

**MEMORANDUM OF AGREEMENT
AMONG
THE FEDERAL RAILROAD ADMINISTRATION,
THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
THE NEW JERSEY TRANSIT CORPORATION (NJ TRANSIT)
AND
THE NEW JERSEY HISTORIC PRESERVATION OFFICER
REGARDING THE
PORTAL BRIDGE CAPACITY ENHANCEMENT PROJECT
IN HUDSON COUNTY, NEW JERSEY**

WHEREAS, the National Railroad Passenger Corporation (“Amtrak”) and the New Jersey Transit Corporation (“NJ TRANSIT”), the project sponsors, are proposing capacity enhancements to the Hackensack River crossing of the Northeast Corridor currently consisting of the Portal Bridge (the “Project”);

WHEREAS, the project sponsors are seeking approvals from the Federal Railroad Administration (“FRA”), and accordingly, FRA is the Project’s lead federal agency pursuant to the National Environmental Policy Act (NEPA, codified at 42 USC 4321 et seq.) and is the federal agency responsible for compliance with Section 106 of the National Historic Preservation Act (codified at 16 USC § 470f, and herein “Section 106”);

WHEREAS, FRA, Amtrak, and NJ TRANSIT, along with the New Jersey Historic Preservation Office (“NJHPO”), as the result of a consultative process in accordance with Section 106, have determined that it is appropriate to enter into this Memorandum of Agreement or “Agreement”, pursuant to Section 800.6 of the regulations implementing Section 106 (codified at 36 CFR Part 800, and herein the “Section 106 Regulations”), which will govern the implementation of the Project and satisfy FRA’s compliance with Section 106;

WHEREAS, FRA has coordinated its compliance with Section 106 and NEPA, pursuant to 36 CFR § 800.8 through its preparation of an Environmental Impact Statement (“EIS”) for the Project;

WHEREAS, through the process conducted in preparing the EIS, FRA has determined that the Project will have an effect on properties qualifying for protection under Section 106, consisting of certain properties listed or eligible for listing on the State and National Registers of Historic Places (“Historic Properties”);

WHEREAS, pursuant to the Section 106 Regulations, FRA and NJ TRANSIT, in consultation with NJHPO, identified the Project’s areas of potential effect (“APEs”) for Historic Properties and determined that the APEs are the areas where potential effects on Historic Properties caused by the Project may occur;

WHEREAS, as documented in the EIS, FRA, and NJ TRANSIT, in consultation with NJHPO, identified seven Historic Properties in the Project’s APEs that qualify for Section 106 protection. These Historic Properties are identified in Table 5.2-1 of the EIS, “Historic Properties within Study Area.” Additionally, Figure 5.2-3 of the EIS depicts the approximate locations of these Built Properties. These figures are annexed hereto as Exhibit A;

WHEREAS, as documented by the EIS, FRA, and NJ TRANSIT, in consultation with NJHPO, identified one area with the potential to contain Archaeological Properties in the Project’s archaeological APE (“archaeologically sensitive area”): the State/National Register-eligible Historic Cemeteries of Hudson

County (a.k.a. Hudson County Potter's Field Burial Ground [New Jersey State Museum #28-Hd-30, LBG]) archaeological site, which has the potential to contain human remains. This location is shown on Figure 5.2-2 of the EIS, annexed hereto as Exhibit B;

WHEREAS, as documented demonstrated in the EIS, the Project is expected to have an adverse effect on two Historic Properties, the State Register-listed and National Register-eligible Portal Bridge, and the State/National Register-eligible Pennsylvania Railroad Historic District. A mitigation plan for the Portal Bridge and the Pennsylvania Railroad Historic District to partially mitigate adverse effects is included in this Memorandum of Agreement.

WHEREAS, the EIS demonstrated that the Project construction could have additional potential adverse effects on certain Historic Properties primarily due to the proximity of the resources to proposed construction activities. Historic Properties that the EIS identified as being in proximity to project construction to require protection under the Construction Protection Plan include Substation 4 (State/National Register of Historic Places [S/NR]-eligible) and the Jersey City Waterworks Pipeline (S/NR-eligible).

WHEREAS, FRA has made a reasonable and good faith effort to identify and contact by letter the appropriate Native American tribes and groups (the "Tribes") that could attach religious or cultural significance to sites within the APEs upon which the Project could have an effect;

NOW, THEREFORE, FRA, Amtrak, NJ TRANSIT, and NJHPO agree that the Project shall be implemented in accordance with the following stipulations to ensure that potential effects on Historic Properties are taken into account.

DRAFT

STIPULATIONS

FRA, AMTRAK, NJ TRANSIT, AND NJHPO AGREE THAT THE FOLLOWING STEPS WILL BE UNDERTAKEN IN CONNECTION WITH THE PROJECT AND THAT FRA WILL INCLUDE THE OBLIGATIONS SET FORTH IN THIS AGREEMENT AS PART OF ITS RECORD OF DECISION AND AS A CONDITION OF FRA'S APPROVAL OF ANY GRANT ISSUED FOR CONSTRUCTION OF THE PROJECT, TO ENSURE THAT THESE MEASURES ARE IMPLEMENTED AS PART OF THE COMPLIANCE WITH THE SECTION 106 PROCESS AND THE SUBSEQUENT PLANNING, DESIGN, AND CONSTRUCTION OF ANY APPROVED PROJECT ALTERNATIVE.

I. MITIGATION OF UNAVOIDABLE ADVERSE EFFECTS

Mitigation for potential adverse effects on the Portal Bridge (SR-listed; NR-eligible) and the Pennsylvania Railroad Historic District (S/NR-eligible) would be developed by Amtrak and NJ TRANSIT in consultation with FRA and NJHPO and may include one or more of the following:

- A. Historic American Engineering Record (HAER) documentation of Portal Bridge;
- B. Archival photographic documentation of the Pennsylvania Railroad Historic District;
- C. Salvage of elements of Portal Bridge and/or Pennsylvania Railroad Historic District, such as trusses, tracks, etc.;
- D. Development of an interpretive exhibit in a park, greenway, or public space that would present the history of the Pennsylvania Railroad and Portal Bridge and possibly include salvaged elements of the resources, signage, etc.

II. CONSTRUCTION PROTECTION PLAN

To avoid Project-related construction damage to any Historic Property, Amtrak and NJ TRANSIT, in consultation with FRA and NJHPO, will develop a Construction Protection Plan for Historic Properties. The Construction Protection Plan, developed prior to construction of the Project, would set forth the specific measures to be used, and specifications that would be applied, to protect Historic Properties during the construction period. Amtrak and NJ TRANSIT shall ensure that Historic Properties that could be adversely affected by the Project construction will be included in a Construction Protection Plan, and Amtrak and NJ TRANSIT shall implement such plan as appropriate.

III. ADDITIONAL EVALUATION FOR HISTORIC CEMETERIES OF HUDSON COUNTY AREA OF ARCHAEOLOGICAL SENSITIVITY**A. Further Impact Analyses**

A number of previous archaeological surveys have been carried out in sections of the Historic Cemeteries of Hudson County, including the Potter's Field Disinterment/Re-interment Project (Louis Berger Group, 2005) and the Access to the Region's Core (ARC) EIS; Phase 1A Archaeological Documentary Study (TransitLink Consultants, 2005). Ground-Penetrating Radar studies were conducted in association with the ARC project (Geo-Graf Geophysical Investigations, 2007) that identified anomalies (potential burial sites) in a water-inundated section of the archaeological APE. Based on the conclusions of these previous archaeological surveys, as

project engineering proceeds, the vertical and horizontal extents of proposed project construction will be compared to archaeologically sensitive areas to determine potential Project effects.

B. Field Testing

If further impact analyses described in II.A.1 determine that the Project may affect areas sensitive for archaeological resources associated with the Historic Cemeteries of Hudson County, Amtrak and NJ TRANSIT, in consultation with FRA and NJHPO, shall undertake field testing to identify the presence or absence of such resources:

1. Prior to commencing any field testing, Amtrak and NJ TRANSIT shall submit a Field Testing Plan outlining the proposed methodology for NJHPO's concurrence. In areas identified as potentially sensitive for human remains, field testing to determine presence or absence of burials will proceed in a sensitive manner, in accordance with requirements for testing in areas potentially sensitive for human remains to be established in the Field Testing Plan, to be completed by Amtrak and NJ TRANSIT in consultation with FRA and NJHPO. Mechanical equipment would be used in field testing only to remove the overburden and to expose soils to a point where grave shafts would be discernable. If grave shafts are discernable, excavation of a sample grave shaft would proceed by hand in order to confirm the presence of human remains. If human remains are found, they would be left in situ and the shaft would be refilled.
2. If archaeological testing is planned in inundated areas requiring dewatering, NJ TRANSIT and Amtrak would obtain a permit from the New Jersey Department of Environmental Protection (NJDEP) and other appropriate agencies.
3. Subsurface work will only be undertaken in areas potentially sensitive for human remains following the prior notification of and opportunity for consultation with any interested lineal descendants of the deceased buried in the Historic Cemeteries of Hudson County (if any such descendants can be reasonably identified and located) as outlined below in III.C.
4. A physical anthropologist/forensic archaeologist shall either be on-call or on-site, as determined in the Field Testing Plan developed in consultation with NJHPO, in the event that skeletal material is encountered during archaeological testing or Project construction in or adjacent to the archaeologically sensitive area;
5. Subsequent to field testing in areas sensitive for human remains, Amtrak and NJ TRANSIT shall provide a technical report to FRA and NJHPO in which one of the following conclusions is reached:
 - (i) The site does not appear to contain materials relating to the Historic Cemeteries of Hudson County; in which case no further action is required.
 - (ii) The site does appear to contain materials relating to the Historic Cemeteries of Hudson County, in which case the site will be treated in accordance with II.A.3 below.
6. NJHPO's review and comment on such reports shall be governed by the process set forth in III.A-B.

C. Disinterment/Re-interment of Human Remains

If field testing determines that human remains exist in areas that will be impacted by the Project, Amtrak and NJ TRANSIT would implement a Disinterment/Re-interment Plan in coordination with FRA, NJHPO, and any interested lineal descendants of the deceased buried in the Historic Cemeteries of Hudson County, as set forth below.

1. Amtrak and NJ TRANSIT would prepare a Disinterment/Re-interment Plan in consultation with FRA, NJHPO, and any interested lineal descendants of the deceased buried in Historic Cemeteries of Hudson County. The Disinterment/Re-interment Plan would be prepared in accordance with guidance promulgated by the ACHP (*Protection of Historic and Cultural Properties* [36 CFR 800]) by an archaeologist that satisfies the qualifications specified in 36 CFR 61, Appendix A. The Disinterment/Re-interment Plan would be developed and implemented so as to avoid and minimize construction delays, and in conformance with the following requirements.
2. Where subsurface work is required, Amtrak and NJ TRANSIT shall make a reasonable and good faith effort, prior to any excavation to disinter remains, to locate and contact any lineal descendants of the deceased buried in the Historic Cemeteries of Hudson County. In the event that interested lineal descendant(s) have been identified and located, Amtrak and NJ TRANSIT shall seek the involvement of the descendants to establish an appropriate protocol outlining appropriate notification procedures and treatment of human remains during disinterment and re-interment.
3. The Historic Cemeteries of Hudson County fall within the jurisdiction of the New Jersey Cemetery Act, Title 8A for the New Jersey Statutes (N.J.S.) (State of New Jersey 2002). The New Jersey Cemetery Board administers the Act, and the New Jersey Attorney General oversees actions and proceedings of the Cemetery Board. Any disinterment and re-interment would also require approval by the Chancery Division of the Superior Court of New Jersey. The landowner of the affected portion of the Historic Cemeteries of Hudson County would have to initiate legal proceedings seeking approval from the Court for any disinterment and re-interment. The Cemetery Board, the State of New Jersey, and interested lineal descendants of the deceased (if applicable) would be defendants in the litigation. A hearing before the Court would be required to approve the Disinterment/Re-interment Plan. Any required legal processes could be carried out in advance of final design, to avoid or minimize schedule delays.
4. A physical anthropologist/forensic archaeologist shall be on-site during disinterment.
5. Once Amtrak and NJ TRANSIT, in consultation with FRA and NJHPO, determine that all remains have been properly exhumed, construction may proceed.
6. Subsequent to disinterment and re-interment, Amtrak and NJ TRANSIT shall provide a technical report to FRA and NJHPO. FRA and NJHPO's review and comment on such submissions shall be governed by the process set forth in III.A-B.

D. Mitigation Data Recovery, Curation, and Public Interpretation

1. Amtrak, NJ TRANSIT, and FRA, in consultation with NJHPO, shall consider measures, such as design modification, for avoidance of the Historic Cemeteries of Hudson County area of archaeological sensitivity.

2. In advance of any mitigation or data recovery efforts undertaken for the Historic Cemeteries of Hudson County, Amtrak and NJ TRANSIT, in consultation with NJHPO, will develop in accordance with 36 CFR Part 79, an Analysis and Curation of Material and Records Plan for any archaeological excavations. NJHPO's review and comment on such plans shall be governed by the process set forth in III.A-B. Amtrak and NJ TRANSIT shall be responsible for the implementation of such a plan, as appropriate.
3. During and/or following mitigation or data recovery efforts, Amtrak and NJ TRANSIT will make a reasonable and good faith effort to provide interpretative materials to the public. Such materials could take the form of a brochure, information kiosk, or web page to provide information on the data recovery program and any archaeological resources uncovered as a result of that program.

E. Unanticipated Discoveries Plan

Amtrak and NJ TRANSIT in consultation with FRA and NJHPO shall develop and implement an Unanticipated Discoveries Plan for human and non-human archaeological resources in the event that any unanticipated archaeological resources are encountered during construction of the Project.

F. Construction and Archaeology Phasing Plan

Amtrak and NJ TRANSIT will take all practical steps to initiate and complete archaeological field analysis and data recovery, as necessary (depending on site access and testing feasibility), prior to construction activities in the vicinity of affected resources. Amtrak and NJ TRANSIT in consultation with NJHPO, will develop a plan to appropriately phase the archaeological field analysis and data recovery with construction activities. NJHPO's review and comment on such plans shall be governed by the process set forth in III.A-B.

G. Professional Standards

Amtrak and NJ TRANSIT shall ensure that all archaeological research, testing, analysis, and plans conducted pursuant to this Agreement are carried out by or under the direct supervision of a person or persons meeting at a minimum the Secretary of Interior's Professional Qualifications Standards. Amtrak and NJ TRANSIT shall ensure that all final archaeological reports are consistent with the NJHPO's *Guidelines for Preparing Cultural Resources Management Archaeological Reports Submitted to the Historic Preservation Office* and to the Department of the Interior's *Format Standards for Final Reports of Data Recovery Program*.

IV. IDENTIFICATION OF ADDITIONAL BUILT PROPERTIES AND ASSESSMENT OF PROJECT EFFECTS

- A. If additional Historic Properties not previously identified as Historic Properties in the EIS are identified in the Project's APEs during Preliminary Engineering, Final Design, or Construction of the Project, the potential effects on Historic Properties will be assessed prior to construction by FRA, Amtrak, and NJ TRANSIT, in consultation with NJHPO, in accordance with the Section 106 process.
- B. If construction activities or Project plans change such that the Project may newly affect an archaeologically sensitive area, Amtrak, NJ TRANSIT, and FRA shall notify NJHPO and invite NJHPO to participate in consultation to determine the appropriate course of action.

V. DOCUMENT REVIEW

NJHPO shall provide comments regarding any future plans and/or amendments to such plans as promptly as possible but not to exceed 30 calendar days of its receipt of such plans or reports. If NJHPO does not submit comments in writing to FRA, Amtrak, and NJ TRANSIT within 30 calendar days of receipt of any such submissions, it is understood that NJHPO has concurred with the proposed plans. If NJHPO objects in writing within 30 calendar days of its receipt of any submissions, then FRA, Amtrak, NJ TRANSIT, and NJHPO shall consult expeditiously in an effort to resolve the objection. If FRA, Amtrak, and NJ TRANSIT cannot resolve NJHPO's objection and if further consultation with NJHPO is deemed unproductive by any party, then the parties shall adhere to the dispute resolution procedures detailed under VII. below.

VI. REPORTING AND OVERSIGHT

- A. Final Reports. Amtrak and NJ TRANSIT shall ensure that all final historic reports and all final archaeological resources reports resulting from this Agreement shall be provided to NJHPO and FRA.
- B. Annual Reports. Commencing one year from the date this Agreement is fully executed, and every year thereafter until the Project is completed or terminated, annual reports will be submitted by Amtrak and NJ TRANSIT to NJHPO and FRA, providing information concerning the implementation of this Agreement and the effect of the Project on Historic Properties.
- C. Annual Review of the Agreement. The signatories to this Agreement, or their successors, will review the implementation of this Agreement and determine whether revisions are needed at the time the annual reports are submitted.
- D. Revisions to the Agreement. After review of the annual reports, if FRA, Amtrak, NJ TRANSIT, and NJHPO, or their successors in interest all agree that revisions to this Agreement are necessary, such revisions will be considered and implemented pursuant to a consultative process involving all the parties to this Agreement.

VII. DISPUTE RESOLUTION

In the event NJHPO objects in writing to any plan or report proposed pursuant to this Agreement within 30 calendar days of its receipt of such plan or report, FRA, Amtrak, and NJ TRANSIT shall meet with NJHPO to resolve the objection. Following such further consultation, FRA shall determine as promptly as possible whether such objection has been satisfactorily resolved. If FRA determines that the objection has not been satisfactorily resolved, within 15 calendar days of its determination in this regard, FRA shall forward all documentation relevant to the dispute, including FRA's proposed resolution of the dispute, to ACHP. ACHP will provide FRA with recommendations or comments within 30 calendar days after receipt of all pertinent documentation. FRA will take such recommendations or comments into account in reaching a final decision regarding the dispute. In the event ACHP fails to respond to FRA's request for recommendations or comments within 30 calendar days of receiving all pertinent documents, FRA may resolve the dispute.

VIII. OTHER

- A. Notwithstanding any other provision in this Agreement, any party may propose an amendment hereto whereupon the parties will consult to consider such amendments.
- B. For purposes of notices and consulting pursuant to this Agreement, the following addresses and contact information should be used for the following agencies:

AMTRAK

Alex Kummant
President, Amtrak
60 Massachusetts Avenue NE,
Washington, DC 20002

NJ TRANSIT

Richard R. Sarles, Sr.
Executive Director, NJ TRANSIT
One Penn Plaza East,
Newark, NJ 07105

FRA

Mark Yachmetz
Associate Administrator for Railroad Development
US Department of Transportation
Federal Railroad Administration
Office of Railroad Development
1200 New Jersey Ave SE, MS-20
Washington, DC 20590
Tel.: 202-493-6381
Fax: 202-668-6330

NJHPO

Ms. Dorothy Guzzo
Deputy State Historic Preservation Officer
New Jersey Historic Preservation Office
501 East State Street
P.O. Box 404
Trenton, NJ 08625
Tel.: 609-984-0176
Fax: 609-984-0578

- C. This Agreement shall take effect on the date it is signed by the last signatory and will remain in effect until the stipulations set forth herein have been met.

EXECUTION AND IMPLEMENTATION OF THIS MEMORANDUM OF AGREEMENT EVIDENCES THAT FRA HAS SATISFIED ITS SECTION 106 RESPONSIBILITIES FOR ALL INDIVIDUAL UNDERTAKINGS OF THE PROJECT.

DRAFT

**APPROVAL AND SIGNATURE PAGE FOR
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FEDERAL RAILROAD ADMINISTRATION

By: _____ Date: _____

Mark Yachmetz
Associate Administrator for Railroad Development

AMTRAK

By: _____ Date: _____

Alex Kummant, President

NJ TRANSIT

By: _____ Date: _____

Richard R. Sarles, Sr.
Executive Director

NEW JERSEY HISTORIC PRESERVATION OFFICER

By: _____ Date: _____

Dorothy Guzzo
Deputy Commissioner