

August 11, 2010

VIA ELECTRONIC TRANSMISSION

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Re: Peace Bridge Memorandum of Agreement

Dear Mr. Nelson, Mr. Kolb, and Ms. Pierpont:

The National Trust for Historic Preservation strongly objects to the attempt by the Federal Highway Administration (FHWA) and the other signatory agencies to circumvent the consultation process required by Section 106 of the National Historic Preservation Act (NHPA) for the proposed Peace Bridge Expansion project in Buffalo. After more than a year of silence from the FHWA, the agency has apparently abandoned Section 106 consultation altogether, and mailed out a “take-it-or-leave-it” Memorandum of Agreement (MOA) to the consulting parties, without any consultation to “resolve” the adverse effects of the project. This flawed process not only reflects procedural violations of the Section 106 regulations, but has also led to an inadequate and defective MOA.

Based on the deficiencies outlined below, we urge the Advisory Council on Historic Preservation (ACHP) not to sign the MOA, and we urge the FHWA to withdraw the MOA and re-engage the consulting parties in the Section 106 process to resolve the adverse effects through “consultation” to consider “alternatives or modifications to the project that would avoid [and] minimize” its adverse effects, pursuant to the requirements in the Section 106 regulations, 36 C.F.R. § 800.6(a).

As a preliminary matter, we are deeply troubled that the ACHP and the State Historic Preservation Office (SHPO) would implicitly condone the FHWA’s approach to the Section 106 consultation process. This seems to contradict the ACHP’s recent approach in connection with the proposed Cape Wind project in Nantucket Sound. In that contentious and high-profile case, the ACHP and SHPO both worked actively

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to try to push the Minerals Management Service (MMS) to engage in a timely and meaningful Section 106 review and consultation process. That kind of effort is not apparent here. In connection with Cape Wind, when it became clear that the agency was unwilling to consider alternatives and modifications to the project that would reduce its adverse effects on historic and cultural resources, the ACHP's comments unequivocally faulted the agency for the inadequacy of its consultation. See, e.g., Comments of ACHP on Cape Wind Energy project, p.4 (Apr. 2, 2010) (“[W]hen the Section 106 process advanced, it was primarily to develop mitigation measures for the Project’s effects rather than to consider alternatives to the Project site that might avoid adverse effects to historic properties.”)

In this case, if the ACHP were to sign the MOA, the ACHP would create the appearance of condoning with little more than hand-wringing the very violations that it criticized so strenuously when carried out by MMS in connection with the Cape Wind project. While the ACHP's Cape Wind comments were obviously issued in response to an agency that had formally terminated Section 106 consultation, we believe the ACHP should represent an affirmative voice throughout the Section 106 process, insisting on “consultation,” and the consideration of alternatives that would make a project less harmful to historic properties. The ACHP's affirmative support for preservation should not be limited to those occasions when an agency has terminated consultation.

Section 106 cannot sufficiently protect the public interest in preservation of our nation's heritage without diligent oversight of the review process by the ACHP and SHPO as an essential safeguard. This safeguard, as well as a commitment to public transparency and accountability generally, is especially vital in the context of a project as destructive and controversial as the Peace Bridge Expansion Project.

What is especially frustrating about the Peace Bridge project is that the major threat to a significant historic neighborhood is caused by unnecessary components of the plan (the visitor center, duty-free shop, and massive parking garage and surface lots) that are unrelated to the actual purpose and need of the project, and could easily be avoided or dramatically reduced if the agencies made any effort to develop creative solutions and compromises.

#### **1. Procedural Violations of the Section 106 Regulations - Failure to Engage in Consultation Regarding Alternatives and Modifications to the Project to Avoid and Minimize Adverse Effects.**

The timeline for the consultation process clearly demonstrates the FHWA's failure to act consistently with the Section 106 regulations. In late 2008, FHWA issued its draft finding of effect, and gave all consulting parties an opportunity to submit comments on the finding on March 18, 2009. In its May 8, 2009 letter with comments on

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FHWA's finding, the ACHP clearly stated that FHWA needed to "continue with consultation to resolve adverse effects and develop the MOA for the preferred alternative." (Emphasis added.) ACHP further directed that the FHWA "should be prepared to incorporate into the project additional ideas from consulting parties to minimize and mitigate project effects on historic properties, particularly visual impacts." The ACHP's comments have been ignored.

On May 12, 2009, FHWA issued its final "determination of adverse effect." The New York State Department of Transportation (NYSDOT) sent a letter to the consulting parties on May 21, 2009, which notified the parties of the formal finding, provided updated documentation from the review process, asked for comments on several proposed mitigation measures, and clearly stated that the "next steps in the Section 106 process involve consultation . . . to resolve adverse effects . . ." The National Trust and other consulting parties responded with comments, objected to the negligible mitigation measures proposed, and urged the agencies to move forward with consultation. However, the agencies never responded to the comments from the National Trust or other consulting parties, and NYSDOT's May 2009 letter was the last correspondence the consulting parties received from ACHP, FHWA, or NYSDOT regarding the Section 106 process, until suddenly receiving the final MOA in late June 2010—more than a year later.

The FHWA's issuance of a final MOA without any consultation to discuss the "resolution of adverse effects" violates Section 106 of the NHPA. The regulations clearly state that, "[i]f an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6." 36 C.F.R. § 800.5(d)(2) (emphasis added). The agency must "consult with the SHPO/THPO and other consulting parties . . . to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." *Id.* § 800.6(a) (emphasis added). This is the fundamental purpose of consultation once an adverse effect is found.

Here, the FHWA has done nothing to meet its responsibilities to engage in meaningful consultation following notification of its formal adverse effect finding in May 2009. As mentioned above, the NYSDOT did ask for suggestions regarding "mitigation" measures, but the National Trust and other consulting parties objected to the assumption that asking for "mitigation" information was enough to satisfy their consultation responsibilities, and we urged the agency to initiate a broader, open discussion with the consulting parties. See Letter from Roberta Lane, NTHP, to Cleo Jones, NYSDOT at 1 (July 23, 2009). Moreover, we specifically criticized the agency's unwillingness to discuss ways to "avoid" and "minimize" adverse effects, especially the failure to address the most damaging—yet easily avoidable—aspects of the project, which have never been justified as critical components to the purpose and need of the project. We did not receive any response regarding the resolution of the

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adverse effects after our July 23, 2009 letter to NYSDOT, or prior to issuing the final MOA. Nor did the agencies provide any opportunity to engage in consultation.

It is worth reiterating that “consultation” to resolve adverse effects certainly requires an agency to do something more than send a single letter requesting information. Indeed, the concept of consultation is considered the very heart of Section 106 review. See *id.* § 800.1(a). The Section 106 regulations define “consultation” as “the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them regarding matters arising in the section 106 process.” *Id.* § 800.16(f) (emphasis added). The agencies’ approach in this case simply does not satisfy the requirement to engage in consultation regarding ways to avoid and minimize harm to historic properties. In light of this critical procedural violation, we urge the ACHP not to sign the MOA, and the FHWA should withdraw the MOA and re-engage the consulting parties in the Section 106 process.<sup>1</sup>

## **2. Fundamental Flaws in the MOA.**

As a direct result of the procedural failure to engage in consultation, FHWA has produced an MOA that we believe is fundamentally inadequate. Several of these specific deficiencies are summarized below.

### **a. The MOA Fails to Reflect Any Effort to Avoid or Minimize Adverse Effects.**

First, the MOA fails to reflect any efforts to “avoid” or “minimize” adverse effects to historic properties through alternatives or modifications to non-essential components of the project that are unrelated to the project’s purpose and need. Since the Section 106 review process began in late 2007, the consulting parties have reiterated over and over that the agencies must reevaluate the needlessly destructive elements of the proposed alternative, especially the visitor center, duty free shop, and parking garage. Indeed, it is worth noting that the Environmental Protection Agency raised a similar criticism about these elements of the FHWA’s preferred alternative. See EPA Letter to FHWA at 2 (Nov. 29, 2007).<sup>2</sup> The failure to

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<sup>1</sup> Alternatively, if FHWA somehow believes that the Section 106 process has reached an impasse with the consulting parties, then the appropriate recourse is to terminate Section 106 consultation process pursuant to 36 C.F.R. § 800.7. The whole purpose of Section 106 will be subverted if the ACHP allows agencies to circumvent consultation because they would prefer not to deal with consulting parties whose views are strongly held. FHWA’s refusal to consult regarding alternatives or modifications to its desired project alternative is an impermissible approach to completing the Section 106 process.

<sup>2</sup> EPA specifically commented:

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incorporate measures to “avoid” or “minimize” these adverse effects in the MOA underscores the agencies’ unwillingness throughout the Section 106 process to acknowledge and address the most damaging aspects of the project.

The language of the MOA states that FHWA gave the consulting parties “an opportunity to articulate their views on project alternatives . . . and mitigation measures.” MOA at 3 (last “whereas” clause on p.3) (emphasis added). Consultation under the Section 106 regulations requires more than simply “an opportunity to articulate . . . views.” Instead, it is “the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement.” 36 C.F.R. § 800.16(f). At first glance, this “whereas” clause in the MOA suggests that the consulting parties had an opportunity to engage in consultation about “project alternatives” and “mitigation measures.” The reality is that the agencies have been unwilling to confront the distinction between an “opportunity to articulate views,” and the concept of true consultation as expressed in the Section 106 regulations. The result is a one-sided MOA that fails to reflect any consultation regarding options to avoid or minimize harm to historic properties, despite the consulting parties’ consistent requests that FHWA comply with this provision of the Section 106 regulations.

It is important to keep in mind that the FHWA must satisfy (and certainly has not to this point satisfied) the substantive standards of Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303, which is applicable to this project. Section 4(f) requires the FHWA to adopt feasible and prudent alternatives or modifications to the project to avoid “using” historic properties, and the FWHA must demonstrate that it has undertaken “all possible planning to minimize harm” to historic properties. In light of the fact that the FHWA is responsible for complying with this substantive standard in any event, there is no sound reason for the ACHP and SHPO not to insist that the FHWA’s mandatory consideration of alternatives to avoid and minimize harm should be integrated into the Section 106 agreement.

**b. The Mitigation Measures Are Not Adequate in Light of the Magnitude and Avoidability of the Harm.**

Aside from the failure to examine alternatives to the non-essential elements of the project that would avoid and minimize harm, the MOA’s identified “mitigation”

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The preferred alternative also includes a visitor center, duty free shop and a 477-space parking garage. It is these attributes of the alternative that would result in the highest impacts to the low income residential neighborhood. To minimize these effects, the document should assess alternatives that locate the visitor center elsewhere in the city (e.g., downtown). Also, we could find no information in the document that supports the need for such a large parking structure at this port of entry.

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measures do not even scratch the surface when it comes to resolving adverse effects. With the exception of moving the Hutchinson Memorial Chapel<sup>3</sup> and providing some landscaping,<sup>4</sup> the mitigation measures focus exclusively on documentation. The MOA does not propose any methods to reduce, modify, or substantially alter the size and/or configuration of the visitor center, duty free shop, and parking garage to reduce impacts. Instead, the MOA simply proposes to document the historic structures that will be demolished as a result of these unnecessary elements of the project. See MOA at 7 (Section IV.B). Obviously, documentation would have no effect at all in reducing the most profound adverse effects of the project: destroying the heart of a cohesive and livable historic neighborhood, and noise and visual intrusion that would greatly diminish the setting and character of the remaining portions of the historic district. See *Muckleshoot Tribe v. U.S. Forest Service*, 177 F.3d 800, 808-09 (9<sup>th</sup> Cir. 1999) (“documenting the [historic resource] did not satisfy the Forest Service’s obligations to minimize the adverse effect”). The MOA also defers to a later date the opportunity, if any, for façade, landscape, and streetscape design comments. See MOA at 8 (Section V.1.). These types of nominal, “window dressing” measures reflect a unilateral, dismissive approach to resolving adverse effects, especially for the most harmful elements of the project that are unnecessary and unrelated to the purpose and need.

These mitigation measures are offered in a vacuum without adequate consideration of FHWA’s responsibilities under Section 4(f). Even if the FHWA could demonstrate that there are no “feasible and prudent” alternatives to using historic resources, it still has an obligation to include “all possible planning to minimize harm.” 49 U.S.C. § 303(c)(2). Determining the least harmful alternative requires FHWA to consider (1) “[t]he degree to which each alternative meets the purpose and need for the project”; and (2) “[t]he relative severity of the remaining harm, after mitigation, to the

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<sup>3</sup> In fact, if FHWA had provided the opportunity for even minimal consultation on mitigation, the plan to move the chapel and the proposed landscaping should have been greatly modified and more directly connected to preservation concerns, at the very least. Moving the Hutchinson Memorial Chapel was not a mitigation measure proposed by the consulting parties or developed through the consultation process, though the MOA seems to suggest that it was. While it could be appropriate to move the chapel to some other location to save it from demolition, there has been no showing that the chapel is in sufficiently stable condition to move intact, and no indication of what stabilization measures would be needed to protect against irreparable damage. Even if it can be moved intact, we question whether the proposed location—in a sea of asphalt and truck processing, for use as a hastily-conceived visitors’ center—would effectively reduce the adverse effect, in contrast to other potential locations that could provide a much more appropriate setting and use.

<sup>4</sup> Because the landscape concept does not relate to the actual potential for adverse visual effects, there is no assurance that it will screen or ameliorate—rather than exacerbate—the adverse visual impact of the incompatible large-scale elements being introduced between this residential neighborhood and its scenic historic setting.

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protected activities, attributes, or features that qualify each Section 4(f) property for protection.” 23 C.F.R. § 774.3(c)(1)(ii), (v). The proposed measures within the MOA do not reflect the level of analysis or minimization that is required by Section 4(f). Since the FHWA will be held responsible for “all possible planning to minimize harm” under Section 4(f), a commitment to that higher standard should be reflected in the MOA as well.<sup>5</sup>

**c. The MOA Fails to Identify the Elements of the Project That Will Harm Historic Properties.**

The MOA fails to address the disparity between the project’s most damaging impacts and its stated purpose and need. In the first “whereas” clause on page 1, FHWA states that the PBA “proposes to expand the capacity of the existing international crossing into Canada from Buffalo, New York to relieve cross-border traffic congestion, address traffic safety issues, and provide for homeland security requirements.” This statement corresponds with the official purpose and need for the project: “to eliminate the bottleneck in the existing international transportation system created by inadequate vehicular capacity of the Peace Bridge and inefficiencies in the plaza configurations, traffic flow patterns and roadway network on the U.S. side of the Peace Bridge.” Draft Design Report, Draft EIS, Appendix S at 7. However, for purposes of the MOA, the description is incomplete, because it fails to identify the elements of the project that will be most destructive to historic properties—the duty free shop, visitor center, and the three-tiered parking garage. The failure to identify and describe these significant elements of the project in the MOA is disingenuous, because it creates the false impression that the destruction of historic resources is compelled by overriding policy considerations such as “traffic safety” and “homeland security.” In reality, of course, the adverse effects are caused by elements of the project that are unnecessary and have nothing to do with the stated purpose and need for the project, as the consulting parties have pointed out repeatedly. We note that the description of the project in the MOA does not even correspond with the description in the ACHP’s May 8, 2009 letter, which identified three major components of the project—“the Customs Plaza, Niagara River bridges, and the connecting roadway system.”

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<sup>5</sup> We are certainly aware that the original proposals for the Peace Bridge Expansion Project were even more destructive of historic properties, and that the agencies reduced the numbers of historic properties that will be demolished by the project, prior to completing the assessment of effects. However, the universal fact that a project could be worse, and in this case, originally would have been worse, does not satisfy the requirement under Section 4(f) to incorporate all possible planning to minimize harm. Nor should it satisfy the ACHP and SHPO in the Section 106 consultation process, especially where, as here, substantial further reduction of adverse effects could be achieved so easily, consistent with the project’s purpose and need, but for the agency’s intransigence.

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In conclusion, the National Trust strongly urges the ACHP not to sign this MOA, in light of the FHWA's refusal to engage in consultation to resolve the adverse effects associated with the Peace Bridge project, by "develop[ing] and evaluat[ing] alternatives or modifications to the undertaking that could avoid [and] minimize" those adverse effects, as required by 36 C.F.R. § 800.6(a). We urge the FHWA to withdraw the MOA and seek to re-engage all consulting parties in the process of seeking alternatives and modifications to the project that would avoid and minimize the project's adverse effects on historic properties. We look forward to working with you to address our concerns and the concerns of other consulting parties.

Respectfully submitted,



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