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
  (Working with Section 106)

- www.npi.org
  (Tools for CRMs: Tools for Preparing Agreement Under Section 106)

- shpo.sc.gov/revcomp
  (MOA and covenant templates, guidance on mitigation and complying with regulations)