



# Standards and Guidelines

- Define all applicable standards to be used for the project
  - Secretary of the Interior's *Standards*
    - Rehabilitation
    - Archaeology
    - Historic contexts
    - Etc., etc.
  - South Carolina guidance
    - Archaeological standards and guidelines
    - Survey Manual
  - HABS/HAER documentation standards



# Stipulations

Field Photography, as defined in the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (68 FR 43159, July 21, 2003) using 35 mm film will be completed...

*What's wrong with this stipulation?*



# Terms and References

- Avoid jargon
- Define any acronyms
- Use consistent terminology



# Enforcement

- “Sunset” clause
- Inspection authority
- Objections
- Penalties



# Monitoring

- Agencies meet at set times to review agreement
- Reports provided by certain parties on progress of agreement
- Occur at specified times within an agency's project implementation



# Monitoring

Every twelve (12) months following the execution of this MOA until it expires or is terminated, the Department of Education shall provide all parties to this MOA a summary report detailing work undertaken pursuant to its terms.

*What's wrong with this stipulation?*



# Late Discovery

- Provision for unanticipated discovery
- Archaeological artifacts or features
- Human remains
- Additional information about a property

# Administration Procedures

## ■ Must Include:

- Duration
- Amendment
- Termination

## ■ Should Include:

- Monitoring and reporting
- Late discoveries
- Emergencies
- Professional qualifications and applicable standards



# Don't Forget!

- Review for consistency
- Review for grammar
- Review for misspellings
- Review for clarity

# Before Signing...

- Submit the finalized draft to the ACHP with a record of consultation
- ACHP has 15 days to determine if it will participate or not



# Programmatic Agreements

- Effects are similar and repetitive
- Effects cannot be fully determined prior to approval of an undertaking
- Nonfederal parties are delegated major decision making responsibilities
- Routine management activities



# Programmatic Agreements

What are the benefits?

- Adjust the standard process
- Replace the standard process completely

# Property Type PA

- Defines a common historic property type
  - Administrative structures
  - Bridges
  - Shell middens
  - Flake scatters
- Assumes eligibility
- Prescribes standard treatment

# “Facility” Management PA

- Military base, National Park, National Forest, Hydroelectric Project, Nuclear Plant
- Usually based on cultural resources management plan
  - Plan developed based on federal standards
  - Plan reviewed and adopted
  - Implement plan in lieu of standard process

# Standards-Based PA

- Reduced/streamlined review if work done per appropriate federal standards
  - Rehabilitation of buildings per *Secretary of the Interior's Standards*
  - Reviewed by local government staff or SHPO
  - If consistent with the *Standards*, then no further review

# Delegation PA

- Delegates aspects of compliance to non-federal parties
- May delegate standard process or tailor the process
- Agency retains the ultimate responsibility for compliance with Section 106



# Exclusions PA

- Excludes specified project types from review
  - Absolutely, or
  - Conditionally, based on certain standards
- Used with Community Development Block Grants, HOME, Neighborhood Stabilization Funds, etc.

# PA Benefits

- Significant streamlining of review for projects with little possibility of affecting historic properties
- Ensures that agency and SHPO staff are able to focus on larger projects
- Opportunity to place cultural resources in the larger management programs of agencies



# PA Concerns

Make sure to include:

- Regular (usually annual) review
- Dispute resolution
- Termination and future results
- Amendments
- User training
- Management training

# Restrictive Covenants

- Architectural
- Archaeological
- Buffers/viewshed
- Used to avoid or minimize adverse effects of a project on historic properties



# Restrictive Covenants

- Run with the land
- Places to ensure legal protection of historic properties
- May have management guidelines as part of covenant



# Restrictive Covenants

- Generally provide enforcement capabilities to an outside party
- Neither federal agency or SHPO
- Local historical society, open land trust, conservation bank, etc.



# Additional Information

- [www.achp.gov](http://www.achp.gov)  
(Working with Section 106)
- [www.npi.org](http://www.npi.org)  
(Tools for CRMs: Tools for Preparing Agreement Under Section 106)
- [shpo.sc.gov/revcomp](http://shpo.sc.gov/revcomp)  
(MOA and covenant templates, guidance on mitigation and complying with regulations)