

Appendix H

Historic Properties Programmatic Agreement

PROGRAMMATIC AGREEMENT
REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC
PRESERVATION ACT FOR THE
CONSTRUCTION AND MAINTENANCE MEASURES FOR THE SABINE –
NECHES WATERWAY,
SOUTHEAST TEXAS AND SOUTHWEST LOUISIANA
AMONG
THE U.S. ARMY CORPS OF ENGINEERS GALVESTON DISTRICT
THE TEXAS STATE HISTORIC PRESERVATION OFFICER
THE LOUISIANA STATE HISTORIC PRESERVATION OFFICER
AND
THE SABINE NECHES NAVIGATION DISTRICT

WHEREAS, the U.S. Army Corps of Engineers, Galveston District (USACE) has determined that the proposed construction and ongoing maintenance of the Sabine-Neches Waterway (hereinafter, “undertaking”) may have an effect on properties eligible for inclusion in the National Register of Historic Places (NRHP) (hereinafter, “historic properties) pursuant to Section 106 of the National Historic Preservation Act (16.U.S.C § 470) (hereinafter NHPA) and its implementing regulation, “Protection of Historic Properties,” (36 CFR 800); and

WHEREAS, the existing Sabine-Neches Waterway Project (SNWW) is administered by the USACE under the authority of the Rivers and Harbors Act of 1962 and improvements are being studied under authorization contained in the Senate Committee on Environment and Public Works Resolution adopted on 5 June 1997; and

WHEREAS, the Sabine Neches Navigation District (SNND) is the non-federal partner with the USACE for this undertaking and is providing all lands, easements, rights-of-way, relocations, removals, and upland placement areas necessary for the project construction and operation; and

WHEREAS, the size of the project area and the number of alternatives being studied for proposed channel improvements make it necessary to defer final identification and evaluation of historic properties until authorization of proposed improvements is obtained; and

WHEREAS, the USACE, the Texas and Louisiana State Historic Preservation Officers (SHPOs), and the SNND agree that it is advisable to accomplish compliance with Section 106 through the development and execution of this Programmatic Agreement (PA) in accordance with § 800.6 and § 800.14(b)(3); and

WHEREAS, the USACE has invited the Advisory Council on Historic Preservation (Council) to determine whether the Council wishes to enter into the Section 106 process; and

NOW, THEREFORE, the USACE, the SHPOs and the SNND, agree that the proposed undertaking shall be implemented in accordance with the following stipulations in order to take into account the effects of the undertaking on historic properties and to satisfy the USACE Section 106 responsibilities for all individual aspects of the undertaking.

Stipulation I

Identification, Evaluation, Effect Determination and Resolution

A. *Scope of Undertaking.* This PA shall be applicable to all new construction activities related to the proposed SNWW channel improvement project and activities related to maintenance dredging. The Area of Potential Effects (APE) shall be established by the USACE in consultation with the appropriate SHPO and shall include all areas to be directly affected by new dredging and channel construction, construction staging and access areas, new or extensions of existing placement areas, ecological mitigation features, areas affected by the beneficial uses of dredged material, and ongoing maintenance dredging activities related to the SNWW project.

B. *Qualifications and Standards.* The USACE shall ensure that all work conducted in conjunction with this PA is performed in a manner consistent with the Secretary of Interior's "Standards and Guidelines for Archeology and Historic Preservation (48 Federal Register 44716-44740; September 23, 1983), as amended, or the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR 68), as appropriate.

C. *Definitions.* The definitions set forth in § 800.16 are incorporated herein by reference and apply throughout this PA.

D. *Identification of Historic Properties.* Prior to the initiation of construction or maintenance activities, the USACE shall make a reasonable and good faith effort to identify historic properties located in the APE. These steps may include, but are not limited to, background research, consultation, oral history interviews, sample field investigation and field survey. The level of effort for these activities shall be determined in consultation with the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party. If no historic properties are identified in APE, the USACE shall document this finding pursuant to § 800.11(d) and retain this documentation in USACE files for at least seven (7) years.

E. *Evaluation of National Register Eligibility.* If cultural resources are identified within the APE, the USACE shall determine their eligibility for the National Register of Historic Places in accordance with the process described in § 800.4(c) and criteria established in 36 CFR 60. The determination of cultural significance shall be conducted in consultation with the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party. Should the USACE and the appropriate SHPO agree that a property is

or is not eligible, such consensus shall be deemed conclusive for the purpose of the PA. Should the USACE and appropriate SHPO not agree regarding the eligibility of a property, the USACE shall obtain a determination of eligibility from the Keeper of the National Register pursuant to 36 CFR 63.

F. *Assessment of Adverse Effects.*

1. *No Historic Properties Affected.* The USACE shall make a reasonable and good faith effort to evaluate the effect of each undertaking on historic properties in the APE. The USACE may conclude that no historic properties are affected by an undertaking if no historic properties are present in the APE, or the undertaking will have no effect as defined in §800.16(i). This finding shall be documented in compliance with § 800.11(d) and the documentation shall be retained by the USACE for at least seven (7) years. The USACE shall provide information on the finding to the public upon request, consistent with the confidentiality requirements of § 800.11(c).

2. *Finding of No Adverse Effect.* The USACE, in consultation with the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party, shall apply the criteria of adverse effect to historic properties within the APE in accordance with § 800.5. The USACE may propose a finding of no adverse effect if the undertaking's effects do not meet the criteria of § 800.5(a)(1) or the undertaking is modified to avoid adverse effects in accordance with 36 CFR 68. The USACE shall provide to the appropriate SHPO documentation of this finding meeting the requirements of § 800.11(e). The SHPO shall have 30 calendar days in which to review the findings and provide a written response to the USACE. The USACE may proceed upon receipt of written concurrence from the SHPO. Failure of the SHPO to respond within 30 days of receipt of the finding shall be considered agreement with the finding. The USACE shall maintain a record of the finding and provide information on the finding to the public upon request, consistent with the confidentiality requirements of § 800.11(c).

3. *Resolution of Adverse Effect.* If the USACE determines that the undertaking will have an adverse effect on historic properties as measured by criteria in § 800.5.(a)(1), the agency shall consult with the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party to resolve adverse effects in accordance with § 800.6.

a. For historic properties that the USACE and the appropriate SHPO agree will be adversely affected, the USACE shall:

- 1) Consult with the appropriate SHPO to identify other individuals or organizations to be invited to become consulting parties. If additional consulting parties are identified, the USACE shall provide them copies of documentation specified in § 800.11(e) subject to confidentiality provisions of § 800.11(c).

- 2) Afford the public an opportunity to express their views on resolving adverse effects in a manner appropriate to the magnitude of the project and its likely effects on historic properties.
 - 3) Consult with the appropriate SHPO, the SNND and Native American tribes which have indicated an interest in the undertaking, and consulting parties to seek ways to avoid, minimize or mitigate adverse effects.
 - 4) Prepare an historic property treatment plan which describes mitigation measures the USACE proposes to resolve the undertaking's adverse effects and provide this plan for review and comment to the appropriate SHPO, consulting parties and Native American tribes that have indicated an interest in the undertaking. All parties shall have 30 calendar days in which to provide a written response to the USACE.
- b. If the USACE and appropriate SHPO fail to agree on how adverse effects will be resolved, the USACE shall request that the Council join the consultation and provide the Council with documentation pursuant to § 800.11(g).
- 1) If the Council agrees to join the consultation, the USACE shall proceed in accordance with § 800.9.
 - 2) If, after consulting to resolve adverse effects pursuant to Stipulations I, II or IV of this PA, the Council, USACE or SHPOs determines that further consultation will not be productive, then any party may terminate consultation in accordance with the notification requirement and process prescribed by § 800.7.

Stipulation II

Post Review Changes and Discoveries

A. *Changes in the Undertaking.* If construction on the undertaking has not commenced and the USACE determines that it will not conduct the undertaking as originally coordinated, the USACE shall reopen consultation pursuant to Stipulation I E – F.

B. *Unanticipated Discoveries or Effects.* Pursuant to § 800.13(a)(2), if historic properties are discovered or unanticipated effects on historic properties are found after construction on an undertaking has commenced, the USACE shall develop a treatment plan to resolve adverse effects and notify the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party within two working days of the discovery. The notification shall include the USACE assessment of National Register eligibility of

affected properties and proposed actions to resolve the adverse effects. Comments received from the SHPO, the Native American tribes or other consulting party within two working days of the notification shall be taken into account by the USACE in carrying out the proposed treatment plan. The USACE may assume SHPO concurrence in its eligibility assessment unless otherwise notified by the SHPO. The USACE shall provide the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party which have expressed an interest in the undertaking a report of the USACE actions when they are completed.

Stipulation III

Curation and Disposition of Recovered Materials and Records

The USACE shall ensure that all archeological materials and associated records owned by the State of Texas or Sponsor, which result from identification, evaluation, and treatment efforts conducted under this PA, are accessioned into a curational facility that has been certified or granted provisional status by the Texas SHPO in accordance with the Texas Administrative Code, Title 13, Part 2, Chapter 29.6 and meets the standards of 36 CFR 79, except as specified in Stipulation IV for human remains. Management and care of artifacts and collections shall follow the Texas Administrative Code, Title 13, Part 2, Chapter 29. Archeological items and materials from privately-owned lands in Texas shall be returned to their owners upon completion of analyses required for Section 106 compliance under this PA. Archeological collections generated from Louisiana lands shall be prepared for curation according to the collections standards of the Louisiana Division of Archeology and curated with the Louisiana Division of Archeology. Archeological items and materials from privately-owned lands may be returned to owners if requested. Private property owners in Louisiana shall be encouraged to curate with the state of Louisiana to ensure long-term preservation and future research potential of non-state owned collections. All associated records from archeological sites in Louisiana shall be curated with the Louisiana Division of Archeology.

Stipulation IV

Treatment of Human Remains

A. *Prior Consultation of Native American Burials:* If the USACE investigations conducted pursuant to Stipulation I of this PA indicate a high likelihood that Native American Indian human remains may be encountered, the USACE shall develop a treatment plan for these remains in consultation with the appropriate SHPO, the SNND, Native American Indian tribes that attach religious and cultural significance to identified historic properties and any other consulting party. The USACE shall ensure that tribes indicating an interest in the undertaking are afforded a reasonable opportunity to identify concerns, advise on identification and evaluation, and participate in the resolution of adverse effects in compliance with the terms of this PA.

B. *Inadvertent Discovery in Texas.* Immediately upon the inadvertent discovery of human remains during historic properties investigations or construction activities

conducted pursuant to this PA, the USACE shall ensure that all ground disturbing activities cease in the vicinity of the human remains and any associated grave goods. Within two working days of the discovery, the USACE shall initiate consultation with the appropriate SHPO, Native American Indian tribes and any other consulting party that might attach religious and cultural significance to identified historic properties. The USACE shall consult with the appropriate SHPO, Native American Indian tribes and other consulting party which have expressed an interest in the undertaking in an effort to develop a plan for resolving the adverse effects.

C. *Inadvertent Discovery in Louisiana*: If an unmarked burial site or human skeletal remains are discovered, the USACE shall notify the local law enforcement office within 24 hours and the Louisiana SHPO within 72 hours. Upon discovery, all disturbing activity shall cease and shall not resume until the USACE has consulted with the Louisiana SHPO and the Louisiana Division of Archeology regarding a plan for the disposition of the remains. This shall be done within 30 days. The USACE, in consultation with the Louisiana SHPO and the Louisiana Division of Archeology, shall take every reasonable action to restore the burial site and avoid disturbing the remains. All burial artifacts found in an unmarked burial site shall become the property of the State of Louisiana and the Louisiana Division of Archeology shall have control over their disposition pursuant to the Louisiana Revised Stat. Ann. Title 8, §671 – 681, “Louisiana Unmarked Human Burial Sites Preservation Act.”

D. *Advisory Council on Historic Preservation Policy Statement regarding Treatment of Burial Sites, Human Remains and Funerary Objects effective 23 February 2007*: This policy applies to all Federal Agencies with Undertakings that are subject to review under Section 106 of the NHPA. To be considered under Section 106, the burial site must be or be a part of an historic property, meaning that it is listed or eligible for listing in the National Register of Historic Places. This policy shall be applied if the burial meets this criterion.

E. *Dispute Resolution*. If, during consultations conducted under paragraphs A, B and C of this stipulation, all consulting parties cannot agree upon an consensus plan for resolving adverse effects, the matter shall be referred to the Council for resolution in accordance with the procedures outlined in § 800.9.

Stipulation V

PA Amendments, Disputes and Termination

A. *Amendments*. Any party to this PA may propose to the other parties that it be amended, whereupon the parties shall consult in accordance with § 800.6(c)(7) to consider such an amendment.

B. *Disputes*. Disputes regarding the completion of the terms of this agreement shall be resolved by the signatories. If the signatories cannot agree regarding a dispute, any one of the signatories may request the participation of the Council in resolving the dispute in accordance with the procedures outlined in § 800.9.

C. *Termination of PA.* Any party to this PA may terminate it by providing sixty (60) days notice to the other parties, provided that the parties shall consult during the period prior to the termination to seek agreement on amendments or other actions that will avoid termination. In the event of termination of this PA by the appropriate SHPO, the USACE shall comply with the provisions of § 800 Subpart B.

Stipulation VI
Termination of Consultation

If, after consulting to resolve adverse effects pursuant to Stipulation I, II or IV of this PA, the USACE or appropriate SHPO determines that further consultation will not be productive, then either party may terminate consultation in accordance with the notification requirements and process prescribed by § 800.7.

Stipulation VII
Term of this Agreement

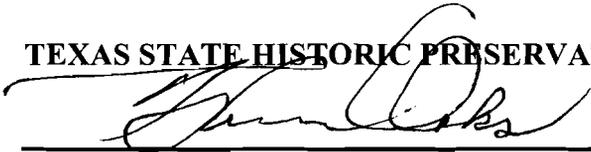
This PA remains in force for a period of ten (10) years from the date of its execution by all signatories. Sixty (60) days prior to the conclusion of the ten (10) year period, the USACE shall notify all parties in writing of the end of the ten year period to determine if they have any objections. If there are no objections received prior to expiration, the PA shall continue to remain in force for a new ten (10) year period.

DISTRICT ENGINEER, U.S. ARMY CORPS OF ENGINEERS, GALVESTON



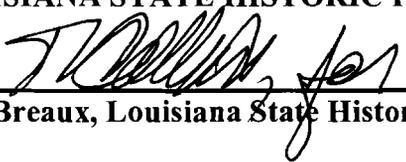
Colonel David C. Weston, District Engineer 11/13/2007
Date

TEXAS STATE HISTORIC PRESERVATION OFFICER



F. Lawrence Oaks, Texas State Historic Preservation Officer 1/31/08
Date

LOUISIANA STATE HISTORIC PRESERVATION OFFICER



Pam Breaux, Louisiana State Historic Preservation Officer 1-29-08
Date

SABINE NECHES NAVIGATION DISTRICT



Paul Beard, Chairman of the Board of Commissioners 12/11/07
Date