

Appendix K

National Historic Preservation Act Coordination – Draft Programmatic Agreement

Brazos Island Harbor, Texas Channel Improvement Project Cameron County, Texas

**U.S. Army Corps of Engineers, Galveston District
2000 Fort Point Road
Galveston, Texas 77550**

December 2013

DRAFT

**PROGRAMMATIC AGREEMENT
REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL
HISTORIC PRESERVATION ACT FOR
THE BRAZOS ISLAND HARBOR CHANNEL IMPROVEMENT PROJECT
IN
CAMERON COUNTY, TEXAS
AMONG
THE U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT,
THE TEXAS STATE HISTORIC PRESERVATION OFFICER,
AND
THE PORT OF BROWNSVILLE**

WHEREAS, the U.S. Army Corps of Engineers, Galveston District (USACE) has determined that the proposed improvements and maintenance of Brazos Island Harbor Channel Improvement Project (hereinafter, “undertaking”) may have an effect on historic properties eligible for listing in the National Register of Historic Places (NRHP) (hereinafter, “historic properties”) pursuant to Section 106 of the National Historic Preservation Act (16 U.S.C. 470) (NHPA), as amended, and its implementing regulations (36 CFR 800); and

WHEREAS, the existing 42-foot Brazos Island Harbor (BIH) project was authorized by the Water Resources Development Act of 1986 (P.L. 99-662) and improvements are being studied under authorization contained in a resolution of the Committee on Public Works, U.S. House of Representatives dated May 5, 1966.

WHEREAS, the Port of Brownsville (POB), is the non-Federal partner with the USACE for construction and maintenance of this undertaking, and is providing the necessary lands, easements, relocations and rights-of-way; and

WHEREAS, the effects on historic properties cannot be fully determined prior to approval of the undertaking; and

WHEREAS, the USACE, the Texas State Historic Preservation Officer (SHPO), and the Port of Brownsville have agreed that it is advisable to accomplish compliance with Section 106 through the development and execution of this Programmatic Agreement (PA) in accordance with 36 CFR 800.6 and 36 CFR 800.14(b)(1)(ii); and

WHEREAS, the USACE has invited the Advisory Council on Historic Preservation (Council) to determine whether the Council wishes to enter into the Section 106 process;

NOW, THEREFORE, the USACE, the SHPO, and the POB agree that the proposed undertaking shall be implemented and administered in accordance with the following stipulations in order to take into account the effects of the undertaking on historic

DRAFT

properties and to satisfy the USACE's Section 106 responsibilities for all individual aspects of the undertaking.

STIPULATIONS

I. Identification, Evaluation, Effect Determination, and Resolution

- A. **Scope of Undertaking.** This PA shall be applicable to all new construction and maintenance activities related to the proposed improvements to the Entrance, Jetty and Main Channels of the BIH project. The Area of Potential Effect (APE) shall be established by the USACE in consultation with the SHPO and shall include all areas to be directly affected by new construction, construction staging and access areas, new or extensions of existing placements or borrow areas, ecological mitigation features, and project maintenance activities.
- B. **Qualifications and Standards.** The USACE shall ensure that all work conducted in conjunction with this PA is performed in a manner consistent with the Secretary of Interior's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716-44740; September 23, 1983), as amended, or the Secretary of the Interior's "Standards for the Treatment of Historic Properties" (36 CFR 68), as appropriate.
- C. **Definitions.** The definitions set forth in 36 CFR 800.16 are incorporated herein by reference and apply throughout this PA.
- D. **Identification of Historic Properties.** Prior to the initiation of construction, the USACE shall make a reasonable and good faith effort to identify historic properties located within the APE. These steps may include, but are not limited to, background research, consultation, oral history interviews, sample field investigations, and field survey. The level of effort for these activities shall be determined in consultation with the SHPO and any Native American Indian Tribe or Tribes (Tribes) that attach religious and cultural significance to identified properties. All draft reports of survey or site testing investigations shall be submitted to the SHPO for review and comment. If the SHPO comments are not received by the USACE within thirty (30) days of receipt, the reports and their recommendations shall be considered adequate and the reports may be finalized. Comments received by the USACE from the SHPO or Tribes shall be addressed in the final reports, which shall be provided to all consulting parties. If no historic properties are identified in the APE, the USACE shall document this finding pursuant to 36 CFR 800.11(d), provide this documentation to the SHPO.
- E. **Evaluation of National Register Eligibility.** If historic properties are identified within the APE, the USACE shall determine their eligibility for the NRHP in accordance with the process described in 36 CFR 800.4(c) and criteria established in 36 CFR 60. All draft reports of NRHP site testing or other NRHP investigations shall be submitted to the SHPO and Tribes for review and

DRAFT

comment. If SHPO comments are not received by the USACE within 30 days of receipt, the reports or investigations and their recommendations shall be considered adequate and the reports may be finalized. Comments received by the USACE from the SHPO or Tribes shall be addressed in the final report, which shall be provided to all consulting parties. The determinations of significance shall be conducted in consultation with the SHPO and Tribes. Should the USACE and the SHPO agree that a property is or is not eligible, then such consensus shall be deemed conclusive for the purpose of this PA. Should the USACE and the SHPO not agree regarding the eligibility of a property, the USACE shall obtain a determination of eligibility from the Keeper of the National Register pursuant to 36 CFR 63. For historic properties found not eligible for the NRHP, no further protection or consideration of the site will be afforded for compliance purposes.

F. Assessment of Adverse Effects.

1. **No Historic Properties Affected.** The USACE shall make a reasonable and good faith effort to evaluate the effect of each undertaking on historic properties in the APE. The USACE may conclude that no historic properties are affected by an undertaking if no historic properties are present in the APE, or the undertaking will have no effect as defined in 36 CFR 800.16(i). This finding shall be documented in compliance with 36 CFR 800.11(d) and the documentation shall be provided to the SHPO and retained by the USACE for at least seven (7) years. The USACE shall provide information on the finding to the public upon request, consistent with the confidentiality requirements of 36 CFR 800.11(c).
2. **Finding of No Adverse Effect.** The USACE, in consultation with the SHPO, and Tribes shall apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR 800.5. The USACE may propose a finding of no adverse effect if the undertaking's effects do not meet the criteria of 36 CFR 800.5(a)(1) or the undertaking is modified to avoid adverse effects in accordance with 36 CFR 68. The USACE shall provide to the SHPO documentation of this finding meeting the requirements of 36 CFR 800.11(e). The SHPO shall have 30 days in which to review the findings and provide a written response to the USACE. The USACE may proceed upon receipt of written concurrence from the SHPO. Failure of the SHPO to respond with 30 calendar days of receipt of the finding shall be considered agreement with the finding. The USACE shall maintain a record of the finding and provide information on the finding to the public upon request, consistent with the confidentiality requirements of 36 CFR 800.11(c).
3. **Resolution of Adverse Effect.** If the USACE determines that the undertaking will have an adverse effect on historic properties as measured by criteria in 36 CFR 800.5(a)(1), the USACE shall consult with the SHPO and Tribes to resolve adverse effects in accordance with 36 CFR 800.6.

DRAFT

- a) For historic properties that the USACE and the SHPO agree will be adversely affected, the USACE shall:
 - (1) Consult with the SHPO to identify other individuals or organizations to be invited to become consulting parties. If additional consulting parties are identified, the USACE shall provide them copies of documentation specified in 36 CFR 800.11(e) subject to confidentiality provisions of 36 CFR 800.11(c).
 - (2) Afford the public an opportunity to express their views on resolving adverse effects in a manner appropriate to the magnitude of the project and its likely effects on historic properties.
 - (3) Consult with the SHPO, Tribes, and any additional consulting parties to seek ways to avoid, minimize or mitigate adverse effects.
 - (4) Prepare an historic property plan (Plan) which describes mitigation measures the USACE proposes to resolve the undertaking's adverse effects and provide this Plan for review and comment to all consulting parties. All parties have 30 days in which to provide a written response to the USACE.
- b) If the USACE and the SHPO fail to agree on how adverse effects will be resolved, the USACE shall request that the Council join the consultation and provide the Council and all consulting parties with documentation pursuant to 36 CFR 800.11(g).
- c) If the Council agrees to join the consultation, the USACE shall proceed in accordance with 36 CFR 800.9.
- d) If, after consulting to resolve adverse effects, the Council, the USACE, or the SHPO determines that further consultation will not be productive, then any party may terminate consultation in accordance with the notification requirements and processes prescribed in 36 CFR 800.7.

II. Post Review Changes and Discoveries

- A. Changes in the Undertaking. If construction on the undertaking has not commenced and the USACE determines that it will not conduct the undertaking as originally coordinated, the USACE shall reopen consultation pursuant to Stipulation I. D-F.
- B. Unanticipated Discoveries or Effects. Pursuant to 36 CFR 800.13(b)(3), if historic properties are discovered or unanticipated effects on historic properties are found after construction on an undertaking has commenced, the USACE shall develop a treatment plan to resolve adverse effects and notify the SHPO and Tribes within 48 hours of the discovery. The notification shall include the USACE assessment of the NRHP eligibility of affected properties and proposed actions to resolve the

DRAFT

adverse effects. Comments received from the SHPO and Tribes within 48 hours of the notification shall be taken into account by the USACE in carrying out the proposed treatment plan. The USACE may assume SHPO concurrence in its eligibility assessment and treatment plan unless otherwise notified by the SHPO within 48 hours of notification. USACE shall provide the SHPO and Tribes a report of the USACE actions when they are completed.

III. Curation and Disposition of Recovered Materials, Records, and Reports

- A. Curation. The USACE shall ensure that all archeological materials and associated records owned by the State of Texas or the POB, which result from identification, evaluation, and treatment efforts conducted under this PA, are accessioned into a curational facility meeting the standards of 36 CFR 79, except as specified in Stipulation IV for human remains. The curation of items owned by the State of Texas or the POB shall be maintained in perpetuity by the POB. Archeological items and materials from privately owned lands shall be returned to their owners upon completion of analyses required for Section 106 compliance under this PA.
- B. Reports. The USACE shall provide copies of final technical reports of investigations and mitigation to the consulting parties and the SHPO, as well as additional copies for public distribution. All consulting parties shall withhold site location information or other data that may be of a confidential or sensitive nature pursuant to 36 CFR 800.11(c).

IV. Treatment of Native American Human Remains

- A. Prior Consultation. If the USACE's investigations, conducted pursuant to Stipulation I of this PA, indicate a high likelihood that Native American Indian human remains may be encountered, the USACE shall develop a treatment plan for these remains in consultation with the SHPO and Tribes. The USACE shall ensure that Tribes indicating an interest in the undertaking are afforded a reasonable opportunity to identify concerns, provide advice on identification and evaluation, and participation in the resolution of adverse effects in compliance with the terms of this PA.
- B. Inadvertent Discovery. Immediately upon the inadvertent discovery of human remains during historic properties investigations or construction activities conducted pursuant to this PA, the USACE shall ensure that all ground disturbing activities cease in the vicinity of the human remains and any associated grave goods and that the site is secured from further disturbance or vandalism. The USACE shall be responsible for immediately notifying local law enforcement officials, and within 48 hours of the discovery, shall initiate consultation with the SHPO and Tribes to develop a plan for resolving the adverse effects.
- C. Dispute Resolution. If, during consultation conducted under paragraphs A and B of Stipulation IV, all consulting parties cannot agree upon a consensus plan for

DRAFT

resolving adverse effects, the matter shall be referred to the Council for resolution in accordance with the procedures outlines in 36 CFR 800.9.

V. PA Amendments, Disputes and Termination

- A. Amendments. Any party to the PA may propose to the other parties that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.6(c)(7) to consider such an amendment.
- B. Disputes. Disputes regarding the completion of the terms of this agreement shall be resolved by the signatories. If the signatories cannot agree regarding a dispute, any one of the signatories may request the participation of the Council in resolving the dispute in accordance with the procedures outlined in 36 CFR 800.9. The USACE shall forward to the Council and all consulting parties within fifteen (15) days of such a request all documentation relevant to the dispute, including the USACE's proposed resolution of the dispute. The Council will respond to the request within thirty (30) days of receiving all documentation. The USACE will take any recommendations or comments from the Council into account in resolving the dispute. In the event that the Council fails to respond to the request within thirty (30) days of receiving all documentation, the USACE may assume the Council's concurrence with its proposed resolution and proceed with resolving the dispute.
- C. Termination of PA. Any party to this PA may terminate it by providing sixty (60) days notice to the other parties, provided that the parties will consult during the period prior to the termination to seek agreement on amendments or other actions that will avoid termination. In the event of termination of this PA the USACE shall comply with the provisions of 36 CFR 800, Subpart B.

VI. Term of this Agreement

- A. This PA remains in force for a period of ten (10) years from the date of its execution by all signatories, unless terminated pursuant to Stipulation V.C. Sixty (60) days prior to the conclusion of the ten (10) year period, the USACE shall notify all parties in writing of the end of the ten year period to determine if they have any objections to extending the term of this PA. If there are no objections received prior to expiration, the PA will continue to remain in force for a new ten (10) year period.

Execution of this PA and implementation of its terms evidences that the USACE has afforded the Council an opportunity to comment on the undertaking and its effects on historic properties, and that the USACE has taken into account those effects and fulfilled Section 106 responsibilities regarding the undertaking.

DRAFT

Colonel Christopher W. Sallese, District Engineer

Date

Mark Wolfe, Texas State Historic Preservation Officer

Date

Eduardo A. Campirano, Port of Brownsville

Date

TEXAS HISTORICAL COMMISSION

real places telling real stories

March 1, 2012

Carolyn Murphy
Chief, Environmental Section
U.S. Army Corps of Engineers
P.O. Box 1229 (PE-PR)
Galveston, Texas 77553-1229

Re: Project review under Section 106 of the National Historic Preservation Act of 1966 and the Antiquities Code of Texas

Draft Report Review, *Remote-Sensing Survey for the Brazos Island Ship Channel Improvement Project, Cameron County, Texas*, TAC Permit No. 6011
COE-VD

Dear Ms. Murphy:

Thank you for your correspondence describing the above referenced project. This letter serves as comment on the proposed federal undertaking from the State Historic Preservation Officer, the Executive Director of the Texas Historical Commission. As the state agency responsible for administering the Antiquities Code of Texas, these comments also provide recommendations on compliance with state antiquities laws and regulations.

The review staff, led by State Marine Archeologist Amy A. Borgens has reviewed the information regarding this project. Additional information was required for magnetometer targets M3, M5, M6, and M10 in order to complete the review of the draft report. The SEARCH Principle Investigator provided additional data, including figures, which greatly clarified the recommendations proposed within the draft report; the inquiry and response are included as Appendix A. The final report will include the new material presented by the authors. We concur that anomalies M1-M4 and M6 are not representative of historic shipwreck sites and that anomalies M5 and M7-M9 are historic in nature but are not significant to warrant additional investigation. We concur that anomaly M10 is potentially associated with the 1864 railroad constructed by General Francis Herron. Both SEARCH and the USACE have indicated that the project impacts should terminate at a distance of 27 meters from M10 and have asked to reduce the 50-m avoidance buffer required by the THC. The 25-m avoidance requested by the USACE (letter dated 13 January 2012) is acceptable. As long as M10 can be avoided by 25 m, the proposed project may proceed without further archeological investigations unless unexpected cultural material is encountered. Further investigation will be required if M10 cannot be avoided by the 25-m buffer. We look forward to the final report.

Thank you for your cooperation in this federal and state review process, and for your efforts to preserve the irreplaceable heritage of Texas. **If you have any questions concerning our review or if we can be of further assistance, please contact Amy Borgens at 512-463-9505.**



RICK PERRY, GOVERNOR • JON T. HANSEN, CHAIRMAN • MARK WOLFE, EXECUTIVE DIRECTOR

P.O. BOX 12276 • AUSTIN, TEXAS • 78711-2276 • P 512.463.6100 • F 512.475.4872 • TDD 1.800.735.2989 • www.thc.state.tx.us

Sincerely,

A handwritten signature in blue ink, appearing to read 'Mark Wolfe', written in a cursive style.

for

Mark Wolfe

State Historic Preservation Officer

MW/ab



DEPARTMENT OF THE ARMY
GALVESTON DISTRICT, CORPS OF ENGINEERS
P. O. BOX 1229
GALVESTON, TEXAS 77553-1229

Nov 21, 2013

Environmental Section

SUBJECT: Proposed Programmatic Agreement for the Brazos Island Harbor Channel Improvement Project, Cameron County, Texas.

Tom McCulloch
Advisory Council on Historic Preservation
Office of Federal Agency Programs
Old Post Office Building
1100 Pennsylvania Avenue NW, Suite 803
Washington D.C., 20004

Dear Mr. McCulloch:

The U.S. Army Corps of Engineers (USACE) proposes to initiate a Programmatic Agreement (PA) pursuant to 36CFR800.14 (b) for the Brazos Island Harbor (BIH) Channel Improvement Project in Cameron County, Texas. Because effects on historic properties cannot be fully determined prior to approval of the undertaking, we find it necessary to initiate this PA to address the potential effects upon historic properties that may be discovered as a result of construction activities, and to address potential effects during operation and maintenance of the existing and proposed project. A Draft PA is enclosed for your review (Enclosure 1).

The purpose of the project is to improve navigation efficiency within the BIH Channel. As part of a feasibility study of the project, the USACE produced a Draft Integrated Feasibility Report - Environmental Assessment (DIFR-EA) and has conducted archival research and historic properties investigations in compliance with Section 106 of the National Historic Preservation Act. A CD copy of the DIFR-EA is provided with this letter as supporting documentation for the project. The feasibility study produced a Tentatively Selected Plan (TSP) (the 52-foot deep by 250-foot wide project) that would include extending and deepening the offshore BIH Entrance Channel and deepening the BIH Jetty Channel and Main Channel. No widening of the existing channel widths is proposed. Dredged material would be placed in existing upland dredged material placement areas, a nearshore feeder berm and offshore dredged material disposal sites.

The Area of Potential Effects (APE) includes all areas to be directly affected by channel dredging and dredged material placement and subsequent maintenance activities. This includes the existing footprint of the BIH channel and the Entrance Channel extension to the proposed depths and the existing dredged material placement areas (New Work Offshore Dredged Material Disposal Sites (ODMDS), Maintenance ODMDS, Feeder Berm, and PAs 2, 4A, 4B, 5A, 5B, 7, and 8). A detailed description of the TSP and the APE is provided in the enclosed "Cultural Resources and Project Summary for the Programmatic Agreement" (Enclosure 2).

Six historic properties investigations have been conducted directly within the project area for both terrestrial and submerged resources. For the present undertaking, the USACE conducted a historic

properties investigation of the BIH channel in 2012 and the results of this investigation were coordinated with the Texas State Historic Preservation Officer (SHPO). As a result of this recent investigation and the five previous investigations within the APE, the USACE determined, in consultation with the Texas SHPO, that no historic properties will be affected by the proposed undertaking. Although, no historic properties have been identified within the APE, there is a potential for unanticipated discovery of cultural materials, particularly as a result of maintenance dredging. Unanticipated discoveries are covered by this PA and the perpetual curation of any cultural materials recovered during the course of construction or maintenance activities will be the responsibility of the Port of Brownsville.

We request your review and comment on the draft PA and invite your signature pursuant to 36CFR800.6.(b)(1). We are inviting the Texas SHPO and the non-Federal sponsor of this project, Port of Brownsville, to be signatories to the PA as well. This draft PA is also being coordinated with Federally-recognized tribes that have an interest in the project area.

Thank you for your cooperation in this review process. If you have any questions concerning this project or if we can be of further assistance, please contact John A. Campbell at 409-766-3878.

Sincerely,

A handwritten signature in black ink that reads "Carolyn Murphy". The signature is written in a cursive style with a large, stylized initial 'C'.

Carolyn Murphy
Chief, Environmental Section

Enclosures



DEPARTMENT OF THE ARMY
GALVESTON DISTRICT, CORPS OF ENGINEERS
P. O. BOX 1229
GALVESTON, TEXAS 77553-1229

November 21, 2013

Environmental Section

SUBJECT: Proposed Programmatic Agreement for the Brazos Island Harbor Channel Improvement Project.

Mr. Mark Wolfe
State Historic Preservation Officer
Texas Historical Commission
P.O. Box 12276
Austin, TX 78711-2276

Dear Mr. Wolfe:

The U.S. Army Corps of Engineers (USACE) proposes to initiate a Programmatic Agreement (PA) pursuant to 36CFR800.14 (b) for the Brazos Island Harbor (BIH) Channel Improvement Project in Cameron County, Texas. Because effects on historic properties cannot be fully determined prior to approval of the undertaking, we find it necessary to initiate this PA to address the potential effects upon historic properties that may be discovered as a result of construction activities, and to address potential effects during operation and maintenance of the existing and proposed project. A Draft PA is enclosed for your review (Enclosure 1).

The purpose of the project is to improve navigation efficiency within the BIH Channel. As part of a feasibility study of the project, the USACE produced a Draft Integrated Feasibility Report - Environmental Assessment (DIFR-EA) and has conducted archival research and historic properties investigations in compliance with Section 106 of the National Historic Preservation Act. A CD copy of the DIFR-EA is provided with this letter as supporting documentation for the project. The feasibility study produced a Tentatively Selected Plan (TSP) (the 52-foot deep by 250-foot wide project) that would include extending and deepening the offshore BIH Entrance Channel and deepening the BIH Jetty Channel and Main Channel. No widening of the existing channel widths is proposed. Dredged material would be placed in existing upland dredged material placement areas, a nearshore feeder berm and offshore dredged material disposal sites.

The Area of Potential Effects (APE) includes all areas to be directly affected by channel dredging and dredged material placement and subsequent maintenance activities. This includes the existing footprint of the BIH channel and the Entrance Channel extension to the proposed depths and the existing dredged material placement areas (New Work Offshore Dredged Material Disposal Sites (ODMDS), Maintenance ODMDS, Feeder Berm, and PAs 2, 4A, 4B, 5A, 5B, 7, and 8). A detailed description of the TSP and the APE is provided in the enclosed "Cultural Resources and Project Summary for the Programmatic Agreement" (Enclosure 2).

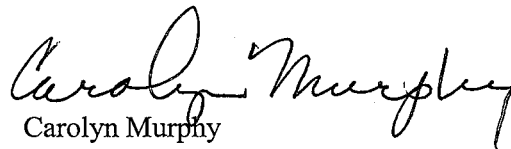
Six historic properties investigations have been conducted directly within the project area for both terrestrial and submerged resources. For the present undertaking, the USACE conducted a historic properties investigation of the BIH channel in 2012 and the results of this investigation were coordinated with the Texas State Historic Preservation Officer (SHPO). As a result of this recent investigation and the five previous investigations within the APE, the USACE determined, in consultation with the Texas

SHPO, that no historic properties will be affected by the proposed undertaking. Although, no historic properties have been identified within the APE, there is a potential for unanticipated discovery of cultural materials, particularly as a result of maintenance dredging. Unanticipated discoveries are covered by this PA and the perpetual curation of any cultural materials recovered during the course of construction or maintenance activities will be the responsibility of the Port of Brownsville.

We request your review and comment on the draft PA and invite your signature pursuant to 36CFR800.6.(b)(1). We are inviting the ACHP and the non-Federal sponsor of this project, Port of Brownsville, to be signatories to the PA as well. This draft PA is also being coordinated with Federally-recognized tribes that have an interest in the project area.

Thank you for your cooperation in this review process. If you have any questions concerning this project or if we can be of further assistance, please contact John A. Campbell at 409-766-3878.

Sincerely,

A handwritten signature in cursive script that reads "Carolyn Murphy". The signature is written in black ink and is positioned above the printed name and title.

Carolyn Murphy
Chief, Environmental Section

Enclosures