

**State Level Agreement
Between
The United States Department of Agriculture
Natural Resources Conservation Service
And
The Kentucky State Historic Preservation Office
For The Administration Of
Soil and Water Conservation Assistance Activities
in the Commonwealth of Kentucky**

PURPOSE: This State Level Agreement (SLA) implements Stipulation IV (State Agreements) of the National Programmatic Agreement among the United States Department of Agriculture, Natural Resources Conservation Service (NRCS) the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers regarding soil and water conservation assistance activities and other actions on private and public lands within the Commonwealth of Kentucky.

The purpose of this agreement is to adjust compliance requirements of the SLA to conditions that exist in Kentucky that could not be uniformly addressed at the national level and to facilitate NRCS actions in Kentucky.

The NRCS and Kentucky State Historic Preservation Officer (SHPO) agree that execution of this Agreement provides for the implementation of policies and procedures developed by NRCS to effectively ensure that the effects of conservation activities on properties with cultural resources are thoroughly considered in the earliest planning stages and that cultural resource protection is accomplished as efficiently as possible.

WHEREAS, the NRCS seeks to comply with its obligations under the National Historic Preservation Act (NHPA) (16 U.S.C. 470f) and related legislation dealing with cultural resources and NRCS follows its policies and procedures for protecting cultural resources issued in the NRCS General Manual (GM) 420, Part 401 Cultural Resources (Archaeological and Historic Properties); and

WHEREAS, the Kentucky State Historic Preservation Officer is the responsible state entity for the recognition and protection of historic properties and for overseeing cultural resources management and protection programs in the Commonwealth of Kentucky; and

WHEREAS, the NRCS General Manual (GM) 420 Part 401.33 requires each state NRCS office to develop with its counterpart SHPO a state level agreement (SLA) in order to further expedite the compliance process, speed delivery of natural resources conservation assistance, and protect cultural resources; and

WHEREAS, the NRCS also has a responsibility under the NHPA to consult with federally recognized tribes with ancestral lands within the boundaries of the state who may have an interest in the management of cultural sites having cultural or religious significance to them. This consultation may result in formal agreements accomplished by means of separate, but complementary, MOA(s) between the NRCS and Tribes(s); and

WHEREAS, the NRCS has further determined that certain types of conservation practices typically have little or no effect upon historic properties included in or eligible for inclusion in the National Register and the Kentucky SHPO concurs in this determination; and

WHEREAS, the Office of State Archaeology, University of Kentucky (OSA) has participated in the consultation, and has been invited to concur in this agreement; and

WHEREAS, the definitions given in GM 420 Part 401.02 are applicable throughout this State Level Agreement; and

NOW, THEREFORE, the NRCS, the Kentucky SHPO, and the OSA agree to the following stipulations, and the NRCS will ensure that they are implemented:

Stipulations

1. Standards and Procedures for Administration of this Agreement

A. Professional Qualifications

The Kentucky NRCS State Office will employ or contract for the regular, continuing services of a Cultural Resource Specialists (CRS) who meets the professional qualifications in archaeology as specified in the Secretary of the Interior's *Standards and Guidelines for Archaeology and Historic Preservation* (48FR 44716-44740) (hereafter, the Secretary's *Standards*) and as a Principal Investigator as set forth in the SHPO's most current *Specifications for Conducting Fieldwork and Preparing Cultural Resource Assessment Reports* (hereafter, the SHPO's *Specifications*). All historic preservation work carried out pursuant to this State Level Agreement, including work by outside consultants, will be performed by or under the direct supervision of a Principal Investigator meeting at a minimum the Secretary of the Interior's *Standards* and the SHPO's *Specifications*. The NRCS will consult with the SHPO to determine and ensure that the Cultural Resource Specialists or outside consultants responsible for carrying out the projects and programs covered by this Agreement meet the Secretary of Interior's *Standards* and the SHPO's *Specifications*.

B. Professional Standards for Field Work and Cultural Resource Assessment Reports

All archaeological surveys, testing, documentation, recordation, data recovery or any other investigations performed or carried out to locate, evaluate, or mitigate historic properties pursuant to this Programmatic Agreement will be carried out in accordance with the Secretary of the Interior's *Standards* and the SHPO's *Specifications*.

C. Inter-agency Cooperation

The NRCS and SHPO will encourage cooperative efforts between their staffs which contribute to the development of mutual trust, understanding, and respect.

1. NRCS and SHPO staff involved in the Section 106 review process will meet quarterly (see Stipulation 12) to discuss individual projects, reports, and other items of mutual concern.
2. At all times CRS and SHPO staff are encouraged to consult and coordinate on an informal basis in order to facilitate the implementation of the terms of this agreement.
3. The NRCS and SHPO preservation professionals are encouraged to participate in joint projects and undertakings relating to historic preservation which promote the conservation of natural and cultural features, contribute to public education, or which benefit the preservation, protection, or interpretation of the cultural and historic resources within a community or region of the Commonwealth.

D. NRCS Personnel Training

The SHPO and NRCS agree that all NRCS technical field employees responsible for completing Form NRCS-KY-CPA 52a "Request for Cultural Resource Review" (Attachment 2) will complete the NRCS National Cultural Resources Training Program (Modules 1-8). NRCS will annually review its employee directory and ensure new employees receive this training before the end of their first year of employment, and that existing employees complete a "refresher" course or training every five years.

E. SHPO Delegation of Limited Authority to NRCS

Provided the NRCS continues to employ a CRS who meets the qualifications set forth in Stipulation 1-A above, the Kentucky SHPO agrees to the limited delegation of authority to NRCS to complete certain Section 106 reviews without SHPO participation on a project by project basis. The specific details of this delegation are contained in Stipulation 2-B, 2-C, and 3-C below. If at any time the SHPO questions the effectiveness of this delegation or its implementation, the NRCS and SHPO will review the matter during a quarterly meeting. If the SHPO continues to have concerns with the limited delegation of Section 106 decisions to the NRCS, the SHPO may resume direct review of individual projects, and request an amendment to the SLA in accordance with Stipulation 11.

2. Establishing the Undertaking: Exempt Projects and Minor Activities

During early project planning stages, NRCS field office personnel will determine whether a proposed action is an undertaking as defined in 36 CFR Part 800.16(y), and if so, whether it is a type of activity that has no potential or only minor potential to cause effects on historic properties, or if it is a more substantial project requiring review in accordance with Stipulation 3. Also, for an activity to be an NRCS undertaking, NRCS must have a significant level of control over the outcome of the project. For example, projects by landowners in which NRCS provides only technical advice and NRCS has no control over the landowner's decisions as to what and where is to be done are not considered undertakings.

- A. The conservation practices listed in Attachment 1 as Not Ground Disturbing (NG) have been evaluated by the signatories to this State Level Agreement as having no potential to cause adverse effects on historic properties and therefore are exempt from further compliance with the provisions of this Agreement and the Council's regulation 36 CFR Part 800, provided they are limited to the items specified and are not part of a larger undertaking. Upon determination by NRCS field office personnel that a proposed conservation practice qualifies as an exemption pursuant to this stipulation, this finding will be documented in NRCS files and the undertaking may precede without review by the CRS or consultation with the SHPO.
- B. The conservation practices listed in Attachment 1 as Potentially Ground Disturbing (PG) have been evaluated by the signatories to this State Level Agreement as having only minor potential to cause adverse effects on historic properties and it is agreed that these may be reviewed by the CRS without further consultation with the SHPO, provided the items specified are not part of a larger undertaking, have an APE less than 2 acres in size, and further provided that:

i. NRCS bases its review upon information adequate to identify previously recorded archaeological sites such as the statewide archaeological site inventory for Kentucky provided by OSA;

ii. NRCS decisions on whether or not archaeological surveys are warranted for Potentially Ground Disturbing projects are based on the professional opinion of the CRS, taking into account various probability factors for the presence of archaeological sites such as general location, soils, slope, topography, etc. It is assumed that if an individual practice is determined to be ground disturbing, in most cases it will need an archaeological survey.

iii. NRCS makes no evaluation of eligibility of properties for the National Register without consulting the Kentucky SHPO; and

iv. NRCS finds that either there are no historic properties present or there are historic properties present but the conservation practice will have no effect upon them.

C. If NRCS field office personnel determine that a conservation practice falls within the Potentially Ground Disturbing category, they will complete a Request for Cultural Resource Review Form (NRCS-KY-CPA 52a - Attachment 2) for the APE and notify the CRS who will complete the cultural resource review process.

i. If the CRS determines there will be no ground disturbance on a particular practice or that a survey is not warranted, the practice may proceed without further review.

ii. If the CRS determines a survey is warranted, it will be conducted as specified in Stipulation 3-C-ii below.

iii. The CRS may place conditions or restrictions on such conservation practices to ensure that possible adverse effects are avoided, and may conduct on-site inspections, limited archaeological and historic investigations, or monitoring of projects under construction as needed. Each Potentially Ground Disturbing project reviewed by the CRS will be documented in NRCS files maintained by the CRS and included in the summary report (Stipulation 12) during quarterly meetings with the SHPO.

D. Potentially Ground Disturbing practices that are 2 acres or larger, and all other undertakings, including those listed in Attachment 1 as Ground Disturbing (GD) will be treated in accordance with Stipulation 3 below.

3. Review of Ground Disturbing Undertakings

- A. All undertakings and conservation practices covered by this agreement that are considered Ground Disturbing will be evaluated by the CRS.
- B. During the planning stage, NRCS field personnel will complete a Request for Cultural Resource Review Form (NRCS-KY-CPA 52a - Attachment 2) for the Area of Potential Effect (APE). The completed form will be sent by the field office to the CRS. The person responsible for completing the 52a in the field must have successfully completed the USDA/NRCS Cultural Resources Training Series Modules 1-8.
- C. For all ground disturbing activities, the CRS will conduct a site file search using the most current Arcview archaeological site file coverage of Kentucky held at the NRCS State Office to determine if the APE contains a known cultural resource or if one is recorded in the vicinity. The CRS will take into account slope, soil conditions, the extent of any previous physical disturbance within the APE, and other relevant factors to make a professional evaluation as to the potential of the APE to contain a cultural resource and the need for an archaeological survey. *Generally, most level to gently sloping lands will be considered to have reasonable archaeological potential, unless they are disturbed by construction, erosion, deflation, or are poorly drained, etc. The absence of recorded sites in the area will not be used as an indication that a survey is not necessary.* Surveys and National Register evaluations will be carried out following the Standards and Specifications set forth Stipulation 1 above.
 - i. If the CRS determines that no known cultural resources are present, and that the APE has little or no potential for the presence of archaeological resources, the project may proceed without SHPO review. The results of this review will be documented in files maintained by the CRS and included in the quarterly summary report. If the review determines there is an existing archaeological resource near or within the APE, or that the APE has the potential to contain archaeological resources, a Phase I archaeological survey will be conducted by the CRS or SHPO approved archaeological consultant.
 - ii. Surveys of projects with an APE less than two (2) acres which fail to find cultural materials qualifying for listing as an archaeological site by OSA may be documented by the CRS using a Management Summary Letter Report (Attachment 3) that will include: a discussion of the proposed project, topographic maps and pictures of the project area, a description of the field methods employed, and a summary of the findings. No documentation for these surveys will be submitted to the SHPO (other than being included in the quarterly summary report) and the proposed conservation practice may be implemented without further review. If the

survey of an APE less than two (2) acres results in a recorded site, the CRS will consult with a SHPO staff archaeologist and decide whether a formal survey report should be submitted to the SHPO, or if a Management Summary Letter Report will be sufficient.

iii. Surveys of projects with an APE of two (2) acres or more will be documented in a formal survey report prepared in accordance with Stipulation 1-B. The NRCS will submit two copies of the report to the SHPO for review and comment. The SHPO will respond in writing within 30 days, unless a longer time is agreed to by the NRCS

iv. For projects conducted by outside consultants, NRCS will submit two report copies to the SHPO for review and approval. The NRCS letter of transfer will include NRCS review comments and recommendations concerning the report's findings of National Register eligibility and project effect on listed or eligible resources. The SHPO will respond in writing within 30 days of receipt, unless a longer time is agreed to by the NRCS.

v. If a Phase II survey is needed to establish site boundaries or National Register eligibility, the survey will be carried out in accordance with Stipulation 1-B, and two report copies will be submitted by NRCS to the SHPO for review and comment. The SHPO will respond in writing within 30 days, unless a longer time is agreed to by the NRCS.

D. NRCS will ensure that public consultation is conducted with appropriate individuals and groups, depending on the size and nature of the project. For small practices on individual farms this will include the landowner, any partner involved (such as the local conservation district) and any other individual, group, or public entity who expresses interest in that undertaking.

4. Determination of Project Effect After Sites are Identified

After receiving the SHPO's comments on a cultural resource assessment report, or otherwise determining that an archaeological site is within or adjacent to the APE of a conservation practice, the NRCS and SHPO will continue consultation to determine the effect of the conservation practice upon cultural resources.

A. If a known archaeological resource exists within or adjacent to the APE or if one is discovered during the cultural resource review process, NRCS will consult with the SHPO and make one of the following findings of effect:

i. If the archaeological resource(s) has previously been determined not eligible for listing in the National Register of Historic Places, or if the

CRS believes the archaeological resource does not meet the National Register criteria, the NRCS will consult with the SHPO and request a concurrence in a finding of No Effect on Historic Properties. The SHPO will respond within 30 days, unless a longer time is agreed to by the NRCS. Upon concurrence by the SHPO, the project may proceed.

ii. If an archaeological site listed, eligible, or potentially eligible for listing in the National Register is within or adjacent to the APE, the NRCS will consult with the SHPO and landowner to seek ways to avoid or minimize adverse effects to the site. If the NRCS and SHPO agree that effects to the site can be avoided or minimized, the NRCS will make a finding of either No Effect on Historic Properties or No Adverse Effect on Historic Properties. After implementation of the agreed to measures, the project may proceed.

iii. If a National Register listed, eligible or potentially eligible archaeological site is present and can not be avoided, the NRCS will consult with the SHPO and landowner to develop appropriate mitigation measures. The NRCS and SHPO may consider either standard on-site mitigation measures, or they may consider alternative off-site mitigation measures.

5. Post Review Discovery of Archaeological Resources

All post review discoveries of archaeological materials made in conjunction with any undertaking covered by this Agreement shall be treated in accordance with the following procedures: The NRCS Field Office personnel will immediately notify the NRCS Cultural Resource Specialist and the SHPO of the discovery and cease all construction activities. The CRS will immediately inspect the archaeological site or materials and consult with a SHPO staff archaeologist to determine what actions need to be taken. The SHPO staff archaeologist may also request an on-site inspection. If the archaeological resource is not considered significant and the SHPO concurs, the construction may resume. If the NRCS and SHPO agree that portions of the site survive that may qualify for listing in the National Register, they will continue consultation and determine appropriate mitigation measures, keeping in mind any loss of significant data that has already occurred. Mitigation may include emergency data recovery and/or implementation of alternative mitigation measures.

6. Historic Buildings and Other Structures

If a building (homes, barns, and other out-buildings) or other structure (rock fence, well, etc.) that may be 50 years old or older is within or near the APE, the CRS will contact the SHPO architectural historian for Section 106 review projects and determine if these potential historic resources may be eligible for listing in the National Register, and if so, if the proposed conservation practice would have any

impact upon them. The CRS will provide the SHPO staff with any information needed to make this assessment, and may arrange an on-site meeting, if requested by the SHPO staff. If the NRCS and SHPO concur that historic buildings and/or other structures listed on or eligible for listing on the National Register may be impacted by the proposed conservation treatment, the NRCS and SHPO will consult and determine ways to avoid, minimize, or mitigate the adverse effects.

7. Human Remains

If human remains are discovered in the APE during planning or implementation of a conservation practice, the project shall stop. NRCS field personnel will immediately notify the CRS who will notify the local Coroner and a unit of law enforcement. The NRCS will comply with KRS 72.020, KRS 213.110, and other Kentucky statutes and regulations relating to burials and cemeteries.

8. Curation Arrangements

If a private property owner requests the return of archaeological materials from their land, the CRS first will attempt to educate the property owner as to the importance of curation. If the owner continues to request the return of the artifacts, the CRS will conduct an analysis of these artifacts as required in the SHPO's *Specifications* prior to returning the materials. Artifacts not returned to the property owner shall be curated in Kentucky at the SHPO approved curation facilities of either the University of Kentucky, the University of Louisville, or Murray State University.

9. Participation by OSA

- A. If a conservation practice is proposed for any tract of state, county, or municipally owned land and the review process described above results in a determination that an archaeological survey is needed, the NRCS will apply to OSA for a permit and comply with KRS 164.705 through 164.735.
- B. The NRCS will maintain on-going access to the state-wide archaeological data base maintained by the OSA. OSA will provide quarterly updates of this data base to NRCS at a cost determined by OSA and NRCS.
- C. The NRCS will provide OSA with map locations of all archaeological survey areas investigated pursuant to this agreement, and with completed OSA site survey forms for all archaeological sites located pursuant to this agreement. Maps and site survey forms will be submitted by the CRS to OSA upon completion of each survey. Copies of all formal Phase I survey, Phase II testing, and Phase III data recovery reports produced under this SLA will also be provided to OSA as part of OSA's documentation of archaeological investigations in Kentucky.

10. Dispute Resolution

Should the SHPO or OSA object within 30 days to any plans, specifications, reports or other actions submitted or undertaken pursuant to this State Level Agreement, the NRCS shall consult with the objecting party to resolve the objection. For unresolved questions of eligibility, the NRCS will prepare documentation in accordance with the provisions of 36 CFR Part 63 for transmittal to the Keeper of the National Register. For other unresolved issues, the NRCS shall request the comments of the Advisory Council on Historic Preservation (ACHP) and their assistance in resolving the dispute. Any ACHP comment provided in response to such a request will be taken into account by the NRCS in accordance with 36 CFR 800.7(c)(4) with reference only to the subject of the dispute; the NRCS's responsibility to carry out all actions under this State Level Agreement that are not the subjects of the dispute will remain unchanged.

11. Amendments, Termination, and Non-Compliance

- A. This State Level Agreement may be amended or modified at any time through mutual consent of the signatories. The list of conservation practices may be updated at any quarterly meeting through the mutual consent of the NRCS and SHPO without requesting a formal amendment to this agreement.
- B. Any party to this State Level Agreement may unilaterally terminate the Agreement by providing 60 calendar day notice to the other parties of the Agreement in which specific reasons for termination are listed. Prior to the 60 calendar day notice, the party initiating termination shall have pursued actions to avoid termination and/or taken measures to amend this Agreement.
- C. In the event this State Level Agreement is terminated, or the NRCS fails to carry out its terms, the NRCS will comply with 36 CFR 800.3 through 36 CFR Part 800.14 with regard to individual undertakings covered by the Agreement.

12. Quarterly Meeting

The NRCS will meet quarterly with Kentucky SHPO staff and review Section 106 program activities and any other concerns for the previous quarter. A summary report of these activities will be presented to the SHPO staff, and any difficulties, problems, or other issues of concern will be discussed. If there are any issues of concern, the SHPO may request additional documentation, meetings or on-site inspections in order to evaluate the activities carried out under the terms of this State Level Agreement. The NRCS and SHPO will continue to evaluate the effectiveness of the SLA, and consider any changes or amendments that might be needed to improve it.

13. Renewal

This State Level Agreement will continue in force for years 2008 through 2012. During year 2012, it will be reviewed by the NRCS, the Kentucky SHPO and OSA for possible modifications, terminations, or extensions. If not renewed or extended, this State Level Agreement terminates December 21, 2012. No extension or modification will be effective unless all parties to the Agreement have signed to it in writing.

Execution and implementation of this State Level Agreement evidences that the Natural Resources Conservation Service has afforded the Council a reasonable opportunity to comment on the program and that the NRCS has taken into account the effects of the covered undertakings on historic properties.

NATURAL RESOURCES CONSERVATION SERVICE

BY: Michael D. Hubbs Date: 2/21/08
Michael D. Hubbs, State Conservationist

KENTUCKY STATE HISTORIC PRESERVATION OFFICER

BY: Donna M. Neary Date: 02/21/08
Donna M. Neary, Director
Kentucky Heritage Council

CONCURRENCE

OFFICE OF STATE ARCHAEOLOGY

BY: Dr. George Crothers Date: 2/27/2008
Dr. George Crothers, State Archaeologist