

DRAFT

JULY 27, 2023 OR&L PROGRAMMATIC AGREEMENT PUBLIC MEETING NOTES

Steve Vendt (HRS) – We would like to go back to the 2017 tiered system version of the Programmatic Agreement (PA).

Meesa Otani (FHWA) – The PA cannot revert back to previous format because since that time, the Program Comment has been approved.

Steve Vendt (HRS) - The Program Comment is not appropriate for the OR&L right-of-way (ROW). There are many items that do not apply.

David Clarke (FHWA) - ACHP published the Program Comment and it does apply. It can be caveated if needed.

- Development of the PA is an iterative process.
- More rounds of comments are possible.
- Some comments are outside of the Programmatic Agreement (PA).

Betsy Merritt (NTHP) – There are problems with the Program Comment; irrelevant activities are included.

- There is confusion with the draft PA. There is concern that portions of the Program Comment contradict the intent of the PA. For example, new at-grade crossings are not allowed without 106 so the PA does not apply. However, per the Program Comment, at-grade crossings are permitted.

David Clarke (FHWA) – Betsy is correct; FHWA is adopting the document from another agency so it is typical to start with the whole document. FHWA has to justify to ACHP that it will deviate from Program Comment. This process will allow FHWA to caveat portions of the Program Comment but FHWA will need documentation to amend/edit the Program Comment.

Mandy Ranslow (ACHP) – It is okay to have caveats.

Alan Downer (SHPD) – A Part 800 alternate procedure exists.

- SHPD does not understand why the PA is needed if FHWA can use the Program Comment. Also, FHWA has a covenant to protect the resource; the Program Comment doesn't overrule FHWA covenant.
- The PA is supposed to be an alternative procedure?

Meesa Otani (FHWA) – FHWA is assembling a flow chart for how the approval process will be conducted. The PA only addresses Section 106.

- FHWA approval of undertakings within the deeded areas is outside of the PA.
- If there is a Federal action, NEPA needs to be cleared.
- There are three components to the Condition 4 approval:
 - o Section 106
 - o Chapter 6E
 - o Condition 4 approval

DRAFT

Susan Lebo (SHPD) – How are the approvals articulated in the PA? SHPD requests something showing the overall approval process.

Meesa Otani (FHWA) – The PA is independent of the Condition 4 approval process. HDOT collects information from the three components to make a determination on the approval.

Stephanie Hacker (SHPD) – Is there a brief summary of the comments?

Meesa Otani (FHWA) - All consultation comments have been included in the comment matrix. There are multiple tabs for different iterations of review.

Stephanie Hacker (SHPD) - What were the major comments?

Meesa Otani (FHWA) – The comments were primarily regarding:

- Applicability of the Program Comment (i.e., Appendix C)
- Use of ‘WHEREAS’ clauses

Stephanie Hacker (SHPD) – It is expected that the PA addresses preservation of the resource.

David Clarke (FHWA) – The PA is intended to address HDOT’s need to allow maintenance and operations but also to its responsibility to facilitate development, balanced with assessing impacts to the resource.

- The current version of the PA is better but it is not done. One or two rounds of consultation still need to be done.

Meesa Otani (FHWA) – The estimated time to complete the three components for project approvals is a few months? Construction methods and the potential to affect the rail need to be assessed.

David Tanoue (RMTTC) – What can projects currently in progress do now?

Meesa Otani (FHWA) – The PA is outside of the approval process. So it is suggested that projects start the 106 process now.

Scott McCormack – Is there an estimated time to complete the approval process?

David Clarke (FHWA) – It should be about 3 months for small projects.

Jim Niermann (RMTTC) - Can we initiate Section 106 now?

David Clarke (FHWA) - Yes, the undertaking falls outside of what is covered by the PA.

Jim Niermann (RMTTC) - When will the PA be completed?

David Clarke (FHWA) – FHWA is targeting January 2024.

DRAFT

David Tanoue (RMTC) - If a project is unaffected by the streamlining proposed by the PA, how should it proceed?

David Clarke (FHWA) - Start the 106 process now. However, approval is unlikely unless there is a definable safety issue. FHWA is not issuing approvals without the PA unless there is a definable safety issue.

Meesa Otani (FHWA) - If you have a questionable exempt activity, forward the information to FHWA to review.

Ross Stephenson (HRS) – A Master Plan is suggested for this process.

- HDOT is not fulfilling its commitments:
 - o Fort Barrette Road is taking quite a while to complete; the rails need to be repaired and crossing arms need to be installed.
 - o The Living Museum is taking longer than expected, and inflation is chipping away at the value of the mitigation fund.

Anthony (?) – FHWA/HDOT’s track record is not good.

- There are safety issues at the crossings. Maintenance of the crossing arms is not being handled well.
- HDOT needs to understand the value of the railroad operation. It can help improve the future.

Rouen Liu (HECO) – HECO shares the same concerns as others who have commented.

- There is a HECO project that is affected by the PA. It has maintenance work in the OR&L ROW that can help the State achieve its renewable energy goals. HECO wants to be able to move forward with its project but has been advised to wait until the PA is done.
- HECO has existing facilities affected. Is there any way to get the work going while the PA is being finalized?

David Clarke (FHWA) – The definition of “safety” is broad. Certain municipal functions can qualify as safety related.

Paul Christiansen (ENV) – Is approval required to upgrade an existing crossing? ENV submitted a comment regarding confirmation whether a project meets the exemption criteria.

Meesa Otani (FHWA) - The intent is that determination will be made in 30 days.

Paul Christiansen (ENV) - What if SHPD isn’t responsive?

Ross Stephenson (HRS) – The rail is important.

- FHWA diverts unused railroad money; this can be applied to Fort Barrette.
- The railroads made the plantations possible; the roads were bad before.

DRAFT

Alan Downer (SHPD) – To clarify, more than 8 years ago, SHPD stated that it would not approve any crossings without the PA; so none have been approved since 2018. SHPD is concerned about the resource and is responsible for requiring the PA.

- “Emergency” needs to be defined. It must be something that absolutely needs to be done now. If it takes longer than 30 days to initiate, then it’s not an emergency.
- The Program Comment should not be used to circumvent the covenant.

Betsy Merritt (NTHP) – I would like David Clarke (FHWA) to be involved.

- Are references to the schedule and PA final?
- Comments were rejected without explanation. Reasons for denial of the comments are expected.

David Clarke (FHWA) – I will be involved; but FHWA will need HDOT buy-in.

- FHWA/ACHP/HDOT are all committed to addressing comments but this isn’t a consensus document; Not everyone will be happy.
- It is not a done deal; we will need more time but we will do our best to finish as quickly as possible.

Betsy Merritt (NTHP) – It is difficult to understand the refusal to reference HRS in the PA. There is a longstanding relationship with HRS.

Meesa Otani (FHWA) – FHWA will consider adding HRS to the WHEREAS clauses.

Ross Stephenson (HRS) – HDOT cannot maintain the OR&L ROW itself; HDOT needs to work closely with HRS.

- It is difficult to understand the refusal to date to acknowledge HRS’ past role in maintaining the OR&L ROW. The Deed requires expertise that is not held by HDOT.

David Clarke (FHWA) – We need a stipulation to monitor the agreement...an annual report?

Betsy Merritt (NTHP) – More detail on the kinds of activities allowed should be incorporated.

- An additional appendix customized for the OR&L ROW should be included.

David Clarke (FHWA) – We need to figure out how to format the proposed change.

Betsy Merritt (NTHP) – There is a long list of mitigation not fulfilled by HDOT (e.g., crossing arms).

- Section 130 funding needs to be looked at. How is it being spent and can it be used for the OR&L ROW?
- For repairs of damages during construction, the PA should identify HRS in the process.

Steve Vendt (HRS) – HRS would like to know what projects/activities are coming. HRS wants to be integral to decisions regarding the OR&L ROW.

John Bond - There are historic markers that need to be preserved, including a historic battlefield site.

DRAFT

Henry Kennedy (HDOT) - Submit comments to Meesa Otani (FHWA) by the end of August. A new draft PA is expected by the end of September and by October, a new PA can be issued.