

CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

EI-26122

(206) 546-1936

FAX: (206) 546-3739

For Filing: 23 June 2017

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

Re: Consolidated Rail Corp. - Ab. Ex. --
in Hudson County, NJ,
AB 167 (Sub-no. 1189X)
And related cases AB 55-686X and
AB 290-306X

Supplemental/Correction Reply Comments

Dear Ms. Brown:

This supplemental comment is for e-filing on behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("City et al") in connection with "Stage 2" or the "Cultural Resources Inventory" being conducted by STB's Office of Environmental Analysis ("OEA") to address the requirements of section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. 306108, in the above captioned proceeding. This supplemental comment also bears on the Cultural Resources Identification Report prepared by RGA. RGA, then Richard Grubb and Associates, originally worked solely for Conrail, preparing an historic report on which Consolidated Rail Corporation ("Conrail") relied in its January 6, 2009, Notice of Exemption with this agency. This report is referred to sometimes as "Hayden 2008." This same consulting firm prepared the Cultural Resources Identification Report, issued by STB on or about May 5, 2017. The fact that Conrail's consulting firm for a controversial abandonment is now preparing information and documents for the agency regulating the same abandonment not only raises -- but also is -- a conflict of interest. The

situation, however, turns out to be even more troubling. It turns out that Conrail and STB OEA have entered into a contract that constrains RGA's evaluation (and thus presumably STB OEA's evaluation) to what RGA prepared for Conrail in 2008. City et al accordingly are supplementing their June 17, 2017 Reply to the CRI Report. The correction is necessary because matters that City et al originally believed were due exclusively to a flawed analysis by RGA instead now appear to flow from a contract between Conrail and STB OEA that arbitrarily limits and constrains RGA and leaves both it and the section 106 process under Conrail control and economic pressure.¹

STB is relying on RGA pursuant to a contract (hereinafter "Contract") entered into by Consolidated Rail Corporation ("Conrail") and STB in July 2015. A copy of that contract, of which we were unaware until after our June 19 comments were filed, is attached as Exhibit A.²

The Contract appears on its face to contain many arbitrary limitations on what the consultant may analyze for section 106

¹ The conflict of interest in relying on Conrail's consultant is all the more serious because Conrail has bound itself in another contract (see Appendix IV to City et al, Supplemental Environmental Comments in AB 167-1189X, filed Sept. 25, 2014, pp. 108-09) to "execute any ... documents as may be required to effectuate and/or confirm the 2005 [illegal] sale of the property" (para 1) and to cooperate with the developer "to secure all necessary approvals" to "develop the property" (that is, demolish the historic Embankment) (para 3). The work of any consultant to a party so pledged is inherently partisan and lacks reliability. This is especially the case since the developer (see 212 Marin Boulevard et al comments filed as Environmental Correspondence on June 19, 2017, p. 2 - alleging that the "Embankment ...continues to constitute and to contribute to blight") makes clear, the developer thinks the historic Embankment itself is a "blight" and in essence opposes any meaningful application of section 106. Reliance on a contractor for a party pledged to assist a developer opposed to application of section 106 and which regards the Embankment as a blight undermines public confidence in STB's process.

² The Conrail/STB contract appears as an unidentified document bearing accession number EO 2640 in the seldom-visited outgoing section of the OEA's "environmental correspondence" website. City et al does not know when EO 2640 was posted to the website.

purposes. In addition, it contains arbitrary limits on how the consultant may proceed, as well as arbitrary instructions on the exact matters the consultant may consider.

Ironically, City et al note that many of these instructions are criticized in the environmental correspondence filed on behalf of the developer (212 Marin Boulevard, et al, hereinafter "the LLCs" or "developer") on June 19 in this docket.³ City et al further note that the Contract apparently operated to limit the consultants from considering whether the Harsimus Branch (Marin to CP Waldo) was eligible for the National Register, which explains why the CRI Report misses this key matter, on which City supplied five verified statements.⁴ The contract also limited its purported survey for potential historic resources by specifying only eight specific properties (none of which included any portion of the Branch itself), and by stating that the survey must be "cost-efficient with limited documentation and reporting."

In addition to the conflict of interest manifest in STB's purported employment of and reliance upon Conrail's consultant, City et al make five fundamental objections to STB's process as outlined in its Contract with Conrail.

³ See, e.g., LLCs' Comments filed as Env. Corr. AB 167-1189X at p.5 (alleging that considering Embankment as part of Cove and Hamilton Park Districts is ultra vires) & Harris Statement p. 3 (objecting to analysis of any nearby historic assets). The LLCs essentially call for no section 106 analysis and thus object even to the de minimis analysis specified by Conrail and STB OEA in the Contract. We note that the LLCs' also criticize the CRI Report for failure to provide documentation (e.g., *id.*, Harris Statement at p.4 first fragment sentence), but that is what is specified by the Conrail/STB contract. It is ironic that Conrail's chosen developer (the LLCs) is thus challenging the agency's section 106 process due to the constraints specified by Conrail in a contract. It is unseemly for Conrail to specify constraints to which its chosen developer now contends result in a flawed report.

⁴ See City et al's Reply filed June 19, 2017 in AB 167-1189X, Appendix, Verified Statements of Blazak and Wrieden, Zakalak, Kratz and Kaese, and City et al's Comment filed June 10, 2017 in AB 167-1189X conveying Comment and Statement of Richard James (verified).

First, the Contract demonstrates/corroborates that the agency has no procedures and no process to evaluate NHPA section 110(k), 54 U.S.C. 306113, in this proceeding. Nothing in the Contract provides for any work on section 110(k) issues. The agency cannot represent that it is dealing with section 110(k) as part of the section 106 process, when it instead is brushing 110(k) under the proverbial rug.

Second, the Contract unreasonably constrains analysis in a fashion that undercuts the section 106 process.⁵

Third, Conrail's comments filed on 19 June in this proceeding indicate that the railroad is objecting to the expenses that it is incurring under the Contract and is

⁵ The contract specifies what RGA shall consider for purposes of "Stage 2" (the cultural resources inventory). The contract limits the assessment to the following four items:

--an inventory of known historic properties

--evaluation of the Harsimus Embankment as a potential contributing element to the Hamilton Park Historic District and the Harsimus Cove Historic District

--conducting a survey for unevaluated properties, but the Contract specifies eight identified in "Hayden (2008)" and states that the "[s]urvey will be cost-efficient with little documentation and reporting."

-- archeological reconnaissance "within the immediate right of way."

Contract pp. 4-5. The Hayden (2008) reference is to the Richard Grubb & Associates (RGA) report for which Hayden was P.I., prepared for Conrail in support of Conrail's Notice of Exemption, filed January 6, 2009 in AB 167-1189X. Hayden (2008) is an exhibit to Conrail's original Notice, from the period when RGA (the consultants who prepared the 2017 CRI Report) worked directly for Conrail. The Conrail/STB Contract thus limits Conrail's consultants to those matters they considered for Conrail in 2008. A process limited to what Conrail's consultants identified for the railroad in 2008 is hardly conducive to a fair and independent analysis. The agency's 106 process in this regard is thus fundamentally misleading and defective.

pressing, albeit politely, the agency to conclude the section 106 process.⁶ While City et al welcome an efficient section 106 process, City et al object to this section 106 process as unreasonably constrained by Conrail's contract with this agency, and as subject to unreasonable control by Conrail in the form of Conrail's determination of budgets and the "final fixed-price" at each stage of the process.⁷ Conrail's proprietary sensibility for the process is manifest in its concern over limiting the consultant's billings. All of this amounts to subordination of the consultant and this agency to Conrail's control for purposes of NHPA compliance.

Fourth, the Contract provides that as part of "Stage 2 Cultural Resources Inventory" the consultant will assist in an effects analysis. The Contract calls for this analysis to include the City's plans and plans for development of the property for residential or other use. Contract p.4. The LLCs criticize analysis of plans.⁸ Strangely, Conrail seems to do so as well,⁹ even though this is what it obligated the consultant to do under its own Contract with the consultant and STB. But it is City et al's understanding that the agency is not supposed to address effects until it has identified historic properties that are potentially impacted by the abandonment/destruction of the Harsimus Branch. The CRI Report, prepared under arbitrary and flawed constraints and subject to financial control and pressure by Conrail, is not a reliable instrument to identify cultural resources, much less evaluate their effects. Moreover, a

⁶ Conrail "Comments" filed June 19, 2017 in AB 167-1189X at pp. 3-4.

⁷ The contract vests power in Conrail to determine the "preliminary budget" for each stage of consultation with all other parties, and also provides that "Conrail will determine the final fixed-price amount to be paid for each stage...." Contract p. 2 (section titled II Objective).

⁸ LLCs (Env. Correspondence) Comments, supra, at 1-11 are basically an assault on consideration of any "plans." They are also an attempt to evade the foreseeable demolition of the Embankment and Branch which the anticipatory demolition Conrail's unlawful de facto abandonment in league with the LLCs in 2005.

⁹ Conrail Comments, supra, at 3.

consultant subject to Conrail's control and pressure as manifest in the Contract is hardly in a position to assist the agency or anyone in an independent or meaningful assessment of effects.

Fifth, the Contract provides for the Conrail consultant to participate in the mitigation phase. This compounds the conflict of interest for, *inter alia*, Conrail is pledged to assist the developer. See note one supra.

To the best of City et al's knowledge, neither STB nor the third party contractor indicated to the public (or any consulting parties other than Conrail) that the contractor's study for the CRI Report would be limited per the Contract.

Under ACHP's regulations (and guidance), STB may rely on consultants, but is independently responsible for compliance with section 106.¹⁰ It follows that STB cannot arbitrarily limit a consultant, as in its Contract with Conrail, and nonetheless represent itself as complying with section 106, in particular in identifying and inventorying cultural resources.¹¹ Moreover, the agency's Policy Statement on Use of Third-Party Consulting (Ex Parte 585, served March 19, 2001), nowhere provides that the agency can rely on the same consultant as that originally

¹⁰ See 36 C.F.R. 800.2(a)(iii): "Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines."

¹¹ See ACHP's Guidance entitled "Fees in Section 106 Review Process," attached as Exhibit B, especially p. 4 of 4 confirms the deficiencies in the Contract between Conrail and STB OEA. The guidance provides that where party consulted seeks payment for information and refuses to provide information absent payment, agency may refuse payment but nonetheless is "obligat[ed] [to obtain] the necessary information for identification of historic properties." It follows that Conrail's economic interest in foreshortening the scope of work in which RGA is engaged to matters RGA identified in 2008 while working for Conrail (with perhaps a couple add-ons concerning three historic districts) does not relieve STB of the duty to identify historic properties.

retained by the railroad, much less constrain the consultant's work to the scope it advocated for the railroad. To the extent STB relies on that policy statement to vindicate its Contract with Conrail, the reliance is misplaced¹² or the Policy Statement defective for encouraging flawed, defective, and unreliable processes for compliance with section 106.¹³

The agency must conduct a cultural resources survey that does not confine the process (1) to evaluation of eight properties identified by RGA while working exclusively for Conrail in 2008, (2) to whether the Embankment contributes to two adjoining historic districts, and (3) to whether the Harsimus Branch contributes to the PRR Historic District. The agency must stop pretending to evaluate effects, much less adverse effects, on the basis of the arbitrary limits specified in its contract with the regulated entity (Conrail) through a consultant to Conrail under pressure to reduce costs to Conrail. The agency must proceed independently to inventory all potential historic assets that may be affected, with appropriate documentation, without presuming that the assets are limited to eight items identified in or before 2008, and three long-extant historic districts. The agency cannot presume to evaluate effects based on an inventory developed in a CRI Report put together under the arbitrary and flawed constraints of the Contract. Finally, the agency needs to incorporate section

¹² The Policy Statement says consultants may be used by a party to present material to the agency, or may be furnished by the party to the agency to assist the agency, but it does not say the party can both present material by a consultant and then furnish the same consultant to the agency for the same case.

¹³ The Board's Canons of Ethics for practitioners states that "[t]he obligation to represent the client with undivided loyalty and not to divulge secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." 49 CFR 1103.16. If RGA were a practitioner, it is hard to see how it could have accepted subsequent employment as the Board's consultant, especially while still being paid by Conrail, unless the Board's interests are now coterminous with those of Conrail and its chosen developer.

110(k) into its section 106 compliance, and not brush 110(k) under an even thicker rug than it appears to be brushing 106.

In addition to the flaws in the Contract identified above, City et al note that the Contract adopts Conrail's view of the case: the Contract utterly ignores that Conrail, in league with its chosen developer (the LLCs), engaged in an unlawful de facto abandonment in 2005 designed to evade federal historic preservation law and federally-mediated state remedies like NJSA 48:12-125.1. The agency should explore ways to facilitate City et al in countering the evasion, not rubberstamp Conrail's unlawful abandonment in derogation of section 106. The agency in a policy statement issued in 2008 stated that de facto abandonments exactly like the kind Conrail engaged in here are "unlawful," compromised section 106 compliance, and necessitated corrective action, which the agency pledged to take.¹⁴ The Contract seems to have missed all of this. STB OEA cannot contract away the agency's responsibilities in order to save money or face for Conrail.

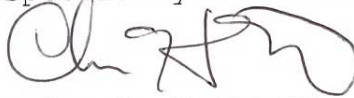
In City et al's view, the lawful way forward is for STB OEA to obtain independent consultants and to undertake a process free from the constraints in the Conrail/STB contract. After appropriate opportunities for public input (the prior opportunities appear tainted), a new cultural resources inventory should be prepared pursuant to contractual guidelines that have at least as much input and oversight from City et al and other "consulting parties" as the existing Contract places in the hands of Conrail. If STB OEA intends to proceed with Conrail's consultants, then City et al lodge a continuing objection to use of those consultants, and to STB's section 106 process as unlawfully limited. City et al again state that no consultant can operate fairly under a contract so constrained in favor of the applicant railroad's approach and positions. City et al also request that STB OEA disclose to City et al and all

¹⁴ Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions, STB Ex Parte No. 678, served April 23, 2008. Admonitions in policy statements like the above are ineffectual unless the agency actually enforces its abandonment authority by voiding transactions that circumvent the Nation's environmental and historic preservation laws and for that and other reasons are inconsistent with the public interest, and with public convenience and necessity.

other consulting parties for examination all documents of STB OEA and Conrail relating to (1) preliminary budgets and "final fixed-price" for all work to date by Conrail's consultant under the Contract and (2) conflicts of interest.

Certificate of service. By my signature below, I certify service of this letter and attachment by USPS First Class or equivalent on the date of this letter on all parties on the service list employed for City et al's June 19, 2017 Reply to the CRI Report in AB 167-1189X.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Ch Montange', with a stylized flourish at the end.

Charles H. Montange
Counsel for City of Jersey City,
Rails to Trails Conservancy,
and Pennsylvania Railroad Harsimus
Stem Embankment Preservation
Coalition

Encls. Exhibits A and B

cc. Service list (w/encls.)

Exhibit A

Statement of Work
Support for Cultural Resources Inventory and Consultation in the Surface
Transportation Board's Case--
Docket No. AB 167 (Sub-No. 1189X)
Consolidated Rail Corporation—Abandonment Exemption in Hudson County,
Jersey City, New Jersey

I. Background

The Surface Transportation Board (Board) has regulatory jurisdiction over railroad abandonments. Abandonment proceedings are subject to environmental and historic review processes under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). In Docket No. AB 167-1189X—in which Conrail seeks to abandon a 1.36-mile segment of rail line known as the Harsimus Branch in Hudson Co., New Jersey—the Board's Office of Environmental Analysis (OEA) is responsible for completion of environmental compliance requirements. Because of the unique facts of this proceeding, OEA's environmental compliance includes evaluation of the effects of the abandonment on the historic Harsimus Branch embankment, as well as potentially-affected neighboring historic properties. The work outlined in this Statement of Work (SOW) supports the OEA's environmental review process, focusing on completion of requirements under Section 106 of the NHPA, codified at 36 C.F.R. 800.

As noted above, the Harsimus Branch abandonment presents unique circumstances. In 2005, Conrail sold part of the Harsimus Branch property (the "embankments") to a private developer without seeking abandonment authority. Thereafter, certain parties petitioned the Board for a determination that the Harsimus Branch was part of a line of railroad subject to the Board's abandonment authority. The Board completed an Environmental Assessment (EA) on March 23, 2009, which it issued for public review and comment. OEA received more than 2000 public comments on the EA. Before OEA was able to complete the environmental and historic reviews, however, court proceedings regarding the case resulted in a Board-ordered abeyance on April 20, 2010. Based on various Special Court and appellate court rulings in 2014, the case is now active before the Board again. Controversy and litigation have characterized the protracted proceedings concerning the proposed abandonment and the private developer's plans for redevelopment of the right-of-way.

The Harsimus Branch abandonment involves a section of rail line that once connected a main line of the Pennsylvania Railroad to the Harsimus Cove on the Hudson River. Stone wall embankments are the primary surviving elements of a short section of elevated rail line that extended from the Bergen Cut to Harsimus Cove. The embankments are listed on the New Jersey Register of Historic Places (Pennsylvania Railroad Harsimus Branch Embankment [ID#131]), have been determined to be eligible for the National

Register of Historic Places, and have been designated as a Municipal Landmark by the City of Jersey City. They are embedded in an urban setting adjacent to or near other historic properties as well.

In accordance with 36 C.F.R. 800, an Area of Potential Effects (APE) report was prepared for the Harsimus Branch abandonment (Hayden 2008).¹ The APE includes an archaeological area and a broader architectural area intended to address the potential effects on historic properties of the developer's post-abandonment redevelopment of the property for residential housing. Direct effects are possible where the surviving embankment itself may be demolished or significantly altered. Indirect effects are anticipated where post-abandonment construction within the right-of-way may intrude upon the view shed of historic properties in or near the right-of-way. In determining the effects of abandonment, the Board will consider the likelihood of the developer's redevelopment plans or the City of Jersey City's plans to develop the embankments for park and trail use coming to fruition.

II. Objective

The environmental review process for the Harsimus project includes several components. Subject to a fixed cost and its approval of the work in stages, Conrail has agreed to pay a qualified contractor to perform the tasks in Section III below related primarily to the Section 106 process and one task derived from the 2009 EA prepared by OEA. In general, the tasks support three of the four steps in the Section 106 process (the first step having been conducted by OEA): *consultation* with interested parties; *identification* of historic properties; and *analysis of effects* to historic properties. The tasks are divided in four stages. Conrail will determine the preliminary budget for each stage in consultation with the contractor and OEA. Immediately prior to the commencement of work on each stage, in consultation with the contractor and OEA, Conrail will determine the final fixed-price amount to be paid for each stage and commit to pay that amount to the contractor as deliverables are accomplished in accordance with the Invoicing Schedule in Section V below. Prior to any stage, if the Board or the courts make rulings that may affect the scope of work, OEA, the contractor, and Conrail will consult regarding amending the remaining tasks.

III. Stages and Tasks

Stage 1

- A. Kick-Off Meeting.** Upon receipt of notice to proceed, the contractor will schedule a kick-off meeting with OEA at the Board's offices in Washington D.C. The tasks, work schedule and deliverables will be discussed during this meeting. Subsequent communication between OEA will be accomplished primarily through telephone and email correspondence, though additional meetings may be required.
- B. Analysis of Public Comments.** The contractor shall analyze public comments (n = 2000+) submitted in response to the Board's 2009 EA. Analysis will include a quantified categorization of comments by a list of topics encompassing the variation of ideas, concerns, questions and

¹ Hayden, Phil (2008). Area of Potential Effects Report and Proposed Methodology for Section 106 Consultation, Conrail Harsimus Branch Abandonment (STB Docket No. AB 167 [Sub-No. 1189]), City of Jersey City, Hudson County, New Jersey. Richard Grubb and Associates, Inc.

suggestions therein. The contractor shall review the comments, develop a list of topics to be addressed and submit this to OEA prior to conducting the analysis. A description of the topics and major concerns represented in each area will be provided. Methods and results will be included in a brief letter report to OEA. Copies of data and tables in spreadsheet format will also be provided to OEA.

- a. Public Analysis Report submittal schedule.
 - i. Within 60 days of the kick-off meeting, a draft report will be submitted to the OEA for review and comment. Two hard copies and one digital copy will be provided.
 - ii. OEA will return comments within 30 days.
 - iii. Within 30 days of receiving comments, the contractor will submit two printed copies and digital version of a Final Report.

Stage 2

C. Cultural Resources Inventory

- a. Cultural Resources Survey and Evaluation Requirements.
 - i. Update the inventory of known historic properties within the APE as listed in Hayden (2008). Confirm the presence of previously recorded historic properties, check for demolition of previously recorded properties and check HPO files for newly identified properties.
 - ii. Evaluate the Harsimus Branch Embankment, known to be National Register-eligible, as a potential contributing element to immediately adjacent historic districts, including the Hamilton Park Historic District and the Harsimus Cove Historic District. Fulfill *New Jersey Guidelines for Architectural Survey* for this effort, leveraging existing documentation for the previously defined districts and embankment.
 - iii. Conduct a streetscape, reconnaissance survey of unevaluated properties greater than 50 years of age within the Architecture APE. Hayden (2008) notes the presence of unsurveyed commercial, retail, industrial buildings as well as parks, monuments, residential buildings and railroad components. Hayden specifically lists the properties listed below as candidates for survey. Survey will be cost-efficient with limited documentation and reporting.
 - 1. New Jersey Junction Railroad/National Docks & New Jersey Connecting Railway Connecting Railway Company
 - 2. Jersey City Cemetery
 - 3. Mary Benson Memorial
 - 4. V.F.W. Monument at Mary Benson Park
 - 5. Holy Rosary Roman Catholic Church and Parish House & school buildings
 - 6. Fifth Ward Savings Bank
 - 7. St. Anthony's School
 - 8. Brick flats on Manila Avenue & Marin Boulevard

- iv. Archaeological reconnaissance (archival, cartographic, walkover) survey of potential for archaeological deposits within the immediate right-of-way. A brief summary of the results of this survey will be included in a report.

Effects Analysis. Evaluate the potential for direct and indirect effects to historic properties in the APE. Include in this analysis the potential for effects to result from 1) the City of Jersey City's plans to develop the embankments for park and trail use, 2) development of the embankments for residential or other use. Subject to availability, the contractor will utilize specific plans from the City and the current property owner in this analysis. Conduct a basic level of modeling to determine which architectural properties that are National Register eligible and that may be eligible based on a streetscape survey could be visually affected from the proposed development.

D. Inventory Report. Complete a brief report that summarizes the evaluation of the Embankment's relationship to the neighboring districts, the reconnaissance survey results for architecture and archaeology, and the review of the potential for effects from the abandonment. The report shall include:

- i. Brief summary of project background and objectives.
 - ii. Brief summary and illustration of the APE via maps (based on Hayden [2008]).
 - iii. Brief summary of methods employed in survey and evaluations.
 - iv. Summary of the evaluation of the Harsimus Branch Embankment as a contributing element to neighboring districts.
 - v. Summary of streetscape reconnaissance survey of previously unsurveyed properties.
 - vi. Completion of minimal reconnaissance requirements of the state of New Jersey for streetscape survey, i.e. basic forms for individual properties previously unsurveyed.
 - vii. Recommendations of National Register of Historic Places eligibility for previously unsurveyed properties.
 - viii. Detailed summary of direct and indirect effects to historic properties likely to result from the proposed abandonment.
 - ix. Bibliography
- b. Inventory Report submittal schedule.
- i. Within 120 days of notice to proceed, a draft report will be submitted to the OEA for review and comment. Three hard copies and one digital copy will be provided.
 - ii. OEA will return comments within 30 days.
 - iii. Within 30 days of receiving comments, the contractor will submit a Revised Draft Report that OEA will utilize for consultation with the SHPO, ACHP and other parties. Ten hard copies and one digital copy will be provided.
 - iv. OEA will return comments on the Revised Draft Report within 30 days.
 - v. Ten printed copies of the Final report and a digital version will be provided to OEA within 30 days of receipt of comments.

Stage 3

E. Public Meeting. Within 45 days of notice to proceed, the contractor will support OEA by organizing and facilitating a public meeting to share information regarding the Section 106 process. Inventory findings and the results of a determination of effect analysis will be shared. Additionally, if an adverse effect determination is made, information on the process to resolve adverse effect in accordance with 36 CFR 800 will be provided. To support this meeting effort, the contractor shall:

- a. Publish a legal notice announcing the availability of the inventory report and a public meeting date.
- b. Prepare presentation materials (hand-outs, posters, etc).
- c. Secure facility for meeting (ensure appropriate meeting space, audio-visual equipment, and court recorder)
- d. Provide staff at meeting (2-3 individuals with subject matter expertise) to set up, answer questions, take notes, and pack materials at meeting conclusion

F. Public Meeting Report. Provide brief summary of meeting, including summary of comments received

- a. Public Analysis Report submittal schedule.
 - i. Within 30 days of the public meeting, a draft report will be submitted to the OEA for review and comment. Two hard copies and one digital copy will be provided.
 - ii. OEA will return comments within 30 days.
 - iii. Within 30 days of receiving comments, the contractor will submit ten printed copies and digital version of a Final Report.

Stage 4

G. Mitigation Plan. If an adverse effect determination is made by the OEA, upon receipt of notice to proceed, the contractor will assist the OEA with the preparation of a Mitigation Plan based on input from consulting parties and under the direction of the OEA. Preparation of the plan may require meetings with the SHPO and other consulting parties. The plan will reflect input from consulting parties and the public.

- c. Mitigation Plan submittal schedule.
 - i. Within 60 days of the Public Meeting, a draft plan will be submitted to the OEA for review and comment. Two hard copies and one digital copy will be provided.
 - ii. OEA will consult with the SHPO and other parties and return comments within 60-90 days.
 - iii. Within 30 days of receiving comments, the contractor will submit two printed copies and digital version of a Final Report.

IV. Performance Schedule

Work performed under this contract shall be conducted by task. As provided in Part III above, some tasks will be conducted concurrently with other tasks. Stages 1 and 2 will overlap, as will Stages 3 and (if necessary) Stage 4. The schedule below identifies targeted milestones for each task. Modifications to the schedule may be required and will be approved as necessary.

- A. Kick-Off Meeting – within 30 days of notice to proceed with Stage 1
- B. Public Comment Analysis—final report within 150 days of notice to proceed with Stage 1
- C. Draft Inventory Report – within 120 days of notice to proceed with Stage 2
- D. Final Inventory Report – within 240 days of notice to proceed with Stage 2
- E. Public Meeting – within 45 days of notice to proceed with Stage 3
- F. Summary Report of Public Meeting—final report within 135 days of notice to proceed with Stage 3
- G. Mitigation Plan—final plan within 180 days of notice to proceed with Stage 4

V. Invoicing Schedule

- A. Task A
 - 1. 100% of contracted amount due at completion
- B. Task B
 - 1. 60% of contracted amount due at draft report submittal
 - 2. 100% of contracted amount due at final report submittal
- C. Task C, D
 - 1. 60% of contracted amount due at draft report submittal
 - 2. 100% of contracted amount due at final report submittal
- D. Task E, F
 - 1. 60% of contracted amount due at draft report submittal
 - 2. 100% of contracted amount due at final report submittal
- E. Task G
 - 1. 60% of contracted amount due at draft report submittal
 - 2. 100% of contracted amount due at final report submittal

VI. Summary of Deliverables

- A. Analysis of public comments from 2009 EA (two hard copies; 1 digital copy in Microsoft Word format and 1 digital copy in Adobe Acrobat format)
- B. Inventory Report prepared in accordance with III.D
- C. Public Meeting Report ((two hard copies; 1 digital copy in Microsoft Word format and 1 digital copy in Adobe Acrobat format)
- D. Mitigation Plan
- E. GIS shapefiles of APE, site locations.
- F. Digital copies of photographs from cultural resources inventory

VII. Modification

The performance requirements in this Statement of Work may be supplemented, amended, or modified as Section 106 consultation and environmental review for this case proceeds. Any modification will be by mutual agreement of the parties in accordance with the terms of the MOU. Modifications will only be binding when in writing and signed by all parties.

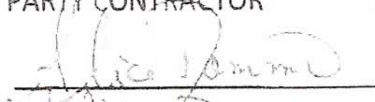
APPLICANT

By: 
ROBERT M. JENKINS, III

Title: Senior Counsel, Mayr Brown LLP

Date: 7/24/15

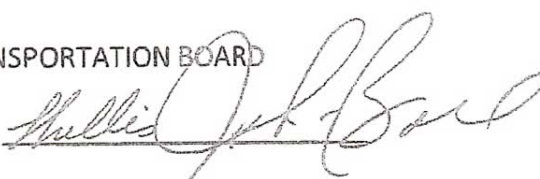
THIRD PARTY CONTRACTOR

By: 
Alice Damm

Title: CEO/President

Date: 7/28/15

SURFACE TRANSPORTATION BOARD

By: 

Title: Deputy-Director

Date: 7/27/15

Exhibit B

Advisory Council On Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

MEMORANDUM

July 6, 2001

To: Federal Preservation Officers
Tribal Historic Preservation Officers
State Historic Preservation Officers
Indian Tribes

From: Executive Director

Subject: Fees in the Section 106 Review Process

There has been a growing concern about the practice of certain parties charging fees from Federal agencies or their applicants for their participation in the Section 106 process. In particular, the issue has emerged in the context of Indian tribes and their participation in the process. While the question of fees has many dimensions that will require more detailed attention over the long term, this memorandum is intended to provide some immediate guidance on the current tribal issue.

Background. The concern that has arisen centers around requests by Indian tribes to be compensated for activities connected to the Section 106 process. To address the issue, there are certain fundamental points that need to be acknowledged:

- Neither Section 106, 16 U.S.C. § 470f, nor the Council's regulations, 36 C.F.R. Part 800, require a Federal agency to engage anyone to provide data or information for Section 106 compliance. While the agency does have an obligation to obtain necessary information to fulfill its legal duties, it has full discretion regarding the means used to meet this obligation.
- Neither Section 106 nor the Council's regulations impose a duty on an applicant for Federal assistance or approval to develop information and analyses for Section 106 compliance or to engage contractors to do so. If a Federal agency has the authority to impose the development of such information and analyses on the applicant and chooses to do so, the legal basis for that obligation on the applicant lies in the Federal agency's authorities and does not derive from the Council's regulations.
- The National Historic Preservation Act (NHPA) does obligate a Federal agency to consult

with Indian tribes that attach religious and cultural significance to historic properties when the agency's undertakings will affect such properties. The Council's regulations specify how that consultation takes place.

- The NHPA and the Council's regulations authorize Federal agencies to contract with others, including Indian tribes, to provide information for complying with Section 106, and encourage agencies to actively involve Indian tribes in the Section 106 review process. However, neither authority requires Federal agencies to pay for any aspect of tribal nor other consulting party participation in the Section 106 process.

The role of Indian tribes in the Section 106 process. An underlying policy of the NHPA and the Council's regulations is that historic resources of significance to Indian tribes deserve full consideration in the Federal planning process and that Indian tribes possess a special perspective on and relation to these resources. This policy finds expression in provisions of the Section 106 regulation that encourage agencies, when identifying historic properties, to seek information from Indian tribes on those historic properties that have religious and cultural significance to them and that establish a consultative role for Indian tribes, both on and off their tribal lands, which provides them an opportunity to make their views known throughout the Section 106 process. These two tribal roles are not treated the same when it comes to compensation, although the line between them may not be sharp.

Facilitating tribal participation. At the outset, it must be stressed that the Council encourages Federal agencies to take the steps necessary to facilitate tribal participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and times that are convenient for Indian tribes to paying travel expenses for participating tribal representatives. Indeed, Federal agencies are strongly encouraged to use resources, consistent with their authorities, to overcome financial impediments that Indian tribes may have to effective participation in the Section 106 process. Likewise, applicants for Federal assistance that assume responsibilities for carrying out Section 106 functions are urged to do the same. However, this encouragement by the Council is not a legal mandate nor does any portion of the NHPA or the Council's regulations require an agency or an applicant to pay for any form of tribal involvement.

Tribal consultation. Throughout the Section 106 process, the regulations impose on Federal agencies (and applicants who assume an agency's duties) an obligation to consult with Tribal Historic Preservation Officers and Indian tribes. These occasions range from the initial scoping of Section 800.3, through the identification, evaluation and effect assessment of Sections 800.4 and 800.5, to the resolution of adverse effects in Section 800.6. The purpose of this role is to give the Indian tribe an opportunity to get its interests and concerns before the agency. In these situations, the Federal agency obligation is to seek and consider the views of participating Indian tribes. This means it must make an effort to solicit a tribe's opinions and factor them into the decisions that the agency must make on the project. The consultation requirement thus gives an Indian tribe the ability to advocate the outcome it would like to see the agency ultimately take in the final project decision.

When the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency's

legal obligation to consult with a tribe under a specific provision of the Council's regulations, the agency or applicant is not required to pay the tribe for providing its views. If the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.

When payment is appropriate. When, during the identification phase of the Section 106 process, an agency or applicant seeks to identify historic properties that may be significant to an Indian tribe, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe. In doing so, the agency essentially asks the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor. The agency or applicant is free to refuse, but retains the obligation for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on the historic properties. Ultimately, the Federal agency must be able to demonstrate that it made the "reasonable and good faith effort" that Section 800.4(b) of the Section 106 regulations requires.

Summary. While the Council's regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation. If an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward. If, on the other hand, the agency or applicant seeks information or documentation that it would normally obtain from a professional contractor or consultant, they should expect to pay for the work product. When the line between the two is unclear, the agency or applicant is encouraged to act in a manner that facilitates, rather than impedes, effective tribal participation in the Section 106 process.



John M. Fowler