

From: [Jaime Loichinger](#)
To: [Tabachnick, Alan](#)
Cc: [Sarah Stokely](#)
Subject: Fw: Summary of our call -
Date: Monday, April 19, 2021 4:04:03 PM

Hi Alan - just wanted to make you aware of the fact that Michele Donato called me today regarding the Harsimus Branch project; see my summary email to her below. Any updates you might be able to share from STB on this project?

Thanks!

jaime

From: Jaime Loichinger
Sent: Monday, April 19, 2021 4:02 PM
To: mdonato@mdonatotest.onmicrosoft.com <mdonato@mdonatotest.onmicrosoft.com>
Subject: Summary of our call -

Michele,

Thanks for taking the time to speak with me today about the Harsimus Branch Embankment project. I understand your frustration with the length of time this project has taken to reach its conclusion.

As I stated during our call, the agency official - in this case, STB - is required to make a determination regarding the applicability of Section 110(k) to its applicant's actions. This process is outlined in 36 CFR Section 800.9(c). I understand that there has been significant documentation of the timeline for Conrail's actions, and you feel that Section 110(k) does not apply in this instance. While I respect your opinion, the regulations require that the agency official make this decision after considering all available information. Given the volume of the information, we do believe STB is at a point where it can reasonably make a determination about the applicability of 110(k).

While you are of the opinion that a determination regarding the applicability of 110(k) can wait until a Memorandum of Agreement (MOA) has been signed, that opinion is inconsistent with the regulations, which are clear that the federal agency should make this determination before continuing consultation, up to and including the resolution of adverse effects. Making a decision regarding the applicability of Section 110(k) at the same time as executing an MOA effectively removes the STB's responsibility to consult with the ACHP and others in the event that STB determines that the applicant did significantly and intentionally adversely affect historic properties. While yes, this is a procedural point, it is an important one that needs to be addressed before we can return to the Section 106 consultation process.

You mentioned during the call that from your conversations with STB staff, you understand that they have, for previous cases, addressed the issue of 110(k) with the execution of an MOA or another finding within the Section 106 process. I was only able to take a cursory look at our records, but could not find any examples of this. From my experiences with numerous other federal agencies, I cannot recall of another agency proposing to link its Section 110(k) decision to the execution of an MOA. Anytime there has been a question regarding anticipatory demolition, the agency has paused the Section 106 review to investigate the issue.

The ACHP is not declining to be a party to the MOA or holding it up its execution. We have asked STB to make this decision now so that we can meaningfully consult and reach resolution

on the undertaking's effects on historic properties. We remain a committed and active participant in the consultation process. However, STB is in control of the consultation timeline and process at this point.

I regret that you feel this regulatory process is burdensome and more focused on the process rather than a specific result. The Section 106 process does not mandate outcomes, and seeks to balance a variety of viewpoints, including those of historic preservation. This particular project has a series of unique factors that have made the process more complicated than usual. However, I believe most of these factors can be resolved once there has been a determination regarding the applicability of 110(k).

Should I be able to answer any other questions, please don't hesitate to contact me.

Sincerely,

Jaime Loichinger

Assistant Director

Advisory Council on Historic Preservation

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