



Preserving America's Heritage

May 14, 2019

Ms. Victoria Rutson
 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 Connect Case #001682

Dear Ms. Rutson:

On March 25, 2019, the Surface Transportation Board (STB) provided the Advisory Council on Historic Preservation (ACHP) with its Cultural Resources Effects Assessment Report (Effects Report) regarding the referenced undertaking. The Effects Report is submitted as part of the STB's compliance with the Section 106 (54 U.S.C. § 306108) of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800). As the ACHP is participating in consultation, we are providing our comments regarding STB's preliminary assessment of effects, and requesting additional information regarding the applicability of Section 110(k) to the undertaking.

On August 4, 2016, the ACHP requested that STB consider the applicability of Section 110(k) to this undertaking. On September 21, 2016, STB informed the ACHP that it would defer its consideration of Section 110(k) until making its final decision regarding the abandonment application by Consolidated Rail Corporation (Conrail). However, 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 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. Should STB determine that Section 110(k) does apply to Conrail's actions, STB would then need to consult with the ACHP regarding the circumstances that justify granting such assistance despite the adverse effect created or permitted by Conrail. Accordingly, the ACHP requests that STB provide an update regarding its efforts to consider the applicability of Section 110(k) to Conrail's actions.

After reviewing the Effects Report, the ACHP believes that STB has defined the undertaking too narrowly. An undertaking is defined as "a project...under the direct or indirect jurisdiction of a Federal

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agency...including those requiring a Federal permit, license or approval” (36 C.F.R. §800.16(y)). While STB’s review of Conrail’s application triggers compliance with Section 106, the regulations require the agency to consider all aspects of the undertaking. We understand that STB has cited a 1990 court ruling to support its undertaking definition and “limited” Section 106 review (Iowa Southern R. Co.—Exemption—Abandonment, 5 I.C.C.2d 496 (1989), *aff’d* sub nom. *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990)). However, that ruling was related to the National Environmental Policy Act (NEPA), which considers the environmental effects of a “major federal action.” The statutory language of NEPA and Section 106 differ, and the definitions of major federal action and undertaking are not the same. The ACHP strongly recommends STB revise its definition of the undertaking to include the activities associated with the potential partial or full redevelopment of the Embankment properties, and to modify the Effects Report based on this revised definition.

The Effects Report provides a good overview of the undertaking’s history and potentially affected historic properties. In the Effects Report, STB analyzed the potential effects to historic properties under four alternatives for the rail right-of-way and the Embankment: complete preservation; partial preservation and partial redevelopment; full demolition and redevelopment; and no action if STB does not grant abandonment authority. However, the Effects Report would benefit from a more robust discussion of how each alternative would affect the integrity of location, design, setting, materials, workmanship, feeling, and association for the identified historic properties. STB should consider revising the Section 4 “Assessment of Effects to Historic Properties Within the APE” of the Effects Report to address this concern. The Effects Report would also benefit from further justification that supports its finding that the No-Action alternative would adversely affect the Saint Anthony’s Polish Roman Catholica Church and School Complex, the Immigrant Roman Catholic Church Historic District, and the Albaniel Dye & Chemical Company/Thomas J. Stewart Company Building when the other three alternatives would not adversely affect these historic properties.

At this time, it is unclear which alternative will be selected, and what type of development could occur within the rail right-of-way and the Embankment, which limits STB in considering the full range of effects from the undertaking. In these situations when the effects cannot be fully determined prior to approval of the undertaking, and there is the potential for adverse effects to historic properties, the ACHP recommends the federal agency develop a programmatic agreement (PA) to govern the consultation process and resolution of potential adverse effects once the preferred alternative is selected (36 C.F.R. § 800.14(b)(1)(ii)). While STB has asserted it has limited regulatory jurisdiction in granting abandonment authority to an applicant, it is still responsible for assessing effects that may include those that are reasonably foreseeable (36 C.F.R. § 800.5(a)(1)). A PA would allow STB to tailor its compliance strategy, including developing a process for Conrail, as STB’s applicant, to consult with the other consulting parties in identifying a preferred alternative and developing a design that would avoid or minimize potential adverse effects. The PA would also include provisions for consultation in the event that mitigation would be necessary.

Procedurally, it would be helpful for STB to clarify how it plans to finalize the Effects Report, including if it will submit a final Effects Report and a formal finding of effect to the New Jersey State Historic Preservation Officer (SHPO) and all other consulting parties for their review and concurrence in accordance with 36 C.F.R. § 800.5(c). This will ensure that all the consulting parties understand what STB is requesting of them, as well as the timeframes for their review. Should any disagreements regarding STB’s finding arise, consulting parties should be aware of the provisions for disagreement, which would follow the process outlined in 36 C.F.R. § 800.5(c)(2).

We look forward to receiving a revised Effects Report, along with STB’s finding of effect. If you have questions or concerns, please contact Sarah Stokely at (202) 517-0224, or via e-mail at sstokely@achp.gov.

Sincerely,

A handwritten signature in blue ink that reads "jaime loichinger". The signature is written in a cursive, lowercase style.

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