



EI - 30899

June 15, 2021

Ms. Danielle Gosselin
Deputy Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Ref: *Proposed Abandonment of Consolidated Rail Corporation's Harsimus Branch*
Jersey City, Hudson County, New Jersey
ACHP Project Number: 001682

Dear Ms. Gosselin:

On May 19, 2021, the Surface Transportation Board (STB) notified the Advisory Council on Historic Preservation (ACHP) and the consulting parties about its decision to consider the applicability of Section 110(k) of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306113) to the referenced undertaking and the applicant's related actions to the property. The STB made this decision as a result of our March 8, 2021 recommendation. The ACHP appreciates the STB's agreement to conduct this review prior to taking any further steps to review this undertaking under Section 106. As the STB considers whether Section 110(k) applies to its applicant's actions, the ACHP would like to offer the following guidance.

As you know, Section 110(k) of the NHPA prohibits a federal agency from granting a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected an historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur. In accordance with both the statute and 36 C.F.R. § 800.9(c) of the Section 106 regulations, it is the responsibility of the federal agency to make a determination regarding the applicability of Section 110(k) of the NHPA prior to conducting its Section 106 review for the subject undertaking.

For this determination regarding the applicability of Section 110(k), the STB should carefully review the timeline of the applicant's actions and consider whether: (1) an intentional significant adverse effect to a historic property occurred as a result of the applicant's actions, and (2) in carrying out that action, there is evidence of the applicant's intent to avoid a Section 106 review. Note that "significant adverse effect" is a higher threshold than the standard "adverse effect" provided for in 36 CFR § 800.5. However, this does not mean that a property must be completely demolished or destroyed. The effects must alter, directly or indirectly, one or more of the characteristics of the historic property that qualify it for inclusion in the National Register of Historic Places in a manner that would significantly diminish its integrity. In looking to the intent of the applicant's actions, the Secretary of the Interior's Standards and Guidelines for Federal Agency Preservation Programs pursuant to the NHPA state that Section 110(k) is applicable where "an historic property is destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of [S]ection 106 review."

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

We understand the STB is currently requesting the views of the consulting parties on the applicability of Section 110(k) to this situation. If, after considering the information gathered, the STB determines Section 110(k) applies to the applicant's actions and the circumstances do not merit proceeding with the application, then the STB should deny the applicant's abandonment request. If, on the other hand, the STB finds Section 110(k) is applicable but believes that the circumstances do justify granting the abandonment request, then the STB should notify the ACHP and provide documentation specifying the circumstance under which the adverse effects to historic properties occurred, the degree of damage to the integrity of the historic property(ies), and any views obtained from the applicant, the State Historic Preservation Officer (SHPO), and any other consulting parties. Upon receipt, the ACHP would have thirty (30) calendar days to provide its opinion on whether the agency should still grant this abandonment request and any possible mitigation of the adverse effects. The STB would need to consider the ACHP's opinion in making its decision whether to grant the abandonment request and, if the STB elects to move forward with the application, it would need to comply with sections 800.3 through 800.6 of the Section 106 regulations to take into account the effects of the undertaking on any historic properties.

Finally, if the STB makes the decision that Section 110(k) is not applicable to this undertaking, then the STB should notify the ACHP, applicant, SHPO, and the consulting parties of this decision, and resume the appropriate point in the Section 106 review process.

We look forward to receiving the STB's decision about the applicability of Section 110(k) to this undertaking. If you have any questions during this review, please contact Ms. Sarah Stokely at (202) 517-0224, or via e-mail at sstokely@achp.gov.

Sincerely,



Jaime Loichinger
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs