



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION COMMUNITY INVESTMENT AND ECONOMIC REVITALIZATION HISTORIC PRESERVATION OFFICE

501 East State Street

P.O. Box 420, Mail Code 501-04B

Trenton, New Jersey 08625-0420

Tel. (609) 940-4312 • Fax (609) 984-0578

www.nj.gov/dep

HPO-K2023-022

PROJECT #08-0811

PHILIP D. MURPHY

Governor

TAHESHA L. WAY

Lt. Governor

SHAWN M. LATOURETTE

Commissioner

November 2, 2023

Danielle Gosselin, Director
Alan Tabachnick, Federal Preservation Officer
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington DC 20423

Dear Ms. Gosselin and Mr. Tabachnick:

As Deputy State Historic Preservation Officer for New Jersey, in accordance with 36 CFR 800: Protection of Historic Properties, as published in the Federal Register on December 12, 2000 (65 FR 777698-77739) and as amended on July 6, 2004 (69 FR 40544-40555), I am providing Continuing Consultation Comments for the following proposed project:

Hudson County, Jersey City

Harsimus Branch Abandonment

Surface Transportation Board (STB)

STB Docket Nos. AB 167 (Sub-No. 1189X), AB 55 (Sub-No. 686X) and AB 290 (Sub-No. 306X)

Thank you for providing the Historic Preservation Office (HPO) with the opportunity for review and comment on the above referenced undertaking. This letter is in response to the revised draft Memorandum of Agreement (MOA) received in digital copy at our office on June 14, 2023 and a virtual public meeting held on September 28, 2023.

The draft MOA is unique and presents challenges to HPO's ability to provide complete comments. First, in my experience, an MOA is typically negotiated with the totality of a federal agency's powers, abilities, and resources at the table. This case is unusual in that the Office of Environmental Analysis (OEA) is negotiating and attempting to execute the MOA while the Surface Transportation Board (STB) retains significant and impactful powers which it may, or may not, exercise in the future to change the conditions of abandonment. We understand the Board's powers include, but may not be limited to:

- a. The Board's ability to impose voluntary mitigation measures.

- b. The Board's ability to impose a public use condition under 49CFR1152.28.
- c. The Board's ability to address any unlawful conduct as appropriate.
- d. The Board's ability to condition abandonment on the execution of a settlement agreement.
- e. The Board's ability to impose penalties.
- f. The Board's ability to adjudicate the sale and demolition of a stanchion.

Thus, the MOA must explain the process by which the Board will ultimately make its final decision on the abandonment application.

Second, the MOA must address the elephant in the room: the sale of the Embankment property several years ago by the applicant, Conrail. This fact has had a significant impact on the course of the Section 106 process that must be clearly acknowledged in the MOA. The Embankment property is already in the hands of nine (9) private owners which necessarily restricts the ability of the applicant to avoid, minimize, or mitigate the adverse impacts of the proposed abandonment.

General Comments

1. It is our understanding that OEA's position is that their mitigation options are limited to documentation. Can you please provide the authority for this position?
2. There has been much discussion of the limitations of the Board's ability to impose involuntary mitigation. However, there has not been significant discussion regarding the possibilities of voluntary mitigation. If there was a settlement agreement (between Conrail, the LLCs, the Albanese Group, the City of Jersey City, the Embankment Coalition, et. al.), could its terms (in whole or in part) be considered voluntary mitigation worthy of consideration in an MOA?
3. Regarding potential vulnerabilities and protections of the Embankment post-abandonment:
 - a. The NJ Register listed property will receive no regulatory oversight or protections pursuant to the NJ Register of Historic Places Act (N.J.A.C. 7:4), unless it is in public ownership. Thus, unless the property is transferred public ownership, a private owner could alter, remove, or demolish the property in whole or in part without oversight from the NJ HPO.
 - b. It is my understanding that the municipal redevelopment plan adopted by the Jersey City on November 28, 2022, which calls for the preservation of 5 blocks of the Embankment while allowing dense development on block 1, is contingent on a settlement agreement (again between Conrail, the LLCs, the Albanese Group, the City of Jersey City, the Embankment Coalition, et. al.). In other words, without a settlement agreement that provides for the preservation of most of the Embankment, the Embankment in total is at possible risk of demolition.
4. In STB's responses to prior comments (comment #2), you state that: "Requests for the imposition of a public use condition under 49 CFR 1152.28 are premature and are outside the scope of OEA's historic review. Requests for public use conditions are granted, if appropriate, by the Board when the Board issues its



final decision in an abandonment proceeding.” If this is the case, then how is it possible to know whether the mitigation is commensurate with the adverse effects to historic properties? Thus the MOA must explain the process by which the Board will ultimately make its final decision on the abandonment application.

Specific Comments

1. Suggest adding a whereas clause that acknowledges that 49 USC 10905 authorizes STB to bar the sale of property proposed for abandonment for other than public use for 180 days, but that STB is unable to exercise this authority in this case due to the sale of the property by Conrail to private owners prior to initiating the application for abandonment with STB.
2. The 5th Whereas clause states: “OEA recommended that the Board impose a condition barring Conrail from consummating the proposed abandonment until the Section 106 process is complete.” It is my understanding that Board authorization of abandonment cannot be given until the Section 106 process is complete, so how could abandonment be consummated? Please add text to clarify.
3. Text should be added to the 11th whereas clause that acknowledges that the Embankment received a Determination of Eligibility from the Keeper in 2000 due to owner objection to National Register listing.
4. Section III of the Stipulations states that "Conrail agrees that any agreement of sale between Conrail and any immediately subsequent purchaser of the right-of-way underlying the Harsimus Branch shall contain a provision requiring that such purchaser agree to leave the signage Conrail erects (if any, and in compliance with the requirements and stipulations of this MOA) within the right-of-way." This provision is not feasible or enforceable since Conrail has already sold the property.
5. In Section I of the Stipulations: please add additional specificity. Can the contractor meet the Professional Qualification Standards in any of the areas? Or just specific areas (Architecture, History, Historic Architecture)?
6. In Section I.A. of the Stipulations, suggest adding more specificity regarding minimum standards for the documentation product. What format (Word, PDF)? Page size? Font size? Number of pages of text? Number of illustrations?
7. Suggest that field documentation be undertaken at HABS/HAER Documentation Level 1.
8. In Section I.B.1. of the Stipulations, the way that the draft MOA is organized, the interpretive signs will be developed and then locations will be selected. This seems backwards. It would make more sense to identify the sign locations first. This might inform the size and materials of the sign as well as the content of the sign.
9. In Section I.B.2. of the Stipulations, the host for the website needs to be identified in the MOA. Otherwise, it could be a fatal flaw in the successful accomplishment of this aspect of mitigation.
10. The requirement for the creation of a video is too vague. How long should it be? Is it envisioned to only appear on the website to be created? Are there other places it could be posted? YouTube?



11. The SHPO does not to have the ability to host or hold the webpage until another host organization can be identified.
12. Regarding the duration of the MOA in Section IV: The HPO is concerned that 4 years may not be an adequate time frame for this MOA. This project has a long history of litigation, and if no settlement agreement is reached, then there seems to be a strong likelihood of additional litigation, which as in the past could endure for many years. If the MOA expires, Section 106 consultation will need to be reinitiated.
13. In STB's responses to prior comments (comment #50), you state that: "... signage would be delivered to the SHPO..." However, the NJSHPO operates out of a leased urban office building and does not have the ability to store any number or any sized signs for any period of time. Please make alternate plans. Priority should be given to installation rather than storage.
14. Public comments made at the September 28, 2023 meeting should be broadly summarized and included in a whereas clause.

Thank you again for providing the opportunity to review and comment on the draft Memorandum of Agreement (MOA). I look forward to receiving a revised MOA that addresses my comments and concerns. Please reference the HPO project number 08-0811 in any future calls, emails, submission or written correspondence to help expedite your review and response. If you have any questions, please feel free to contact Andrea Tingey of my staff at (609) 984-0539 or Andrea.Tingey@dep.nj.gov.

Sincerely,

Katherine J. Marcopul

Katherine J. Marcopul
Deputy State Historic
Preservation Officer

cc Barbara Miller, Office of the General Counsel, Surface Transportation Board

