

**PROTOTYPE PROGRAMMATIC AGREEMENT BETWEEN THE
US DEPARTMENT OF AGRICULTURE,
NEW JERSEY NATURAL RESOURCES CONSERVATION SERVICE STATE OFFICE,
AND
THE NEW JERSEY STATE HISTORIC PRESERVATION OFFICER,
REGARDING CONSERVATION ASSISTANCE**

WHEREAS, the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) administers numerous voluntary assistance programs, special initiatives, and grant and emergency response programs for soil, water, and related resource conservation activities available to eligible private producers, States, commonwealths, Federally Recognized Tribal governments, other government entities, and other applicants for conservation assistance, pursuant to the Agricultural Act of 2014 (2014 Farm Bill, Public Law 113-79); Soil Conservation and Domestic Allotment Act of 1935 (Public Law 74-46, 16 U.S.C. 590 a-f, as amended); the Flood Control Act of 1944 (Public Law 78-534, as amended); the Watershed Protection and Flood Prevention Act (Public Law 83-566, as amended, 16 U.S.C. 1001-1012); the Agricultural and Food Act of 1981 (Public Law 97-98, 95 Stat. 1213); the Agricultural Credit Act (Public Law 95-3341, Title IV, Section 403); Food, Agriculture, Conservation and Trade Act of 1990 (Public Law 101-624); the Flood Control Act of 1936 (Public Law 74-738); the Food Security Act of 1985 (Public Law 99-198, as amended); the Federal Agricultural Improvement and Reform Act of 1996 (Public Law 104-127); and executive and secretarial orders, implementing regulations and related authorities; and

WHEREAS, NRCS, through its conservation assistance programs and initiatives, provides assistance for activities with the potential to affect historic properties eligible for or listed in the National Register of Historic Places (NRHP), including National Historic Landmarks (NHLs) and therefore constitute undertakings subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, and its implementing regulations, 36 CFR Part 800, including the provisions of these regulations addressing NHLs at 36 CFR Part 800.10; and

WHEREAS, NRCS has determined that the requirement to take into account the effects to historic properties of its undertakings may be more effectively and efficiently fulfilled through the use of a Prototype Programmatic Agreement (Prototype Agreement); and

WHEREAS, the NRCS New Jersey State Office has consulted with the New Jersey State Historic Preservation Officer/SHPO and followed the instructions in the Advisory Council on Historic Preservation (ACHP) letter that accompanied the Prototype Agreement, dated November 21, 2014; and

WHEREAS, NRCS also is responsible for fulfilling the requirements of the National Environmental Policy Act (NEPA), including the use of categorical exclusions, and coordinating NEPA and Section 106 reviews, as appropriate; and

WHEREAS, NRCS developed this Prototype Agreement in consultation with the National Conference of State Historic Preservation Officers (NCSHPO) and its members, interested Indian tribes, Native Hawaiian organizations, interested historic preservation organizations, (such as the National Trust for Historic Preservation), and the Advisory Council on Historic Preservation (ACHP); and

WHEREAS, in accordance with 36 CFR Part 800.14(b)(4), the ACHP has designated this agreement as a Prototype Agreement, which allows for the development and execution of subsequent prototype agreements by individual NRCS State office(s) (State-based Prototype Agreements) to evidence compliance with Section 106; and

WHEREAS, this State-based Prototype Agreement conforms to the NRCS Prototype Agreement as designated by the ACHP on November 21, 2014, and therefore, does not require the participation or signature of the ACHP when the NRCS State Office and the SHPO agree to the terms of the State-based Prototype Agreement; and

WHEREAS, this Prototype Agreement replaces the 2002 nationwide “Programmatic Agreement among the United States Department of Agriculture Natural Resources Conservation Service, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers relative to Conservation Assistance,” as amended in 2011 and 2012, which expired on November 20, 2014; and

WHEREAS, the NRCS State Conservationist is the responsible federal agency official within the state for all provisions of Section 106, including consultation with the SHPO, NHOs, and government-to government consultation with Indian tribes to negotiate the State-based Prototype Agreement; and

WHEREAS, the State-based Prototype Agreement does not apply to undertakings occurring on or affecting historic properties on Tribal lands, as defined by Section 301(14) of the NHPA, without prior agreement and execution of a State-based Prototype Agreement with the concerned Indian tribe; and

WHEREAS, NRCS New Jersey has contacted with the Delaware Tribe of Nations; the Nanticoke Lenni-Lenape Tribal Nation; the Powhatan Renape Nation; and the Ramapough Lenape Indian Nation; and has invited their participation in the development of this Prototype Agreement; and

WHEREAS, this Prototype Agreement does not modify the NRCS’ responsibilities to consult with Indian tribes and NHOs on all undertakings that might affect historic properties and properties of religious and cultural significance to them, regardless of where the undertaking is located, without prior agreement by the concerned Indian tribe or NHO, and recognizes that historic properties of religious and cultural significance to an Indian tribe or NHO may be located on ancestral homelands or on officially ceded lands near or far from current settlements; and

WHEREAS, when NRCS conducts individual Section 106 reviews for undertakings under this State-based Prototype Agreement, it shall identify and invite other agencies, organizations, and individuals to participate as consulting parties; and

NOW, THEREFORE, the NRCS New Jersey State Office and the SHPO agree that undertakings in New Jersey shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

STIPULATIONS

NRCS shall ensure that the following stipulations are met and carried out:

I. Applicability.

- a. Once executed by the NRCS and the New Jersey SHPO, this State-based Prototype Agreement sets forth the review process for all NRCS undertakings subject to Section 106 in New Jersey.
- b. Execution of this State-based Prototype Agreement supersedes any existing State Level Agreement with the New Jersey SHPO under the previous NRCS nationwide Programmatic Agreement, but does not replace any existing project-specific Section 106 agreements (Memoranda of Agreement or Programmatic Agreements).
- c. This State-based Prototype Agreement applies only when there is a Federal Preservation Officer (FPO) in the NRCS National Headquarters (NHQ) who meets the Secretary of the Interior's Professional Qualification Standards (48 FR 44716).
- d. This State-based Prototype Agreement applies only where there is staffing or access to staffing (through contracted services or agreements with other agencies or Indian tribes) who meet the Secretary of Interior's Professional Qualification Standards in the New Jersey NRCS state office.

II. Roles and Professional Qualifications.

- a. The NRCS New Jersey State Conservationist is responsible for oversight of its performance under this State-based Prototype Agreement.
- b. The NRCS New Jersey Cultural Resources Coordinator (CRC) shall work in conjunction with the New Jersey SHPO, to coordinate, monitor, and oversee the work and reporting of all NRCS New Jersey field office personnel. The New Jersey CRC shall coordinate with such personnel to provide technical historic property and resource

information to the NRCS New Jersey State Conservationist for use in section 106 findings and determinations, after appropriate consultations with the New Jersey SHPO, Indian tribes, and discussions with the landowner. The NRCS New Jersey CRC shall coordinate efforts to assist the NRCS New Jersey State Conservationist in determining whether an undertaking has the potential to affect historic properties, triggering Section 106 review, pursuant to 36 CFR Part 800.3(a).

c. When necessary, NRCS New Jersey shall utilize specialized cultural resources personnel (i.e., detailed NRCS Cultural Resources Specialists (CRS), archaeologists, historians, professional service contractors, etc.) to carry out additional Section 106 historic preservation compliance work on its behalf. NRCS New Jersey shall ensure that all cultural resources personnel carrying out this Section 106 historic preservation compliance work are appropriately qualified to coordinate the reviews of resources and historic properties as applicable to the resources and historic properties being addressed (site, building, structure, landscape, resources of significance to Indian tribes, and other concerned communities). Thus, these personnel must meet the Secretary of the Interior's Professional Qualification Standards and have the knowledge to assess the resources within an undertaking's area of potential effect (APE). The NRCS New Jersey State Conservationist is responsible for consultation with the New Jersey SHPO and government-to-government consultation with Indian tribal leaders and/or their THPO to develop consultation protocols. These responsibilities may not be delegated to any other staff, nor carried out on behalf of NRCS by another federal agency.

d. The NRCS New Jersey field office personnel involved in implementing this State-based Prototype Agreement, after completion of the NRCS web, classroom, and field awareness training acquired through the USDA AgLearn training site, shall work with the NRCS New Jersey CRC and/or specialized cultural resources personnel, as feasible, in completing historic preservation compliance (Section 106) field records for the agricultural producer's (NRCS client or voluntary applicant for assistance) files and for use in producing initial historic property identification records (as set forth and outlined in NRCS' operational guidance, the National Cultural Resources Procedures Handbook, Title 190 Part 601).

e. The NRCS New Jersey CRC, with the guidance of the NRCS FPO and/or New Jersey SHPO, shall oversee development of the scope of work for investigation of the APEs for identified undertakings (see 36CFR Part 800.4). NRCS New Jersey may use professional service contractors or consultants or partners to assist with cultural resources compliance studies. NRCS New Jersey shall ensure these professional service contractors or consultants or partners meet the Secretary of Interior's Professional Qualification Standards.

f. NRCS New Jersey remains responsible for all consultation with the New Jersey SHPO, Indian tribes and THPOs, and all determinations of National Register of Historic Places (NRHP) eligibility and effect. The NRCS may not delegate consultation for findings and determinations to professional service consultants or producers/applicants for conservation assistance.

III. Training.

- a. NRCS shall require personnel conducting cultural resources identification and evaluation work to complete, at a minimum, the NRCS Web-based (in USDA AgLearn) and field Cultural Resources Training Modules. This cultural resources training must be completed prior to completing cultural resources compliance work, and must be completed within the first year of employment with the NRCS. NRCS New Jersey shall require its CRC or other NRCS personnel overseeing and administering cultural resources work to take the NRCS Cultural resources Training Modules (awareness training) and the ACHP's *Section 106 Essentials* course, or a course with similar content, if approved by the NRCS FPO, Training must be completed within the first calendar year of the State-based Prototype Agreement. NRCS New Jersey personnel shall review and update training completion with their supervisors and include their training in their Individual Development Plans.
- b. NRCS may invite the SHPO or staff to participate in presentations at agency classroom or field trainings.
- c. NRCS shall encourage all personnel conducting or overseeing cultural resources work to take additional appropriate specialized training as provided by the SHPO, the ACHP, National Park Service, General Services Agency or other agencies, as feasible.

IV. Lead Federal agency.

- a. For any undertaking for which the NRCS is the lead federal agency for Section 106 purposes per 36 CFR Part 800.2(a)(2), NRCS staff shall follow the terms of this State-based Prototype Agreement. NRCS shall notify the SHPO of its involvement in the undertaking and the involvement of the other federal agencies.
- b. For any undertaking for which the NRCS is not the lead federal agency for Section 106 purposes, including those undertakings for which the NRCS provides technical assistance to other USDA or other federal agencies, the terms of this State-based Prototype Agreement shall not apply to that undertaking. If the lead federal agency agrees, NRCS may follow the approved alternative procedures in place for that agency.

V. Review Procedures.

- a. In consultation with the New Jersey SHPO, NRCS shall identify those undertakings with little to no potential to affect historic properties and list those undertakings in Appendix A. Upon the determination by the NRCS New Jersey that a proposed undertaking is included in Appendix A, the NRCS is not required to consult further with the SHPO for that undertaking.
- b. The list of undertakings provided in the Appendix A may be modified through consultation and written agreement between the NRCS State Conservationist and the SHPO without requiring an amendment to this State-based Prototype Agreement. The NRCS State

office will maintain the master list and will provide an updated annual list to all consulting parties with an explanation of the rationale (metadata) for classifying the practices accordingly.

c. Undertakings not identified in Appendix A shall require further review. NRCS New Jersey shall consult with the New Jersey SHPO to define the undertaking's APE, identify and evaluate historic properties that may be affected by the undertaking, assess potential effects, and identify strategies for resolving adverse effects.

1. NRCS New Jersey may provide its proposed APE, identification of historic properties and/or scope of identification efforts, and assessment of effects in a single transmittal to the New Jersey SHPO, provided this documentation meets the substantive standards in 36 CFR Part 800.4-5 and 800.11.

2. NRCS New Jersey shall attempt to avoid adverse effects to historic properties whenever possible; where historic properties are located in the APE, NRCS New Jersey shall describe how it proposes to modify, buffer, or move the undertaking to avoid adverse effects to historic properties.

3. Where NRCS New Jersey determines a finding of "no historic properties affected" or "no adverse effect" to historic properties, the New Jersey SHPO shall have 30 calendar days from receipt of this documented description and information to review it and provide comments. The NRCS shall take into account all timely comments.

i. If the New Jersey SHPO, or another consulting party, disagrees with the findings and/or determinations made by NRCS New Jersey, it shall notify the NRCS New Jersey within the 30-day calendar time period. The NRCS New Jersey shall consult with the New Jersey SHPO or other consulting party to attempt to resolve the disagreement. If the disagreement cannot be resolved through this consultation, NRCS shall follow the dispute resolution process in Stipulation VIII below.

ii. If the New Jersey SHPO does not respond to the NRCS New Jersey within the 30 calendar day period and/or NRCS New Jersey receives no objections from other consulting parties, or if the New Jersey SHPO concurs with the determination and proposed actions of NRCS New Jersey to avoid adverse effects, NRCS New Jersey shall document the concurrence/lack of response within the review time noted above, and may move forward with the undertaking.

4. Where a proposed undertaking may adversely affect historic properties, NRCS New Jersey shall describe proposed measures to minimize or mitigate the adverse effects, and follow the process in 36 CFR Part 800.6, including consultation with other consulting parties and notification to the ACHP, to develop a Memorandum of Agreement to resolve the adverse effects. Should the proposed undertaking have the potential to adversely affect a known

National Historic Landmark, the NRCS shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to the NHL in accordance with Section 110(f) of the NHPA and 36 CFR Part 800.6 and 800.10, including consultation with the ACHP and respective National Park Service Regional National Historic Landmark Program Coordinator to develop a Memorandum of Agreement.

5. More specific procedures used by NRCS New Jersey to complete the Section 106 review process can be found in the NRCS National Cultural Resources Procedures Handbook, Title 190 Part 601, and in the NRCS New Jersey Cultural Resources Review Form and Instructions provided in Appendix D to this Agreement. The documents in Appendix B provide additional detailed instructions for how NRCS New Jersey and the New Jersey SHPO shall complete cultural resources reviews.

i. The NRCS New Jersey Cultural Resources Review Form and Instructions provided in Appendix B may be modified through consultation and written agreement between the NRCS New Jersey State Conservationist and the New Jersey SHPO without requiring an amendment to this agreement.

VI. Emergency and Disaster Management Procedures (Response to Emergencies)

a. NRCS New Jersey shall notify the New Jersey SHPO, Native American Tribes and other consulting parties, as appropriate, immediately or within 48 hours of the emergency determination, following the NRCS' Emergency Watershed Program (EWP) final rule (see Section 216, P.L. 81- 516 Final Rule, 7 CFR Part 624 (April 2005)).

b. Where the NRCS EWP final rule is found to be inapplicable, NRCS New Jersey shall follow the recently approved guidelines for Unified Federal Review issued by the department of Homeland Security, Federal Emergency Management Service (DHS, FEMA), the Council on Environmental Quality (CEQ), and the ACHP in July 2014 or the procedures outlined in 36 CFR Part 800.12(b).

VII. Post-review discoveries of cultural resources or historic properties and unanticipated effects to historic properties.

a. Where construction has not yet begun and a cultural resource is discovered after Section 106 review is complete, the NRCS shall consult to seek avoidance or minimization strategies in consultation with the New Jersey SHPO, and/or to resolve adverse effects in accordance with 36 CFR Part 800.6.

b. The NRCS New Jersey shall ensure that every contract for assistance includes provisions for halting work/construction in the area when potential historic properties are discovered or unanticipated effects to historic properties are found after implementation, installation, or construction has begun. When such a discovery occurs, the producer who is receiving financial assistance or their contractor shall immediately notify the Office

NRCS New Jersey State Conservationist, the New Jersey CRC, or specialized cultural resources personnel as specified in II.c. of this agreement, and supervisory NRCS New Jersey personnel for the area, and the landowner/applicant.

1. The NRCS New Jersey CRC or specialized cultural resources personnel for NRCS New Jersey shall inspect the discovery within 24 hours, if weather permits, and in consultation with the local NRCS New Jersey official (field office District Conservationist or Assistant State Conservationist for Field Operations), concerned Indian tribes, the New Jersey SHPO, the NRCS New Jersey State engineering or program supervisor, as appropriate, the landowner/producer (whomever NRCS is assisting). The NRCS New Jersey CRC or specialized cultural resources personnel for NRCS New Jersey shall establish a protective buffer zone surrounding the discovery. This action may require inspection by tribal cultural resources experts in addition to the CRC or NRCS' Archaeological Consultants.

2. All NRCS New Jersey contact with media shall occur only under the direction of the NRCS New Jersey Public Affairs Officer, as appropriate, and the NRCS New Jersey State Conservationist.

3. Security shall be established to protect the resources/historic properties, workers, and private property. Local law enforcement authorities will be notified in accordance with applicable State law and NRCS policy in order to protect the resources. Construction and/or work may resume outside the buffer only when the NRCS New Jersey State Conservationist determines it is appropriate and safe for the resources and workers.

4. The NRCS New Jersey CRC shall assist the NRCS New Jersey State Conservationist in notifying SHPO and the ACHP no later than 48 hours after the discovery, and in describing the assessment of the National Register eligibility of the property, as feasible, and proposed actions to resolve any adverse effects to historic properties. The eligibility determination may require the assessment and advice of concerned Indian tribes, the New Jersey SHPO, and technical experts (such as historic landscape architects) not employed by NRCS.

5. The New Jersey SHPO and ACHP shall respond within 48 hours from receipt of the notification with any comments on the discovery and proposed actions.

6. NRCS New Jersey shall take any comments provided into account and carry out appropriate actions to resolve any adverse effects.

7. NRCS New Jersey shall provide a report of the actions to the New Jersey SHPO and the ACHP within 3 months of completion.

c. When human remains are discovered, the NRCS New Jersey shall follow all applicable federal, tribal, and state burial laws and ordinances, including the Native American Graves Protection and Repatriation Act, and implementing regulations, when

on tribal or federal lands, and related human rights and health statutes, where appropriate. NRCS shall also refer to the ACHP's Policy Statement regarding *Treatment of Burial Sites, Human Remains and Funerary Objects* and the ACHP's Section 106 Archaeology Guidance. NRCS New Jersey shall also follow USDA and NRCS policy on treatment of human remains and consultation.

VIII. Dispute resolution.

a. Should any consulting or signatory party to this State-based Prototype Agreement object to any actions proposed or the manner in which the terms of the agreement are implemented, the NRCS New Jersey State Conservationist and CRC shall consult with such party to resolve the objection. If the NRCS New Jersey State Conservationist determines that such objection cannot be resolved, he or she will:

1. Forward all documentation relevant to the dispute, including the NRCS New Jersey State Conservationist's proposed resolution, to the NRCS FPO and Senior Policy Official (SPO Deputy Chief for Science and Technology) and the ACHP. The ACHP shall provide the FPO, SPO, and NRCS New Jersey State Conservationist 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, NRCS New Jersey shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and any signatory or consulting parties, and provide them with a copy of this written response. NRCS New Jersey will then proceed according to its final decision.

2. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, NRCS may make a final decision on the dispute and proceed. Prior to reaching such a final decision, NRCS New Jersey shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and consulting parties, and provide them and the ACHP with a copy of the written response.

b. The NRCS New Jersey State Office responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remains unchanged.

c. Any consulting party to the State-based Prototype Agreement may request the ACHP provide its advisory opinion regarding the substance of any finding, determination, or decision regarding compliance with its terms.

d. At any time during the implementation of the State-based Prototype Agreement, a member of the public may submit an objection pertaining to this agreement to the NRCS New Jersey State Conservationist, in writing. Upon receiving such an objection, the NRCS New Jersey State Conservationist shall notify the NRCS SPO, FPO and the New Jersey SHPO, take the objection into account, and consult with other consulting parties as appropriate to resolve the objection. The NRCS New Jersey State Conservationist shall notify the SPO, FPO, and New Jersey SHPO of the outcome of this process.

IX. Public Involvement

The NRCS State Conservationist will ensure the public is involved in the development of this State-based Prototype Agreement and participates in Section 106 review as set forth above in Section V (reference to other parties).

X. Annual reporting and monitoring.

a. Every year following the execution of this agreement, commencing February 31, 2016, until it expires or is terminated, the NRCS New Jersey State Conservationist shall provide all consulting parties (including those parties who participate in the consultation but do not sign the agreement) and the FPO a summary report detailing work undertaken pursuant to its terms during the previous calendar year. This report will include a summary of undertakings falling under Appendix A as well as undertakings that required further review; a summary of the nature and content of meetings held with the New Jersey SHPO; and an assessment of the overall effectiveness of the State-based Prototype Agreement. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in efforts by NRCS New Jersey to carry out the terms of this agreement.

1. The NRCS FPO shall use the state reports to provide, through the NRCS SPO, an annual report to the ACHP.

2. The NRCS New Jersey State Conservationist shall use the state report to assess the need for annual meetings with the New Jersey SHPO each fiscal year.

b. The State Conservationist will participate in an annual review with the NRCS Regional Conservationist regarding the effectiveness of the prototype agreement and submit a written (email) report following this review to the SPO (Deputy Chief for Science and Technology).

c. The NRCS State Conservationist and the SHPO may request that the ACHP participate in any annual meeting or agreement review.

XI. Compliance with applicable State law and Tribal law (when on Tribal lands).

NRCS New Jersey shall comply with relevant and applicable state law, including permit requirements on state land, and with relevant and applicable tribal law, when on tribal lands.

XII. Duration of Prototype Agreement.

This State-based Prototype Agreement for NRCS New Jersey will be in effect for five (5) years from the date of execution unless amended or terminated pursuant to Stipulation XIII below. If at the end of five years, the terms of this agreement are found to be effective and

operational, this State-based Prototype Agreement shall be extended and additional five years.

XIII. Amendment and termination.

- a. This State-based Prototype Agreement may be amended if agreed to in writing by all signatories. The amendment will be effective on the date a copy, signed by all of the signatories, is filed with the NRCS FPO, SPO, and the ACHP.
- b. If any signatory to this State-based Prototype Agreement, or the ACHP, determines that its provisions will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation XII.A. If within 30 calendar days, or other time period agreed upon by the signatories, an amendment cannot be agreed upon, any signatory or the ACHP may terminate the agreement upon written notification to the other signatories.
- c. If this State-based Prototype Agreement is terminated, or expires without being extended via the amendment process described above, and prior to continuing work on any undertaking, NRCS shall comply with 36 CFR Part 800 for all individual undertakings in New Jersey.
- d. NRCS New Jersey will consider requests from other USDA agencies to become a signatory to the State-based Prototype Agreement following formal written requests and appropriate discussion with and approval by the NRCS FPO and SPO, and joint USDA Agency -NRCS State Office consultation with the ACHP, NCSHPO, the SHPO, and other consulting parties, as appropriate. Such inclusion of the USDA agency may require amendment to this State-based Prototype Agreement.

Execution of this State-based Prototype Agreement by the NRCS and SHPO and implementation of its terms evidence that NRCS has taken into account the effects of its undertakings in New Jersey on historic properties and afforded the ACHP a reasonable opportunity to comment.

Signatory Parties



Carrie Lindig, State Conservationist, New Jersey Natural Resources Conservation Service

4/28/16 Date



Daniel Saunders, New Jersey State Historic Preservation Officer (DEPUTY SHPO)

4/19/16 Date

