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**PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL RAILROAD ADMINISTRATION,  
THE SURFACE TRANSPORTATION BOARD,**

**THE MINNESOTA STATE HISTORIC PRESERVATION OFFICE,  
THE WISCONSIN STATE HISTORIC PRESERVATION OFFICE,**

**THE MINNESOTA DEPARTMENT OF TRANSPORTATION, AND  
THE WISCONSIN DEPARTMENT OF TRANSPORTATION  
REGARDING**

**COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC  
PRESERVATION ACT,  
AS IT PERTAINS TO THE NORTHERN LIGHTS EXPRESS HIGH SPEED RAIL  
PROJECT**

WHEREAS, the Minnesota Department of Transportation (MnDOT), in cooperation with the Minneapolis-Duluth-Superior Passenger Rail Alliance (Alliance) proposes to construct the Northern Lights Express High Speed Rail Project (NLX Project) between a southern terminus in Minneapolis, Minnesota and a northern terminus in Duluth, Minnesota/Superior, Wisconsin; and

WHEREAS, MnDOT has received a grant from the Federal Railroad Administration (FRA) through the High-Speed and Intercity Passenger Rail Program for initial planning, conceptual design, and preliminary engineering for the NLX Project; and

WHEREAS, FRA is the lead Federal agency relative to this Undertaking for compliance with the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act (NHPA), codified at 16 U.S.C. 470f, and its implementing regulations at 36 CFR Part 800; and

WHEREAS, on April 17, 2013, the Surface Transportation Board (STB) determined that it may have jurisdiction over certain aspects of the NLX Project and requested that it be added as a signatory to the Programmatic Agreement (PA) to fulfill its obligations under Section 106 of NHPA;

WHEREAS, MnDOT and the Alliance, in cooperation with FRA and STB, are preparing an Environmental Assessment (EA) in accordance with the requirements of NEPA to address the potential impact of the NLX Project on a variety of human and natural resources; and

WHEREAS, FRA and STB have a statutory obligation, as Federal agencies, to fulfill the requirements of Section 106; and

WHEREAS, the purpose of this PA is to provide project wide consistency in consultation procedures, documentation standards, and Federal agency oversight in compliance with Section 106 of the NHPA for the NLX Project; and

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WHEREAS, FRA and STB have delegated to MnDOT various actions required by Section 106, as set forth in this Programmatic Agreement (PA) in Section II. C. and a delegation letter to the Minnesota State Historic Preservation Office (MnSHPO) dated December 26, 2012; and

WHEREAS, MnDOT's Cultural Resources Unit (CRU) has the appropriately qualified staff and will manage the Section 106 responsibilities within MnDOT; and

WHEREAS, FRA authorizes MnDOT CRU to initiate consultation with the MnSHPO and the Wisconsin State Historic Preservation Office (WisSHPO) pursuant to 36 CFR 800.14(b)(1)(iii) for the Undertaking covered by this PA; and

WHEREAS, FRA and MnDOT CRU have initiated consultation with the MnSHPO and the WisSHPO concerning the potential types of effects the NLX Project may have on historic properties within Minnesota and Wisconsin, respectively; and

WHEREAS, MnSHPO and WisSHPO for purposes of this PA agree to consult only on historic properties within their respective states; and

WHEREAS, the WisDOT and WisSHPO have agreed that MnSHPO will have lead SHPO status over the Grassy Point Bridge, which crosses into both states; and

WHEREAS, the Project's Area of Potential Effect (APE) was determined by FRA and MnDOT CRU pursuant to 36 CFR 800.4(a)(1); and

WHEREAS, MnDOT CRU, on behalf of FRA, has completed Phase I survey within the APE for the NLX Corridor and identified properties that are potentially eligible for listing in the National Register of Historic Places (NRHP); and

WHEREAS, MnDOT CRU will prepare, at the direction of FRA, additional environmental documentation on subsequent phases of the NLX Corridor implementation, in accordance with NEPA, including any cultural resource studies required for Section 106; and

WHEREAS, the NLX Project design is currently at concept-level engineering with the EA identifying broad impacts that would potentially result from project implementation; and

WHEREAS, following the EA and FRA's issuance of a Finding of No Significant Impact (FONSI), the NLX Project will enter the Preliminary Engineering phase, where greater information will be available regarding the ability to avoid, minimize or mitigate potential impacts to historic properties resulting from the NLX Corridor and future site specific projects; and

WHEREAS, FRA has determined that a phased process for compliance with Section 106, as provided for in 36 CFR 800.4(b)(2), is appropriate for the NLX Project such that completion of the identification of historic properties, determination of effects on historic properties, and consultation concerning measures to avoid, minimize, or mitigate if needed, any adverse effects will be carried out prior to any notice to proceed to construction and site specific project implementation; and

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WHEREAS, FRA has determined that the proposed NLX Project includes rail lines, associated structures, maintenance and ancillary facilities, construction easements, and staging areas, which are subject to Section 106 review and may have an effect upon historic properties included on or eligible for inclusion on the NRHP. The NLX Project includes the following stages:

- Stage 1: NLX Corridor as detailed in the EA (NLX Corridor).
- Stage 2: All other site specific project elements and facilities not analyzed in the EA (Site Specific Projects).

WHEREAS, pursuant to the requirements of NEPA, FRA and MnDOT conducted a public and agency involvement program as part of the environmental review process for the EA through which information was provided to federal, state, and local agency representatives; elected officials; property owners; interested persons; and interested organizations; and

WHEREAS, FRA and MnDOT CRU prepared a list of Native American Tribes or groups for Section 106 consultation for the EA and initiated consultation with the identified federally-recognized Native American tribes. FRA sent letters to these tribes providing information about the proposed project alternatives and requesting information about any traditional cultural properties that could be affected by the NLX Project; and

WHEREAS, FRA and MnDOT CRU will continue to consult with federally-recognized Native American Tribes, concerning properties of traditional religious and cultural significance; and

WHEREAS, FRA, STB, MnSHPO and WisSHPO are signatories pursuant to 36 CFR 800.6(c)(1) and agree to implement the procedures and measures described herein for the NLX Project in keeping with the following stipulations; and

WHEREAS, MnDOT and WisDOT have been invited by the FRA to sign this agreement in accordance with 36 CFR 800.6(c)(2); and

WHEREAS, FRA has consulted with the Advisory Council on Historic Preservation (ACHP) concerning this PA and the ACHP has declined to participate in the consultation, and

WHEREAS, the Burlington Northern Santa Fe (BNSF) Railway, which owns the right-of-way and operates freight rail service within the NLX Corridor, invited to participate in this PA as a Concurring Party and on July 10 declined; and

NOW, THEREFORE, FRA, STB, MnSHPO and WisSHPO agree that the proposed NLX Project covered by this PA shall be implemented in accordance with the following stipulations in order to consider the effect of each element of the NLX Project on historic properties and that these stipulations shall govern compliance of the proposed NLX project with Section 106 of the NHPA until this PA expires or is terminated.

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## STIPULATIONS

### I. APPLICABILITY

- A. Unless this PA is amended pursuant to section XVII B. or terminated pursuant to section XVII D., this PA shall apply to the NLX Project.
- B. While no use of tribal land is anticipated, if such undertakings occur, the lead Federal agency will follow appropriate tribal consultation procedures in 36 CFR Part 800, as well as those provided in Stipulation IV below, with regard to those effects.
- C. In the event that MnDOT applies for additional federal funding or approvals for the undertakings from another agency that is not party to this PA and the NLX Project, as described herein, remains unchanged, such funding or approving agency may choose to comply with Section 106 by agreeing in writing to the terms of this PA and notifying and consulting with FRA, STB, MnSHPO, WisSHPO, MnDOT and WisDOT. Any necessary modifications will be considered in accordance with Stipulation XVII.B of this PA.

### II. ROLES AND RESPONSIBILITIES

#### A. FRA

As the lead Federal agency and pursuant to 36 CFR 800.2(a)(2), FRA is responsible for fulfilling the requirements of Section 106, and ensuring the provisions of this PA are carried out. FRA will conduct government-to-government consultation with federally-recognized Native American tribes, execute MOAs for the NLX Corridor and each future site specific project of the NLX Project, and participate in the resolution of disputes. FRA is responsible for all determinations of eligibility and finding of effect of the undertakings.

#### B. STB

As a cooperating Federal agency, STB is responsible for fulfilling the requirements of Section 106, pursuant to 36 CFR Part 800. STB is also responsible for reviewing project documentation in a timely manner and participating in consultation as set forth in this PA.

#### C. MnDOT

FRA and STB have delegated to MnDOT CRU responsibility for the implementation of the following provisions of this PA: Consult with other consulting parties and the public; conduct Section 106 reviews; delineate and change the APE as needed and get FRA permission for and inform the other signatories of the change; prepare documentation for MnSHPO, WisSHPO, STB and FRA including determinations of eligibility and effect; circulate comments from signatories; maintain documentation of the Section 106 compliance for the NLX Corridor and each site specific project within the NLX Project; develop a prototype MOA for the NLX Corridor and each site specific project within the NLX Project; invite local agencies, Native American groups, interested non-governmental organizations,

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and individuals to participate in the development of the NLX Corridor and each site specific project MOAs to agree upon means to avoid, minimize, and/or mitigate adverse effects to historic properties; develop and assure adherence with site specific project MOAs for the NLX Corridor and each site specific project; develop a built-environment treatment plan and an archaeological treatment plan to be used for the NLX Corridor and each site specific project; develop and assure adherence with the individual NLX Corridor and site specific project treatment plans, as provisions in the MOAs for the NLX Corridor and each site specific project; and ensure project information is available to consulting parties and the public in concert with the NEPA process for the NLX Corridor and each site specific project.

**D. MnSHPO and WisSHPO**

1. MnSHPO and WisSHPO shall be responsible for reviewing project documentation and participating in consultation as set forth in this PA for the State of Minnesota and the State of Wisconsin, respectively.
2. All submittals to MnSHPO and WisSHPO shall be in paper format.
3. Pursuant to 36 CFR 800.3(c)(4), the MnSHPO and WisSHPO shall review and comment on all adequately documented project submittals within 30 calendar days of receipt.

**III. PROFESSIONAL QUALIFICATIONS STANDARDS**

All actions prescribed by this PA that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet, at a minimum, the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-44739) (Appendix A to 36 CFR Part 61) in the appropriate discipline. Hereinafter, such persons shall be referred to as Principal Investigators (PIs). MnDOT CRU shall ensure that the work outlined in this PA is conducted by staff meeting these qualifications standards. However, nothing in this stipulation may be interpreted to preclude FRA or MnDOT CRU or any agent or contractor thereof from using the services of persons who are not PIs, as long as their activities are overseen by PIs.

**IV. ON-GOING CONSULTATION WITH NATIVE AMERICAN TRIBES**

**A. FRA**

1. As the lead Federal agency with responsibility for Section 106 compliance, FRA is responsible for all government to government consultation with federally-recognized tribes. A list of federally-recognized Native American tribes contacted can be found in Attachment C.
2. FRA requested government-to-government consultation on the NLX Project via letters sent to all federally-recognized Native American tribes that could be affected by the undertaking

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described in this PA. Federally-recognized Native American tribes were provided a 30-calendar-day opportunity to comment.

3. FRA shall ensure that on-going consultation with federally-recognized Native American tribes continues early in the project development process for the NLX Corridor and each site specific project to identify cultural, confidentiality, or other concerns including those about historic properties, and to allow adequate time for consideration of such concerns whenever they may be expressed.
4. In accordance with 36 CFR 800.2(c)(2), federally-recognized Native American tribes may be identified as consulting parties for the NLX Corridor and individual site specific projects and in subsequent MOAs that are prepared for the NLX Corridor and each site specific project covered by this PA as described further in Stipulation VIII.A.
5. Consultation with federally-recognized Native American tribes shall continue throughout the development of NLX Corridor and subsequent site specific projects, regardless of whether such tribes responded within 30 days to the consultation letter sent by FRA attempting to initiate such consultations at the outset of this NLX Project.
6. FRA shall identify tribes who will participate in an undertaking as a consulting party and shall consider future written requests to participate as consulting parties in an undertaking.

B. MnDOT

1. MnDOT CRU may consult informally with the federally-recognized Native American tribes and will coordinate such consultation with FRA, as appropriate.

C. Consultation for each Undertaking

1. MnDOT CRU may invite federally-recognized Native American tribes that attach religious and cultural significance to historic properties that may be affected by an undertaking to participate in informal informational meetings for the NLX Corridor and site specific projects, if deemed necessary by the parties involved.
2. FRA shall consult on a government-to-government basis with federally-recognized Native American tribes identified as consulting parties that attach religious and cultural significance to historic properties that may be affected by an undertaking at key milestones in the Section 106 and NEPA processes to gain input from tribal governments. MnDOT CRU shall consult with all other involved Native American groups. The tribal consultation includes the following Native American consultation points:
  - i. During identification of cultural or historic properties, to confirm the historic or cultural properties identified.
  - ii. During assessment of adverse effects, (a) to provide requested inventory forms of historic properties adversely affected for review, (b) to determine when and where tribal monitors may be needed during ground disturbing activities in previously identified

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sensitive areas or known sites, and (c) to develop avoidance, minimization and treatment measures for adverse effects to both archaeological and built resources.

- iii. During resolution of adverse effects, (a) to develop and finalize treatment plans for archaeology and built resources, (b) to develop and execute MOAs, and (c) to determine when and where tribal monitors may be needed during treatment plan implementation or construction.
- iv. During treatment plan and MOA implementation, (a) to provide for tribal monitors where agreed upon, and (b) to review and comment on the Programmatic Agreement Annual Report, including input on the treatment plan and MOA implementation.

## **V. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC**

### **A. Public Involvement**

Public involvement in planning and implementation of undertakings covered by this PA shall be governed by FRA's, STB's, and MnDOT's environmental compliance procedures, MnDOT's environmental planning methods, and any relevant federal and MnDOT guidance documents. Historic resources will be identified and effects will be disclosed to the extent allowable under 36 CFR 800.2(d)(1-2), 800.3(e), and 800.11(c)(1 and 3) and Stipulation XII of this PA. Consistent with Section 106, the public and consulting parties will have an opportunity to comment and have their concerns taken into account on the findings identified in Section 106 survey and effects determination documents via attendance at public meetings where they can submit comments on the information presented, as well as have access to the Section 106 documents. Public meetings specific to historic properties and the effects of the project and treatment of these properties will be held in locations along the NLX corridor and for site specific projects, as appropriate. Interest groups and interested individuals will be invited to comment on the treatments proposed and those with demonstrated interest in the project will be invited to participate as consulting parties to the individual section MOAs.

Public involvement and the release of information hereunder shall be consistent with 36 CFR 800.2(d)(1-2), 800.3(e), and 800.11(c)(1 and 3), and the Freedom of Information Act, 5 U.S.C. 552, and the implementing regulation applicable to the U.S. Department of Transportation, at 49 CFR Part 7.

### **B. Consulting Parties**

Consulting parties shall participate in undertakings covered by this PA in accordance with 36 CFR 800.2(c)(3) through (5) and 800.3(f). Consulting parties may include other federal, state, regional, or local agencies that may have responsibilities for historic properties and may want to review reports and findings for an undertaking within their jurisdiction.

MnDOT CRU shall submit to FRA, STB, MnSHPO and WisSHPO a list of consulting parties for the NLX Corridor and each subsequent site specific project and a summary of coordination efforts and comments received. MnSHPO and WisSHPO shall submit comments, including recommendations for additional parties to MnDOT CRU within 30 days. MnDOT CRU shall revise and update this information as necessary based on

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MnSHPO's and WisSHPO's comments, and re-submit them to MnSHPO and WisSHPO as part of the reports to be prepared under Stipulation VI. MnDOT CRU and FRA shall also consider individuals' written requests to participate as consulting parties in the development of measures to avoid, minimize, and mitigate adverse effects to historic properties. Pursuant to 36 CFR 800.11(e) through (g), comments made by the public will be included in documentation of project effects to the NLX Corridor and subsequent site specific MOAs, as appropriate.

## **VI. IDENTIFICATION AND EVALUATION OF HISTORIC PROPERTIES**

### **A. Area of Potential Effects**

An APE for the NLX Corridor was developed by FRA and MnDOT CRU pursuant to 36 CFR 800.4(a)(1) taking into account statements by MnSHPO, WisSHPO, stakeholders and interested parties. The APE for each site specific project will be determined by MnDOT CRU, on behalf of FRA, in accordance with the APE for the NLX Corridor and the APE Delineation guidelines (Attachment A). As described in Attachment A, throughout the design process, MnDOT CRU will determine if revisions to an undertaking require modifications to the APE. If an APE requires revisions, MnDOT CRU is responsible for informing the signatories, together with FRA or other federal agency, consulting Federally-recognized Native American tribes, and other consulting parties.

### **B. Identification and Evaluation of Historic Properties**

1. The signatories to this PA agree that MnDOT CRU will have the responsibility to identify historic properties and prepare documentation in accordance with Attachment B. As appropriate, these methods may be modified for the NLX Project or site specific project in consultation with the signatories and in accordance with PI review and current professional standards. Findings shall be made by MnDOT CRU to FRA based on NRHP criteria (36 CFR 60.4) and evaluated in accordance with 36 CFR 800.4(c). Evaluation methods and criteria shall be consistent with the Secretary of the Interior's Standards and Guidelines for Evaluation (48 Fed. Reg. 44729-44738) (36 CFR 63) and shall be completed by PIs qualified in the appropriate discipline: archaeology, architectural history, or history.
2. Historic properties shall be identified to the extent possible within the APE for the NLX Corridor and each of the site specific projects and will be documented in individual Survey Reports (SR) as described in Attachment B. The content, methodology, level of effort, and documentation requirements for historic property evaluations in the SR shall follow federal, Minnesota and Wisconsin guidelines and instructions, and are provided in detail in Attachment B. The identification effort and ineligible properties shall be documented in separate technical reports for archaeological properties and historic architectural properties, the drafts of which will be submitted for review by the signatories and other consulting parties including tribal historic preservation officers (THPOs) and tribal representatives who have expressed an interest in the undertaking.



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- i. Archaeological properties include precontact and historic period archaeological sites, objects, and districts, and properties identified in 36 CFR 800.4. Evaluations shall be made by PIs fully qualified in the discipline of archaeology. Archaeological properties within the APE shall be documented in the SR. The content, methodology, level of effort, and documentation requirements for archaeological evaluations in the SR are provided in detail in Attachment B. Any archaeological investigations that may be required for portions of the project in Minnesota or Wisconsin on non-federal publicly owned land shall be conducted under a State Archaeologist's permit (Minnesota 138.31-.42 and WIS. 44.47). The goal of the investigation is to locate and identify any significant archaeological resources that could be affected by the project, well in advance of any construction. The results of the survey will be used in consultation in order to avoid, minimize, or mitigate adverse effects to identified significant archaeological resources. This requirement shall be incorporated into all Archaeological Treatment Plans proposed for portions of the project or project phases in Minnesota and Wisconsin.
  - ii. Historic architectural properties include historic buildings, structures, objects, sites, landscapes and districts. Evaluations shall be made by PIs. Historic architectural properties within the APE that are identified by PIs as historic properties shall be documented in the SR. Historic architectural properties evaluated as ineligible for the NRHP by PIs shall be documented in the SR. The content, methodology, level of effort, and documentation requirements for historic architectural evaluations in the SR are provided in detail in Attachment B.

#### C. Review of Documentation of Historic Properties

1. Upon review and concurrence of the determinations of eligibility by FRA, a Draft SR would be submitted by MnDOT CRU to the signatories and identified consulting parties, including Native American tribes, upon request and would include documentation of all properties in the APE that are listed in the NRHP, previously determined eligible for the NRHP, found eligible for the NRHP by PIs, or that appear ineligible for the NRHP. Known archaeological properties that cannot be evaluated prior to approval of an undertaking will be presumed NRHP eligible. Where archaeological testing to determine NRHP eligibility is not feasible during the identification and evaluation phase, project-specific MOAs may include a provision for treatment plans that include archaeological testing or use of a combined archaeological testing and data recovery program.
2. MnDOT CRU shall submit its determinations to the signatories and consulting parties, including Native American tribes, identified as a result of Stipulations IV.C and V.B, who shall have 30-days to review the determinations and provide their recommendations for changes to the determinations based on National Register criteria. If no objection is made, consistent with Stipulation VI.D, within the 30-day period, the determinations for those historic properties would become final.
3. Other potentially eligible properties within the APE will be evaluated by PIs, documented for each undertaking in a SR, and submitted to MnSHPO or WisSHPO for review and concurrence. If MnSHPO, WisSHPO, agency reviewer, consulting Native American tribe, or

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other consulting party asks for additional information or a re-evaluation of a property that has been determined to be not eligible, that property and the updated finding of eligibility or non-eligibility shall be included in the Final SR. Comments received from the STB, MnSHPO, WisSHPO, the THPO, agency reviewer(s), consulting Native American tribe(s), and other consulting parties will be considered and may be incorporated into a Final SR.

- 4 If, after the submission of the Final SR, there are changes to the APE that include additional properties not exempt from evaluation or information is received that there may be additional historic properties within the APE, a Supplemental SR will be prepared, and distributed following review by FRA, to STB, MnSHPO, WisSHPO and all parties who received the Final SR for a review and comment period of 30 days. If no objection is made, consistent with Stipulation VI.D, within the 30-day period, the determinations for those historic properties in the Supplemental SR would become final.

#### D. Eligibility Disagreements

Should a disagreement arise regarding the NRHP eligibility of a property in the APE for an undertaking, FRA shall forward a Determination of Eligibility documentation to the Keeper of the National Register (Keeper) for resolution in accordance with 36 CFR 800.4(c)(2) if:

1. MnSHPO, WisSHPO or a federal agency with jurisdiction over the involved lands objects in writing within 30 days to a finding of eligibility, or
2. A Native American tribe or group that ascribes traditional religious and cultural significance to a property objects in writing within 30 days to a Finding of Eligibility regarding that property; and
3. FRA is not able to resolve that objection through consultation with the MnSHPO or WisSHPO and the objecting party as provided for in Stipulation XVII.A.

Should a member of the public disagree with any NRHP eligibility determinations, MnDOT CRU shall inform FRA and any affected signatories and take the appropriate objection into account. MnDOT CRU shall consult for no more than 30 days with the objecting party and, with any or all of the other signatories. MnDOT CRU shall document such consultation efforts and submit the findings in writing to FRA for review. FRA's decision regarding resolution of the objection from a member of the public will be final.

#### E. Phased Identification

In accordance with 36 CFR 800.4(b)(2), phased identification may occur in situations where identification of historic properties cannot be completed. In these cases, subsequent MOAs will provide a provision for the development and implementation of a post-review identification and evaluation effort as applicable to the NLX Project.

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## **VII. ASSESSMENT OF ADVERSE EFFECTS**

- A. If historic properties are identified within the APE for the NLX Project, MnDOT CRU shall assess adverse effects in accordance with 36 CFR 800.5 and document its assessment in the SR, providing it to FRA for review, for each undertaking where historic properties were identified within the APE. The SR shall describe the assessment of potential adverse effects to historic properties that would result from the construction or operation of the project, and identify mitigation measures that would eliminate or minimize effects to be incorporated into the design and construction documents of the NLX Project. Following FRA review and concurrence, MnDOT CRU shall distribute the SR to the signatories, and other consulting parties, including Native American tribes, identified as a result of Stipulations IV.C and V.B, who shall have a 30-day review and comment period. MnDOT CRU shall ensure that comments are considered prior to finalizing the SR for submission to the SHPO for final review and concurrence. The MnSHPO or WisSHPO shall have an additional 15 days for review and concurrence with the final SR.
- B. FRA will notify and invite the Secretary of the Interior (represented by the National Park Service regional office's program coordinator) when any project section may adversely affect a National Historic Landmark (NHL) pursuant to 36 CFR 800.10 and Section 110(f) of the NHPA.
- C. Consistent with 36 CFR 800.5(b) and (d)(1), FRA may determine that there is no adverse effect on historic properties within the APE for an undertaking when the effects of the undertaking would not meet the Criteria of Adverse Effect at 36 CFR 800.5(a)(1), the undertaking is modified to avoid adverse effects, or if conditions agreed upon by SHPO are imposed, such as subsequent review of plans for rehabilitation by the MnSHPO/WisSHPO/THPO to ensure consistency with the Secretary's Standards for the Treatment of Historic Properties (36 CFR Part 68) and applicable guidelines, to avoid adverse effects. Any conditions would be documented by the written concurrence of the consulting parties. MnDOT CRU will submit all such written concurrence documents to FRA, which is responsible for ensuring compliance with all conditions to avoid adverse effects.

## **VIII. TREATMENT OF HISTORIC PROPERTIES**

### **A. Memoranda of Agreement**

- 1. A MOA will be developed by MnDOT CRU for the NLX Corridor and each site specific project that FRA determines would have an adverse effect to historic properties or when phased identification is necessary and adverse effects could occur.
- 2. Each MOA will include minimization and protective measures for eligible properties identified in the SRs such as preservation-in-place; processes for addressing project design changes or refinements after the SRs for the NLX Corridor and each site specific project are completed, and a process for efficiently addressing unanticipated discoveries in the post-review period.

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3. FRA will notify the ACHP of any findings of adverse effect and invite the ACHP to participate in the development of the MOAs pursuant to 36 CFR 800.6(a)(1)(i)(c), as appropriate.
  4. Should Native American tribes or groups decline to participate as signatories to a NLX Corridor or site specific project MOA, unless requested, documentation regarding treatment that is called for in that NLX Corridor or site specific MOA will not be provided. Native American tribes and groups will continue to receive information on the NLX Corridor or subsequent site specific project MOAs as part of the NEPA process and may request to consult at any time on an undertaking, or request additional coordination with MnDOT or FRA.
  5. Pursuant to 36 CFR 800.11(e) through (g), views of the public will be considered and included where appropriate in specific project MOAs.
  6. Upon review, concurrence, and execution of the MOA, Section 106 review will be considered concluded for the NLX Corridor or particular site specific project, though coordination and compliance efforts would continue according to the terms of this PA and the MOA.

#### B. Individual Treatment Plans

1. Treatment plans will be developed by MnDOT CRU for the NLX Corridor and each site specific project. Where National Register eligible buildings or structures may be adversely affected by the NLX Corridor or a site specific project, a Built Environment Treatment Plan will be prepared. Where National Register eligible archaeological properties may be adversely affected by the NLX Corridor or a site specific project, an Archaeological Treatment Plan will be prepared. Such Treatment Plans will include, respectively:
  - i. The Built Environment Treatment Plan (BETP) will provide detailed descriptions of treatment measures for eligible buildings, structures, objects, landscapes and districts that would be affected by the undertaking. The BETP will also include descriptions of measures to be taken to protect historic properties and to avoid further adverse effects to historic properties. In accordance with 36 CFR 800.5(a)(1), BETPs will take into account the cumulative and foreseeable effects of the NLX Project on historic architectural properties.
  - ii. The Archaeological Treatment Plan (ATP) will provide detailed descriptions of protection measures for archaeological resources and resources of importance to Federally Recognized Native American Tribes or Native American groups because of cultural affinity. The ATP could include but is not limited to the establishment of archaeologically sensitive areas, use of preconstruction archaeological excavation, preservation-in-place, avoidance, minimization, monitoring during construction where appropriate, procedures to be followed when unanticipated discoveries are encountered, processes for evaluation and data recovery of discoveries, responsibilities and coordination with Federally Recognized Native American tribes, Native American

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groups, and compliance, and curation of recovered materials pursuant to applicable Minnesota and Wisconsin laws and the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq.

2. Each treatment plan will address historic properties adversely affected and set forth means to avoid, protect, or develop treatment measures to minimize the NLX Project's effects where MnDOT CRU, in consultation with the appropriate agencies, MnSHPO and/or WisSHPO, and other MOA signatories, determines that adverse effects cannot be avoided. The treatment plans will conform to the principles of the Council's Treatment of Archaeological Properties: A Handbook Parts I and II, the "Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation" (48 Fed. Reg. 44716-44742 (September 29, 1983), and appropriate MnSHPO and WisSHPO Guidelines. MnDOT CRU will take into consideration the concerns of the consulting parties in determining the measures to be implemented.

#### C. Treatment Plan Reviews

##### 1. Signatory Review

MnDOT CRU shall provide the treatment plans to FRA for review, prior to providing it to MOA signatories and MOA concurring parties for a 30-day review and comment period. Based on comments received, treatment plans will be revised and resubmitted for a final 30-day review. If FRA, MOA signatories and/or MOA concurring parties fail to comment within 30-days of receiving the treatment plan, MnDOT CRU may assume concurrence of the other parties and may proceed with the implementation of the treatment plan. Treatment plans may be amended by MnDOT CRU, upon FRA review without amending the MOAs. MnDOT CRU and FRA will make a good faith effort to identify major alterations to treatment plans that substantively affect mitigation measures and seek additional consultation with the other MOA signatories before approving such revised treatment plans. Where warranted, such good faith efforts shall include submittal of the draft revised treatment plan to the MOA signatories for a minimum of 15 calendar days prior to the anticipated approval of the revisions. Disputes will be resolved in accordance with the Dispute Resolution clause in Stipulation XVII.A.

##### 2. Public Participation

MnDOT CRU shall take reasonable steps to provide opportunities for members of the public to express their views on the treatment plans. Opportunities for public input may include the distribution of treatment plans consistent with 36 CFR 800.2(d)(1-2), 800.3(e), and 800.11(c)(1) and (3). Where appropriate, MnDOT CRU will hold informational meetings with the public to explain the treatment plans and obtain comment. Any public comments received will be considered and incorporated into the treatment plans as appropriate.

#### D. Treatment Plan Implementation

1. Upon execution of each MOA and prior to the commencement of construction activities, each related treatment plan will be implemented. Depending upon the nature of the

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treatment, the treatment may not be completed until after the specific project or the NLX Project is completed. Termination of the project after initiation of the treatment plans will require completion of any work in progress, and amendment of each treatment plan as described below. Amendments to the treatment plans will be incorporated by written agreement among the signatories to the MOA. Each MOA will outline appropriate reporting processes for the treatment plans.

## 2. Dispute Resolution

The parties participating in the development and implementation of the treatment plans will come to agreement on the treatment prescribed in and the implementation of the treatment plan in the MOA. If the parties are unable to come to agreement on the treatment of adverse effects in the MOA, the procedures outlined in XVII.A will be followed to resolve the dispute.

## **IX. CHANGES IN ANCILLARY AREA/CONSTRUCTION RIGHT-OF-WAY**

MnDOT CRU will notify the MOA signatories and consulting parties of changes in the size or location of ancillary areas or the construction right-of-way that result in changes to the APE, or effects to historic properties (see Attachment A) as appropriate. If any changes result in the use of unsurveyed areas, MnDOT CRU will ensure that these areas are surveyed in order to locate any potentially significant cultural resources and that those resources are evaluated for NRHP eligibility. MnDOT CRU will consult with the MOA signatories and consulting parties regarding any newly identified historic properties that cannot be avoided. Protective and/or mitigation measures will be developed and the treatment plans will be amended and implemented in accordance with Stipulation VIII. All such changes will be documented in the annual Programmatic Agreement report.

## **X. CONSTRUCTION APPROVAL**

Upon the completion of the pre-construction activities prescribed in the treatment plans and after treatment plan implementation where adverse impacts would occur, and in accordance with the provisions of the applicable MOA, or where no historic properties were identified, MnDOT CRU may authorize construction within portions of the APE.

## **XI. DISCOVERIES, UNANTICIPATED ADVERSE EFFECTS, UNANTICIPATED DAMAGE**

In accordance with 36 CFR 800.13(a)(2), if a previously undiscovered archaeological, historical, or cultural property is encountered during construction, or previously known properties would be affected or have been affected in an unanticipated adverse manner, MnDOT CRU will implement the following procedures:

- A. MnDOT CRU shall ensure that all operations for the portion of the undertaking with the potential to affect an historic property are immediately ceased and will contact FRA, STB, and affected MOA signatories, if appropriate. upon unanticipated resource discovery;

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- B. MnDOT CRU shall make a preliminary determination of the National Register eligibility of the historic property and the potential for the undertaking to adversely affect the resource and shall forward that finding to FRA who will make the final eligibility and effects determinations. If adverse effects to the resource can be avoided, no consultation with MOA signatories and consulting parties is necessary. If adverse effects cannot be avoided, MnDOT CRU will consult with the MOA signatories and propose treatment measures to minimize the effects;
  - C. MnDOT CRU shall notify Federally-recognized Native American tribes of any discoveries that have the potential to adversely affect properties of religious or cultural significance to them. After being notified of such discoveries, the Native American tribes can request further consultation on the project by notifying MnDOT CRU, in writing within three business days. For interested Native American groups that are not Federally-recognized, MnDOT CRU shall notify them of any discoveries that have the potential to adversely affect properties of religious or cultural significance to them. After reviewing such discoveries, such interested Native American groups can request further consultation on the project by notifying MnDOT CRU in writing within three business days;
  - D. MnDOT CRU shall implement the avoidance, minimization, or treatment plan and advise FRA and other signatories of the satisfactory completion of the approved work. Once the approved work is completed, the activities that were halted to address the discovery of resources may resume;
  - E. Any treatment to damaged properties will follow the Secretary of the Interior's Standards for the treatment of historic properties. If MnDOT CRU determines damaged property should be repaired after construction is completed, then stabilization measures that will prevent and not cause further damage will be undertaken; and
  - F. If a National Historic Landmark is affected, MnDOT CRU shall include the Secretary of the Interior represented by the National Park Service regional office's program coordinator and the ACHP in the notification process.

## **XII. CONFIDENTIALITY**

If disclosure of location information could result in disturbance of an historic resource, all parties to this PA shall ensure that shared data, including data concerning the precise location and nature of historic properties and properties of religious and cultural significance are protected from public disclosure to the greatest extent permitted by law, including conformance to Section 304 of the NHPA, as amended and Section 9 of the Archaeological Resource Protection Act and Executive Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996.

## **XIII. HUMAN REMAINS**

### **A. Notification and Treatment**

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1. If human remains are inadvertently discovered during construction activities, all construction activity will cease within and immediately adjacent to the discovery and MnDOT would notify the appropriate parties in accordance with the project specific treatment plan.
  2. Any human remains and funerary objects discovered on non-federal land within the State of Minnesota during the implementation of the terms of this PA and subsequent project specific MOAs during the undertaking itself will be treated by MnDOT CRU in accordance with the requirements of the Minnesota Private Cemeteries Act (Minnesota 307.08) and the project specific treatment plan.
  3. Any human remains and funerary objects discovered on non-federal land within the State of Wisconsin during the implementation of the terms of this PA and subsequent project specific MOAs during the undertaking itself will be treated by MnDOT CRU in accordance with the requirements of the Wisconsin Burial Sites Protection law (Wisconsin Statutes 157.70 and Wisconsin Administrative Code HS 2), which includes immediately contacting the WisSHPO.
  4. If the appropriate state laws do not prescribe a course of action with regard to human remains and funerary objects, the ACHP “Policy Statement regarding Treatment of Human Burial Sites, Human Remains and Funerary Objects” February 23, 2007; <http://www.achp.gov/docs/hrpolicy0207.pdf> shall be consulted for guidance.

#### **XIV. CURATION**

##### **A. Collections from State and Private Lands**

Cultural materials discovered on state lands shall belong to the respective states according to Minn. Stat. 138.31 to 138.42 and Wis. Stat. 44.77 and shall be curated in accordance with applicable laws and procedures.

Private landowners in Minnesota and Wisconsin shall be encouraged to curate archaeological materials recovered from their lands, as recommended in the foregoing statutes.

#### **XV. DOCUMENTATION STANDARDS**

- A. All documentation that supports the findings and determinations made under this PA shall be consistent with 36 CFR 800.11 and shall be in accordance with MnDOT CRU’s requirements and its subsequent revisions or editions and with the attachments to this PA. Documentation shall be submitted to MnDOT CRU and prepared by PIs who, at a minimum, meet the Secretary of the Interior’s Professional Qualifications Standards (48 FR 44738-44739) (Appendix A to 36 CFR Part 61). MnDOT CRU shall review the documentation for adequacy, and transmit all documentation cited herein as stipulated by this PA.
- B. All documentation prepared under this PA shall be kept on file at MnDOT CRU and FRA and made available to the public without the inclusion of culturally sensitive information that



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may jeopardize confidentiality as stipulated by this PA, consistent with applicable confidentiality requirements and Federal records management requirements.

## **XVI. AUTHORITIES**

Compliance with the provisions of this PA does not relieve FRA or other federal agencies of any other responsibilities not described in this PA to comply with other legal requirements, including those imposed by NAGPRA (25 U.S.C. Section 3001 and 43 CFR 10), the ARPA (16 U.S.C. Section 470 aa-47011), and NEPA (42 U.S.C. Section 4321-4347), and applicable Executive Orders.

## **XVII. ADMINISTRATIVE STIPULATIONS**

### **A. Dispute Resolution**

1. Should any signatory to this PA object within 30 days to any action proposed or any document provided for review pursuant to this PA, FRA shall consult with the objecting signatory to resolve the objection. If FRA determines that the objection cannot be resolved within 15 days, FRA shall forward all documentation relevant to the dispute, including FRA's proposed resolution, to the ACHP. FRA will also provide a copy to all signatories and consulting parties for the undertaking. ACHP shall provide FRA with its advice on the resolution of the objection within 30 days of receiving adequate documentation. Prior to reaching a final decision on the dispute, FRA shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the signatories and consulting parties, including Native American tribes, and provide them with a copy of this written response. FRA will then implement any action determined by this dispute resolution process and proceed according to its final decision.

If ACHP does not provide its advice regarding the dispute within 30 days, FRA may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FRA shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and consulting parties for the undertaking, and provide them and ACHP with a copy of such written response.

### **B. Amendment**

1. The signatories to this PA may request that it be amended, whereupon the signatories will consult to consider such amendment. This PA may be amended only upon written concurrence of all signatory parties.
2. To address changes in the treatment of specific historic or archaeological properties affected by the undertaking, MnDOT may propose revisions to the treatment plans or MOAs, as appropriate, rather than to this PA. Upon concurrence of the signatories, MnDOT and FRA may revise the treatment plans to incorporate the agreed upon changes without executing a formal amendment to this PA. An MOA may be amended only upon written concurrence of all signatory parties.

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3. Revisions to an attachment to this PA would be implemented through consultation and include any necessary revisions to the PA itself that may result from modification of an attachment.

#### C. Annual Report

1. The signatories and consulting parties, including Native American tribes, may review activities carried out by MnDOT CRU pursuant to this PA. MnDOT CRU shall facilitate this review by compiling specific categories of information to document the effectiveness of this PA and by making this information available in the form of a written annual PA report. Categories of information shall include, but are not limited to, a summary of actions taken under this PA, including all findings and determinations, public objections, and inadvertent effects or foreclosures. The range and type of information included by MnDOT CRU in the written report and the manner in which this information is organized and presented must be such that it facilitates the ability of the reviewing parties to assess accurately the degree to which the PA and its manner of implementation constitute an efficient and effective program under 36 CFR Part 800.
2. MnDOT CRU shall prepare the written report of these findings annually following execution of this PA. MnDOT CRU shall submit the annual reports to FRA, STB, MnSHPO, WisSHPO and WisDOT no later than three (3) months following the end of the State fiscal year until all treatment is completed. There will be a 30-day period to review and comment on the report. The annual PA report will be finalized within 30 days of receipt of comments.
3. MnDOT CRU shall assure that the final report herein prescribed is made available for public inspection. The report will be sent to signatories and consulting parties, including Native American tribes, of this PA and any subsequent MOAs, and a copy available to members of the public for comment, upon request.

#### D. Termination

FRA, STB, MnSHPO, WisSHPO, MnDOT, or WisDOT may terminate this PA by providing 30 days written notice to the other signatories; the signatories shall consult during the 30-day period prior to termination to seek agreement on amendments or other actions that would avoid termination. Should such consultation result in an agreement on an alternative to termination, the signatory parties shall proceed in accordance with that agreement. Should a signatory party propose termination of this PA, they will notify the other parties in writing. If any of the signatories individually terminates their participation in the PA, then the PA may be terminated in its entirety. In the event of termination, then FRA shall either consult in accordance with 36 CFR 800.14(b) to develop a new agreement or request the comments of the ACHP pursuant to 36 CFR Part 800. Beginning with the date of termination, FRA shall ensure that until and unless a new agreement is executed for the actions covered by this PA, such undertakings shall be reviewed individually in accordance with 36 CFR 800.4-800.6.

#### E. Duration of this Programmatic Agreement

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In the event that the terms of this PA are not carried out within 10 years, this PA shall be assessed by the signatories to determine if it still needed and working effectively, or whether it should be terminated. If the PA is effective and its duration needs to be extended, the signatories can decide to extend the duration of the PA. If the signatories determine that the PA is effective, but needs revisions, revisions will be made. In the event the signatories determine that the PA is not effective and cannot be amended to address concerns, the PA shall be considered null and void, memorialized in a letter to the signatories from FRA. If FRA or another Federal agency party to this PA chooses to continue with the undertaking, it shall re-initiate review of the undertaking in accordance with 36 CFR Part 800.

F. Execution and Implementation of the Programmatic Agreement

This PA may be implemented in counterparts, with a separate page for each signatory. Execution of this PA by FRA, STB, MnDOT, WisDOT, MnSHPO, and WisSHPO, and implementation of its terms evidence that FRA and STB have taken into account the effects of this undertaking on historic properties and afforded ACHP an opportunity to comment.

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**SIGNATORIES**

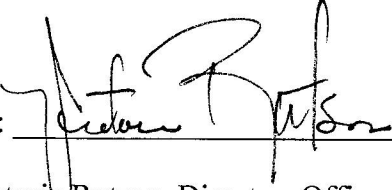
**Federal Railroad Administration**

By: David Valenstein Date: August 8, 2013

David Valenstein, Division Chief Environment and Systems Planning

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**Surface Transportation Board**

By:  Date: July 26, 2013

Victoria Rutson, Director, Office of Environmental Analysis

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**Minnesota State Historic Preservation Office**

By: Barbara Howard Date: 7/24/2013

Barbara Mitchell Howard, Deputy SHPO

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**Wisconsin State Historic Preservation Office**

By: Jim Draeger Date: 8/2/13  
Jim Draeger, Deputy SHPO

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**INVITED SIGNATORIES:**

**Commissioner Minnesota Department of Transportation**

By:  Date: 7/26/13

Charles A. Zelle, Commissioner



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**Secretary Wisconsin Department of Transportation**

By: MR GOTTIEB Date: 7/23/13

Mark Gottlieb, Secretary