

From: Tabachnick, Alan
Sent: Tuesday, February 2, 2021 1:46 PM
To: Jaime Loichinger
Cc: Marcopul, Kate; Tingey, Andrea; Andrea Ferster; Sarah Stokely; Charles H. Montange (c.montange@frontier.com); Gosselin, Danielle; Wayland, Joshua; Miller, Barbara; Hunt, Theodore; Kitay, Evelyn
Subject: RE: Harsimus Branch Abandonment - ACHP comments and questions

Jaime,

Thank you for your questions and comments about the Section 106 process for the proposed Harsimus Branch abandonment. I have provided some brief responses to your primary questions below.

1. Section 110(k)

OEA's role at the Board with respect to the NHPA is to ensure that the Board complies with Section 106 and to make recommendations related to that compliance for the Board to consider in its licensing decisions. The question of whether a Section 110(k) violation occurred and whether, if a violation occurred, abandonment authority should nonetheless be granted is ultimately for the Board to decide and not OEA. As we have consistently explained and with which ACHP has concurred, the Board will fully consider the alleged Section 110(k) violation after OEA concludes its Section 106 process and before the grant of any abandonment authority so a Board decision addressing Section 110(k) after the conclusion of the Section 106 process will not be moot. See Sept. 21, 2016 and May 15, 2017 Letters from OEA to ACHP, and Jan 24, 2020 Letter from ACHP to OEA. To clarify this issue (and make clear that the Section 106 process could be reopened if the Board finds a Section 110(k) violation), OEA is revising the draft MOA to add language further addressing Section 110(k).

2. Settlement Agreement

The Rails-to-Trails Conservancy's (RTC) statement that the draft MOA is predicated on the finalization of a potential settlement agreement is incorrect. As we have repeatedly explained to all parties, while we support the efforts to reach a settlement, the Board has never had any role in the potential settlement agreement because it would address post-abandonment uses of the rail right-of-way that are outside of the Board's jurisdiction – which is limited to the interstate rail system. See Feb. 19, 2020 Letter from OEA to ACHP. In fact, the MOA is not dependent on a settlement agreement being reached and expressly states that any settlement agreement that might be reached is outside the scope of the MOA. Therefore, the current status of the settlement negotiations does not affect the finalization of the MOA and the timely completion of the Section 106 process here.

3. Mitigation Measures

RTC and other consulting parties mischaracterize the scope of OEA's ability to recommend – and the Board's ability to impose – mitigation measures to resolve adverse effects to historic properties. As we have consistently explained, the Board's authority to impose mitigation conditions related to historic preservation in abandonment cases is very limited. The Board can only impose voluntary mitigation measures that the parties have agreed to and involuntary mitigation in the form of documentation of historic properties. See e.g. OEA Feb. 2019 Letter to ACHP (citing relevant precedent). If ACHP or any consulting party has input or thoughts about the mitigation currently included in the draft MOA, or would like to suggest additional measures that would be within the Board's authority to impose, we welcome the opportunity to hear and consider them.

I hope that this information is helpful to you. We plan to circulate a revised MOA with a comment and response table to all the consulting parties for their review in the near future and look forward to continuing to work with you and the other consulting parties toward the completion of the Section 106 process.

If you have any additional questions, feel free to reach out to me at any time. Thanks very much for your participation in the 106 process and stay safe.

Alan Tabachnick

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From: Jaime Loichinger <jloichinger@achp.gov>
Sent: Friday, January 22, 2021 3:09 PM
To: Tabachnick, Alan <alan.tabachnick@stb.gov>
Cc: Marcopul, Kate <Kate.Marcopul@dep.nj.gov>; Tingey, Andrea <Andrea.Tingey@dep.nj.gov>; Andrea Ferster <aferster@railstotrails.org>; Sarah Stokely <sstokely@achp.gov>; Charles H. Montange (c.montange@frontier.com) <c.montange@frontier.com>
Subject: Harsimus Branch Abandonment - ACHP comments and questions

Hi Alan,

We recently spoke with the New Jersey SHPO regarding its concerns for the Section 106 consultation for the Harsimus Branch abandonment. In a timely coincidence, the Rails to Trails Conservancy (RTC) sent a comment letter to the ACHP, updating us on recent developments regarding the settlement agreement, and its interest in ensuring an appropriate resolution of adverse effects. Given that STB is the federal agency responsible for complying with Section 106, we are sharing RTC's letter with you for inclusion in STB's administrative record, and for consideration in conducting the next steps of the Section 106 review. Below are additional observations and inquiries from the ACHP.

- Section 110(k): we continue to have concerns that that STB will be making a decision about the applicability of Section 110(k) after we execute the Memorandum of Agreement (MOA). That decision will be moot at that point. STB staff should consider whether there is the possibility of them making at least a preliminary determination that Section 110(k) does not apply here based on information we know at this stage of the consultation. That could be included as a whereas clause in the MOA, stating that STB staff determined, after consulting with the ACHP, to move forward with the Section 106 review based on its preliminary determination that Section 110(k) does not apply and through execution of the MOA the Board approved the final Section 110(k) determination. We can modify the text in the language based on how internally the Board will make its decision about Section 110(k).
- Settlement: Through the RTC's letter, we understand that the settlement agreement among Conrail, Jersey City, the Embankment Coalition, Rail to Trails Conservancy, and Albanese (the Parties) is no longer an option. When will consulting parties be notified about this change? Has STB considered how the lack of a settlement agreement will affect the MOA's development?
- Mitigation Measures: particularly in the absence of a settlement agreement, additional measures may be needed to ensure that there is commensurate mitigation to offset the adverse effects to the historic properties. To that end, STB should clarify to the consulting parties the timeline for additional consultation to discuss mitigation and the MOA drafting process.

Given the breadth of these topics, it may be helpful for us to have a consultation meeting to discuss them appropriately. Accordingly, the ACHP is available at STB's convenience to participate in such a meeting, and looks forward to the ongoing discussion. Should you have any questions regarding these points, please don't hesitate to contact me or Sarah Stokely, copied here.

Sincerely,

Jaime Loichinger

Assistant Director

Advisory Council on Historic Preservation

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