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VIA E-FILING AND EMAIL

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Director
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Surface Transportation Board
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Washington, D.C. 20423

Mr. Alan Tabachnick
Federal Preservation Officer
Office of Environmental Analysis
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Re: AB 167 (Sub-No. 1189X) et al.,

Dear Ms. Gosselin and Mr. Tabachnick:

The LLCs and the Albanese Organization, Inc. (“LLCs/Albanese”) hereby reply to the Comments on the revised draft Memorandum of Agreement (“Revised Draft MOA”) filed by the New Jersey State Historic Preservation Office on November 2, 2023 (EI-33152) (“SHPO Revised MOA Comments” or “Comments”).

The need for this reply is compelled by the perplexing timing, nature, and content of the SHPO’s Comments. With all due respect, the SHPO’s Comments display an absence of diligence, reasoned analysis, or support, and a seemingly vexatious disregard for the limited jurisdiction of the Surface Transportation Board (“STB” or “Board”), clear deadlines honored by others, and the need to orderly and timely complete the Section 106 review.

As importantly, the SHPO’s Comments reflect a clear attempt to achieve protracted bureaucratic delay to jeopardize an invaluable use based on unfounded theories that have already been addressed fully on the record and are easily refuted. The LLCs/Albanese have repeatedly sought to assure that the SHPO understands the far-reaching value of their project, a project that maximizes preservation and open space far beyond any conditions that the Board can legally impose. Despite previously assuring the LLCs/Albanese that the MOA is acceptable with only a minor comment about signage, the SHPO has now interjected a myriad set of open-ended “questions” and “comments” that are clearly aimed at seeking delay for the sake of delay that serves no useful purpose.

So that OEA may have a more complete and informed basis to properly review and address the SHPO’s belated Comments, and to ensure there is a complete record, the LLCs/Albanese respectfully submit this reply. To the extent necessary, good cause exists for the grant of leave to submit this reply.

The SHPO MOA Comments Are Far Out of Time

OEA first issued a Draft MOA over three years ago, on October 14, 2020 (“Initial Draft MOA”), and established a 30-day review period for comments by November 14, 2020. The SHPO provided belated comments on the Initial Draft MOA on December 3, 2020, without any explanation for the delay or request for leave. At that time, the SHPO (1) “concur[red]” with timely comments of the Advisory Council on Historic Preservation (“ACHP”), which called the draft MOA “a good start” and provided limited and discrete recommended revisions to the MOA; and (2) recommended that while “it was agreed that . . . the [possible] settlement agreement lies outside the Section 106 process,” that “if executed in advance of the MOA, it could be usefully referenced in the MOA.”¹

On June 14, 2023, OEA issued a Revised Draft MOA, addressing comments received on the Initial Draft MOA, and reflecting the Board’s 110k Decision. It also contained a separate, exhaustive table responding to all comments raised on the Initial Draft MOA. Comments were due within 30 days, i.e., July 14, 2023. The SHPO provided no comments on the Revised MOA during the open comment period (nor did the ACHP), and raised no issues during the public meetings on the MOA, including those on June 8, 2023 and September 28, 2023.

Despite having raised no questions or major issues with the Initial Draft MOA or the Revised Draft MOA during the open comment periods, during any of the public meetings discussing the MOA, at the very time the STB is finalizing the MOA for final signature, for the first time the SHPO suddenly and inexplicably now raises substantial “new” questions and issues. Remarkably, some contradict its prior comments or simply ignore the Board 110k Decision, all could have and should have been raised much earlier, and several are outside the scope of the Section 106 review and the jurisdiction of the STB.

The SHPO MOA comments are clearly untimely, and OEA is not required to accept them. The Board’s general rules require timely filing of documents. 49 C.F.R. § 1104.6. In addition, the Section 106 regulations specify the same 30-day period for timely responses from the SHPO as the Board required. 36 C.F.R. § 800.3(c)(4). SHPO’s Revised MOA Comments are tardy, by over three-and-a-half (3.5) months. The SHPO offers no explanation for its tardiness, likely because it has none.²

¹ The SHPO also referenced clarifying the potential applicability of Section 110(k) of NHPA. That issue became moot with the STB’s August 22, 2022 decision (“110k Decision”), that found, after a year-long review of all of the relevant facts and detailed arguments, no “anticipatory demolition” of any historic properties had occurred in violation of Section 110(k). The Revised Draft MOA appropriately reflects the 110k Decision.

² The Board’s rules require any requests for extensions by parties be filed not less than 10 days before the due date, and only on a showing of “good cause.” 49 C.F.R. § 1104.7. The SHPO made no such extension request or showing.

Also, many of the SHPO's belated questions and new comments could and should have been raised over three years ago by November 14, 2020, the deadline for comments on the Initial MOA, or informally at any time during the past three years. The Section 106 review process has already been repeatedly and needlessly delayed over eight (8) years since being reopened in 2015. The SHPO's Revised MOA Comments undermine the need for finality in the Section 106 review by raising "new" issues that, if accepted, "would render agency decisionmaking intractable, always awaiting updated information, only to find the new information outdated" and deficient in some manner. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989); accord *Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (agency cannot be expected to "behave like Penlope unraveling each day's work to start the web again the next day"). The STB's obligation is to "stop, look and listen," an obligation that has been fully honored.

If OEA ultimately still chooses to accept the SHPO's Revised Draft MOA comments, unless addressed promptly and in the manner suggested below, SHPO's untimely Comments will only serve to create further disruption, complications, and issues that impede the Board's orderly and timely finalization of Section 106 review – a process that has already taken far too long and longer than any other abandonment proceeding.

The SHPO's MOA "Must Explain" and "Must Address" Comments Are Misplaced

The SHPO asserts that the MOA "must explain" and "must address" a myriad of matters regarding the Board's authority over rail line abandonment approval, including the possibility of forced settlement, "adjudicat[ing]" and "penal[izing]" unspecified "unlawful conduct," and the sale of the underlying property. The Revised Draft MOA already addresses most of these, others have been fully addressed and resolved in the STB's 110k Decision, and OEA has already explained why others are outside the scope of OEA's Section 106 review.

- SHPO's request to address "[t]he Board's ability to condition abandonment on the execution of a settlement agreement," is misplaced. The Revised MOA whereas clauses 6 and 7 at page 3 already explain the Board's inability to impose involuntary mitigation. Also, the SHPO's new assertion that the "Board's powers include" the ability order involuntary settlement under Section 106 is especially perplexing as it disregards the Board's limited authority and callously contradicts, without explanation, SHPO's (and ACHP's) previous agreement that "the [possible] settlement agreement lies outside the Section 106 process," but that "if executed in advance of the MOA, it could be usefully referenced in the MOA." Nevertheless, if OEA believes this portion of the preamble should be supplemented, OEA should consider including the following:

OEA has explained that the Board “has no authority to . . . force adoption of any particular settlement plan” (CRIA at 1-12, 2-1 to 2-2), that if voluntary settlement had been reached, OEA was “willing to recognize the terms of any Omnibus Settlement Agreement between the parties and to incorporate appropriate voluntary mitigation measures into a MOA . . . provided that the parties voluntarily agree to those measures and that the measures do not commit the Board to actions beyond its regulatory authority” (CRIA at 2-2). However, in this instance, no such voluntary settlement has been reached to date that could or should be recognized in this MOA.

- SHPO’s requests to address (1) “[t]he Board’s ability” to address “unlawful conduct” and to impose “penalties,” (2) “[t]he Board’s ability to adjudicate the sale and demolition of a stanchion,” and (3) “the elephant in the room: the sale of the Embankment property several years ago by the applicant, Conrail,” are also confusing and misplaced. The Revised Draft MOA whereas clauses 8-9 at page 3, already address the Board’s consideration and resolution of these matters as part of its 110k Decision. Remarkably, SHPO conveniently ignores the Board’s thorough and reasoned 110k Decision that it specifically requested be made prior to the conclusion of the Section 106 review, and it provides no explanation why the MOA should go further to readdress previously rejected claims. Nevertheless, if OEA believes this language should be supplemented, OEA should consider including the following:

After certain parties alleged “anticipatory demolition” of historic property, the STB put on hold the Section 106 review process, and ordered briefing, as the SHPO and the ACHP had requested, to consider possible violations and appropriate penalties. The two actions by Conrail that allegedly violated Section 110(k) that were considered by the Board were: (1) the removal of bridges and related rail infrastructure, and (2) the sale of the Embankment properties to the LLCs in 2005. The rail structures and plate girder bridges on and connecting the separate sections of the Embankment were removed at the request and urging of Jersey City in the mid-1990s. (CRI at ii.). None of the railway trestles, stanchions, track, signals, or other facilities that once stood were themselves declared eligible for the National Register, and they were removed well before any portions of the properties were declared eligible for the National Register. Conrail and the LLCs pledged not to disturb the Embankment at any time during the STB abandonment review proceeding, including its Section 106 review, and they have not done so. The Board’s Decision on Section 110(k) found that there was no “unlawful conduct” or violations requiring redress or penalties, including with respect to alleged actions involving a stanchion, there was no improper sale of property, there was no intent to harm historic resources following the sale, and the sale has not resulted in adverse effects to the historic property – nor has the Board been deprived of any historic preservation remedies that it would have had if Conrail still owned the properties.

- SHPO's further request that the MOA address "[t]he Board's ability to impose a public use condition under 49 CFR 1152.28," is especially perplexing. OEA has already fully explained in its response to comments on the Initial MOA that "[r]equests for the imposition of a public use condition under 49 C.F.R. § 1152.28 are premature and outside the scope of OEA's historic review. Requests for public use conditions are granted, if appropriate, when the Board issues its final decision in an abandonment proceeding. Therefore, it was not appropriate for OEA to add this as a condition in the revised draft MOA." Nevertheless, should OEA feel compelled to include this subject in the MOA, the OEA should consider including in the preamble the following:

WHEREAS, certain parties have suggested the Board impose a public use condition under 49 C.F.R. § 1152.28. Such requests are outside the scope of OEA's historic review, and no such public use condition or stipulation would ensure protection of a historic resource under the NHPA. Such requests are also premature, as requests for public use conditions are granted, if appropriate, by the Board when the Board issues its final decision in an abandonment proceeding. Therefore, it is inappropriate for OEA to add such a possible condition in the MOA, nor have the parties agreed upon it as a possible stipulation. In any event, public use conditions are completely voluntary, and the Board has no ability to compel a railroad to entertain any proposals from public entities, or to sell property to any particular party at any particular price. Also, requests for a public use condition must be filed promptly, no more than 45 days after the exemption application is filed, and no such timely request was ever timely made in this proceeding.

SHPO's "General Comments" Belatedly Raise New Questions that Neither Seek, Nor Require, Any MOA Revisions

The SHPO devotes a significant part of its Comments to posing several new questions to OEA disguised as "General Comments." These questions have already been addressed, and/or should have been raised *four years ago*, when OEA initiated Step 4 of the Section 106 review (resolution of adverse effects), or at the very latest, in SHPO's comments on the Initial Draft MOA, due three years ago (November 14, 2020). The SHPO offers no explanation for belatedly raising these answered questions now. In any event, the SHPO's General Comments do not suggest any further revisions to the Revised MOA, nor should OEA make further revisions to address any of the "General Comments." Instead, OEA can provide responses to these questions to the SHPO informally.

Nevertheless, to be helpful and ensure that the record is complete, the LLCs/Albanese provide the following additional responses to the SHPO's new questions (the SHPO's questions are summarized):

1. *Provide authority on OEA's limited mitigation options.* See CREA at vi, 1-6, 1-10, 2-2, 5-2 to 5-3; CREA Add. at 43-47, 51-52; CRIA at ix, 1-5 to 1-6, 2-1, 2-7 to 2-8, 2-24, 4-2 to 4-3; *see also Iowa So. R.R. – Exemption – Abandonment*, 5 I.C.C.2d 496, 501 (1989), *aff'd sub nom. Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828-29 (1991).

2. *Could the terms of voluntary mitigation be included in an MOA?* Previously addressed by OEA in multiple occasions in its Section 106 reports and above. See also SHPO/ACHP's previous agreement that that "the [possible] settlement agreement lies outside the Section 106 process," and that "if executed in advance of the MOA, it could be usefully referenced in the MOA." The LLCs/Albanese also emphasize that no voluntary settlement has been reached that could be referenced or incorporated into the MOA. The LLC's/Albanese have presented extensive information showing the extraordinary project proposed – a project that equals or surpasses the well-known High Line project in Manhattan. Also, once abandonment is granted, but only after abandonment is granted, the Embankment can and likely will become part of the future extension of the Greenway that passes through Jersey City, an overburdened community as defined by the New Jersey Environmental Justice Law, N.J.S.A. 13:1D-157. As an overburdened community, Jersey City suffers disproportionately from lack of access to open space. The proposed dedication of all but one elevated parcel for such use far surpasses the authority of the STB to implement. However, as the LLCs/Albanese have referenced repeatedly, no settlement will occur absent the completion of the Section 106 review and a final STB decision on the merits. Unfortunately, the protracted delays in completing the Section 106 review and clearing the regulatory requirement of abandonment only serves to delay, prevent, and jeopardize settlement and this exemplary project.

3. *Any protections under N.J.A.C. 7:4 are unavailable because the property is not "in public ownership" and unless transferred to public ownership, an owner can "demolish the property" without SHPO oversight.* The recent redevelopment plan adopted by Jersey City is contingent on a settlement agreement, and without such an agreement, "the Embankment in total is at possible risk of demolition." SHPO's concerns are entirely off-base and misguided. First, the Board has no authority under NHPA or otherwise to force the transfer of a railroad right of way to "public ownership." Also, the SHPO has no authority to seek to take property to enable it to engage in state law historic preservation oversight – nor is such a taking necessary to protect the Embankment. Second, the recent redevelopment plan approval does not in any way place the Embankment at "possible risk of demolition." The SHPO's assertions are irresponsible and a red herring. To the contrary, the plan approved by the City Council mandates that blocks 2-6 be used as a park, *subject to a settlement agreement*. SHPO's irresponsible allegation has it upside-down: the recent zoning changes actually protect the property, and without final STB abandonment approval and settlement, including protection of the vast majority of the Embankments, no High-Line type park and Greenway extension will be created. Instead, the Embankments will continue to deteriorate.

Also, SHPO completely ignores the fact that demolition and development of the Embankment cannot take place without compliance with municipal landmark restrictions that the City has placed on the Embankment properties, local level approval and permitting, and City approval of additional land use plans. No post-abandonment redevelopment can occur without City approval. As OEA has previously referenced in its reports, the six sections of the Embankment are designated as a Jersey City Municipal Landmark. CRI Report at 1-5, 5-4. A petition for local landmark designation of the Embankment was filed and approved by Jersey City in 2006, amending City Code Chapter 345, Land Development Ordinance § 345-30, and designating the Embankment as “historic” and subject to protection under the Ordinance. CRI Report App. R. Under the Ordinance, a property owner seeking to develop, construct, alter, or rehabilitate a Landmark must first secure a Certificate of No Effect, a Certificate of Appropriateness, or appropriate waiver, before work commences. Adherence to these regulations is required for any future use or development of the Embankment pursuant to Chapter 345, Article 30, Section G. CRI Report App. R; see also *id.* at App. Q.

4. *If “public use” conditions are not decided until the final decision “how is it possible to know whether the mitigation is commensurate with the adverse effects to historic properties.”* As discussed above, SHPO’s “public use” question misapprehends the Board’s rules and ignores the fact that a public use request has no connection with the Section 106 review or historic property protection. The Board’s rules only require that *timely* filed public use requests be negotiated for a period of not more than 180 days from the effective date of the decision authorizing the abandonment. 49 C.F.R. § 1152.28 (a)(3) and (b). Public use conditions are strictly voluntary. The Board has no ability to require an applicant to accept any public use proposals or mandate that any negotiated public use actually protect the right of way from demolition (e.g., a planned Embankment tear-down to build a public highway, large-scale utility plants and facilities, public housing, an amusement park, etc.). Moreover, the Board’s ability to *delay* consummation of an abandonment by 180 days to allow for such public use *negotiations* is made only *after* “the Board finds that the present or future public convenience and necessity require or permit abandonment.” *Id.* at § 1152.28. OEA has previously addressed this issue, noting that “[t]he Board cannot force a railroad to sell or donate its property or to impose restrictions on a deed of sale for the purposes of historic preservation” (CRIA at 5-3). SHPO’s assumptions that the STB’s public use requests are connected to its Section 106 review, might afford protection of historic properties, and/or should be made prior to the Board’s abandonment decision, are misguided and misinformed. The SHPO appears to be seeking a taking of property without just compensation that is not authorized by the NHPA, the STB’s jurisdiction, and the United States Constitution and in a manner that likely undermines, and does not protect, historic resources.

Response to SHPO’s Specific Comments

The SHPO proposes a number of technical revisions seeking “more specificity” in the MOA Stipulations addressing historic documentation (e.g., documentation font size, aspects of video creation, website hosting, etc.). All of these could and should have been raised

previously, and if timely raised, most of them likely could have been worked out in good faith informal discussions with the Conrail, ACHP, and OEA in a matter of a few days at most. However, at this late stage, these technical revision requests are untimely and should be rejected. Beyond these technical requests, several of SHPO's other specific requests are off-base and inappropriate:

Comment 1 (seeking to add public use language in the whereas clause): this request is addressed above.

Comment 2 (seeking to clarify that the timing of final decision cannot occur prior to the conclusion of the Section 106 review): this request is inappropriate and ignores the fact that all or virtually all abandonment decisions are issued prior to finalization of Section 106 review. The Board's rules at 49 C.F.R. § 1152.26 normally require a final decision on the merits in abandonment cases within 110 days of the filing of the application, with consummation subject to completion of any remaining environmental and historic preservation review, and any other appropriate conditions.

Comment 12 (seeking to extend the MOA termination date, and referencing the possibility that "Section 106 consultation will need to be reinitiated" in the future): The LLCs/Albanese do not oppose time extensions of the MOA term, but only if and as reasonably necessary to ensure that the required historic documentation can be appropriately implemented. However, the assumption by SHPO that the termination of the MOA might somehow lead to or permit a reopening of the Section 106 review post abandonment is erroneous and contrary to the Board's rules governing the reopening of proceedings.

Comment 14 (seeking the inclusion of a summary of public comments from one consultation meeting): this request is unnecessary and ignores the other seven public meetings that have been held, and the numerous written comments that have been received and responded to by OEA in eight exhaustive written assessments spanning over 1,000 pages.

* * *

Unfortunately, as reflected herein, many of the SHPO's belated Revised MOA Comments are misguided and frankly reflect a lack of diligence and understanding of governing laws and rules, including local protections that are not changed or affected by STB abandonment approval, and/or reflect a desire to pursue delay for the sake of delay in a manner that actually undermines historic preservation. As such, the motives of the SHPO must be called into question.

Notions of fair play and the need for administrative finality oblige OEA to refrain from reengaging in instances such as this when a party asks new questions, proffers new theories, or otherwise "changes its mind at a late stage in the process." *Connecticut Trust for*

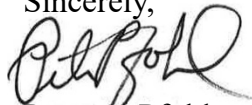
Historic Preservation v. ICC, 841 F.2d 479, 484 (2d Cir. 1988). OEA has also admonished: “[t]he Board does not use delay or threat of delay in the Section 106 process to force a railroad or other entity to commit to mitigation actions involuntarily.” (CRIA at 5-3). Unfortunately, this appears to be the clear intent of the belated SHPO MOA Comments, although the LLCs/Albanese sincerely hope this is not the case. The LLCs/Albanese also reemphasize here that ***no settlement will occur absent the completion of the Section 106 review and a final STB decision on the merits.***

OEA has painstakingly complied with and exceeded all applicable NHPA requirements, but the LLCs/Albanese wish to remind it that: (1) there is an overwhelming need to complete this protracted proceeding, including the Section 106 review process, promptly and by the end of this year; and (2) the need for closure is especially acute here, where the Section 106 review has been so exhaustive, the line has been out of service for over three decades, and the Board’s rules require abandonment proceedings to be conducted in less than four months (49 C.F.R. § 1152.26). Further, the protracted delay in completing the review flies in the face of the National Transportation Policy to minimize the need for federal regulatory control over the rail transportation system, reduce regulatory barriers to exit from the industry, and to require fair and expeditious handling and resolution of all proceedings brought to the Board decisions. 49 U.S.C. §§ 10101(2), (7), & (15).

The administrative process must come to an end. No further delays should be allowed. The final MOA to be signed by NJ SHPO, ACHP, Conrail, and OEA should be completed as soon as possible, and by the end of this year, thereby completing the exhaustive and excessively delayed Section 106 review.

We ask that this letter be included as part of the record and posted as environmental correspondence in this docket.

Sincerely,



Peter A. Pfohl

cc: Katherine Marcopol
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