



Preserving America's Heritage

March 11, 2013

**PROGRAM COMMENT TO EXTEND THE DURATION OF AGREEMENTS EXECUTED
UNDER THE DEPARTMENT OF ENERGY'S PROTOTYPE PROGRAMMATIC
AGREEMENT**

I. Introduction

The Department of Energy's (DOE) Office of Weatherization and Intergovernmental Programs (OWIP) provides financial assistance to state agency applicants for three weatherization related grant programs: Weatherization Assistance Program (WAP), State Energy Program (SEP), and Energy Efficiency and Conservation Block Grant (EECBG). DOE has determined that activities carried out by these funded programs constitute undertakings with the potential to affect historic properties. Therefore, DOE must comply with Section 106 and its implementing regulations, 36 CFR Part 800, for these undertakings.

The Advisory Council on Historic Preservation (ACHP) and DOE began a partnership in August 2009 to explore possible program alternatives to tailor the Section 106 process for these undertakings in anticipation of the dramatic increase in project funding as a result of American Recovery and Reinvestment Act. DOE, in consultation with the ACHP and the National Conference of State Historic Preservation Officers (NCSHPO), developed a prototype Programmatic Agreement (PA) to cover three weatherization related grant programs and to create efficiencies in the administration of these OWIP grants: WAP, SEP, and EECBG. The prototype PA identifies a category of routine undertakings with limited potential to affect historic properties and exempts them from further review. The ACHP's Chairman designated the prototype PA on February 8, 2010. Under the terms of the prototype PA, DOE, the State Historic Preservation Officer (SHPO), and the relevant state agency receiving OWIP grants can execute subsequent agreements without ACHP involvement. Execution of an agreement pursuant to the prototype PA presumes that DOE will conduct its government-to-government consultation responsibilities with federal recognized Indian tribes and its Section 106 consultation requirements with Native Hawaiian organizations. If DOE is notified that a particular undertaking may result in an adverse effect on historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations, DOE must invite such Indian tribes or Native Hawaiian organizations to participate in consultation for the affected project.

Since its designation, DOE has used the prototype PA to successfully negotiate and execute 44 programmatic agreements with SHPOs and state agencies receiving DOE OWIP grants. DOE's direct recipients may use the executed state agreement developed under the prototype PA as well. The prototype PA initially proposed a three year duration clause from the time of execution and filing with the ACHP. As a result, the 44 agreements executed under the prototype PA have different expiration dates. Several of the agreements will expire in mid-March 2013. It is now DOE's and the ACHP's intention that these agreements should extend beyond the three year term.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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II. Background

During the development of the prototype PA in 2009, the ACHP invited SHPOs, Indian tribes, and Native Hawaiian organizations to participate in a series of teleconferences to discuss the prototype PA and share information on which DOE programs would be covered by the new program alternative. The tribes that participated in the teleconferences noted that the vast majority of funding from the three programs did not relate to undertakings on or affecting historic properties on tribal lands, and were not interested in participating further in the process to develop the prototype PA. The SHPOs were generally supportive of DOE's intent to pursue a program alternative such as the prototype PA that would assist them in managing their workload by streamlining the review of certain undertakings. Further, the SHPOs liked the format of the prototype PA as they would be able to modify individual agreements under its terms to account for state-specific issues.

As a result of the partnership with ACHP and the development and the administration of the prototype PA, DOE established internal and external training; recognized best management practices; and utilized DOE guidance and directives to ensure that the DOE weatherization programs were properly implemented in compliance with Section 106. The prototype PA established review efficiencies and protocols which allowed for the grant programs to expedite the weatherization efforts of the homes of many low income individuals across the country, as well as assisted communities in funding energy efficiency, renewable energy, and weatherization projects for public buildings such as schools and courthouses. Due to the success of the prototype PA for DOE's weatherization programs, other departments within DOE have sought ACHP's and OWIP staff's guidance and direction for meeting their historic preservation compliance responsibilities.

In the past year, DOE and the ACHP have discussed how to extend and build upon the program established by the prototype PA. In December 2012, DOE and the ACHP held listening sessions with SHPOs. The discussions focused on the effectiveness of the prototype PA and the feasibility of pursuing a new program alternative. The SHPOs that participated in those listening sessions were generally supportive of the development, implementation, and effectiveness of the prototype PA and expressed a preference to continue using the PAs to provide streamlining of reviews and other review efficiencies. Further, in developing the text of this Program Comment, the ACHP provided an opportunity for SHPOs, Indian tribes, Native Hawaiian organizations, and state agencies to comment on its applicability and terms.

This Program Comment extends the duration of the existing 44 agreements executed under the prototype PA until December 31, 2020, and provides the same duration period for any future agreements that may be executed under the prototype PA. Nothing in this Program Comment alters or modifies any other provisions of the prototype PA or the 44 agreements, including the ability of the parties to amend or terminate an executed agreement prior to the expiration date.

III. Establishment and Authority

This Program Comment was issued by the ACHP on March 11, 2013 pursuant to 36 CFR 800.14(e).

IV. Date of Effect

This Program Comment went into effect on March 11, 2013.

V. Use of this Program Comment to Extend the Duration of the Existing Agreements Executed under the DOE Prototype PA and for New Agreements Executed pursuant to the Prototype PA

By the issuance of this Program Comment, the DOE may continue, through December 31, 2020, complying with its responsibilities under Section 106 of the National Historic Preservation Act for its WAP, SEP, and EECBG in the relevant States using the 44 agreements currently executed, including those agreements that were recognized by Stipulation III, and those to be executed, under the "Prototype Programmatic Agreement between the United States Department of Energy, the State Energy Office and the State Historic Preservation Office regarding EECBG, SEP and WAP Undertakings," designated by the ACHP on February 8, 2010, regardless of the duration clause of those agreements. However, if any of those agreements is terminated under its own terms, DOE may no longer use it to comply with its Section 106 responsibilities in the relevant State. This will provide continuity in the Section 106 review for those undertakings covered by the existing and any new agreements executed under the prototype PA. This Program Comment does not alter or modify any provisions of the prototype PA or the 44 executed agreements other than their duration clauses.

VI. Amendment

The ACHP may amend this Program Comment after consulting with DOE, NCSHPO, and other parties as appropriate, and publishing notice in the Federal Register to that effect.

VII. Sunset Clause

This Program Comment will terminate on December 31, 2020, unless it is amended to extend the period in which it is in effect.

VIII. Termination

The ACHP may terminate this Program Comment by publication of a notice in the Federal Register thirty (30) days before the termination takes effect.

Authority: 36 CFR § 800.14(e)