

BOARD OF COUNTY COMMISSIONERS

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Dylan Reingold, County Attorney
William K. DeBaal, Deputy County Attorney
Kate Pinglot Cotner, Assistant County Attorney



June 10, 2015

David Valenstein
Chief, Environmental and Corridor Planning Division
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Draft Determination of Effects, All Aboard Florida Project

Dear Mr. Valenstein:

I am writing in response to your letter dated May 19, 2015, in which you invite Indian River County (the "County") to "further consult in the Section 106 process" for the proposed All Aboard Florida ("AAF") project (the "Proposed Project"). Enclosed with your letter is a document entitled "All Aboard Florida – Orlando to Miami, Florida Intercity Passenger Rail Project – Phase 2 FRA Draft Determination of Effects" (the "Draft Determination"). Your letter states that if the County "would like to participate as a consulting party" in the Section 106 process it must respond and provide comments on the Draft Determination by June 12, 2015.

Although the County is responding to your letter within the deadline imposed, please be advised that in doing so it is in no way waiving its objection to FRA's defective process for the cultural resource review of the Proposed Project under Section 106 of the National Historic Preservation Act ("NHPA"). The reasons for that continuing objection – which the County has previously expressed in the comments it submitted on the draft environmental impact statement ("DEIS") issued by FRA for the Proposed Project – are summarized below. In short, the County believes procedural defects in the process followed by FRA have resulted in material omissions in the substance of the Section 106 review for the Proposed Project. More particularly, the County objects to the findings set forth in the Draft Determination, since FRA has overlooked significant cultural resources entirely, and has failed to identify or minimize significant adverse effects to several of the listed and eligible cultural resources that it has identified. For these reasons, the County requests that FRA reinstate the Section 106 process, and conduct a review that allows for the meaningful participation of all consulting parties.

1. FRA has Failed to Consult with the County and Other Local Governments.

The NHPA Regulations provide that “[a] representative of a local government with jurisdiction over an area in which the effects of an undertaking may occur *is entitled to participate as a consulting party.*” 36 C.F.R. § 800.2(b) (emphasis added). Accordingly, under the regulations “[t]he [federal] agency *shall* invite any local governments ...” to join in the consultation. *Id.* 800.3(f)(1) (emphasis added). Notwithstanding such explicit mandates, your May 19 letter is the first invitation the County has received from FRA to join as a consulting party in the Section 106 review of the Proposed Project. Indeed, FRA previously had decided *not* to invite the participation of the County and scores of other affected local governments. (See the DEIS, “SHPO concurred with *FRA’s determination that consultation with local entities was not required for Phase II*” of the Proposed Project. DEIS at 4-124. (emphasis added.) This determination, and the consequent exclusion of virtually all local authorities from the Section 106 consultation, was a clear violation of the NHPA Regulations.

A last minute letter inviting a few local governments to “further consult” in the Section 106 process does nothing to cure this violation.¹ The NHPA Regulations are clear that consulting parties are to be provided the opportunity to participate in the process from its *inception* -- not at a point where a final determination is about to be issued. The regulations direct the agency official to “identify any ... parties entitled to be consulting parties and invite them to participate as such in the [S]ection 106 process” at the outset of the historic review process. 36 C.F.R. § 800.3(f). Thereafter, the agency is supposed to “[s]eek information, as appropriate, from consulting parties ..., and identify issues relating to the undertaking’s potential effects on historic properties;” 36 C.F.R. § 800.4(a)(3); invite the views of consulting parties on the effects, and assessment of adverse effects of an undertaking on historic properties, 36 C.F.R. § 800.4(d)(2); consider the views of consulting parties in applying the criteria of adverse effect to historic properties, 36 C.F.R. § 800.5(a); and consult with the consulting parties in the development and evaluation of alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties. 36 C.F.R. § 800.6(a), 800.6(b)(1)(i). Where, as here, the Section 106 process is coordinated with a review under the National Environmental Policy Act, the parties are to be prepared to consult “early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration,” and the agency must “ensure that preparation of ... an EIS includes appropriate ... consultation leading to resolution of any adverse effects.” 36 C.F.R. § 800.8.

¹ As indicated in the County’s comments on the DEIS, FRA has excluded many other affected local governments from the consultation, and the County does not know whether other local governments, or other entities entitled to consulting party status, have received similar invitations from FRA.

A belated invitation soliciting written comments immediately prior to *completion* of the NEPA process bears no resemblance to the early and continuing consultation with local governments called for by the regulations. This is especially so because the Draft Determination does not provide the information required for a proper assessment of the effects of the Proposed Project on cultural resources, or the measures available to minimize them.

2. The Draft Determination Does Not Identify Significant Cultural Resources

One result of FRA's failure to consult with local governments and other knowledgeable organizations is that it has continued to overlook a number of listed and potentially eligible resources in the Section 106 review. For example, the Draft Determination states that "none of the historic properties include a quiet setting as a character-defining feature that could be impacted by indirect noise effects." The document thereby ignores the effect that the Proposed Project would have on Old Sebastian Town East and Old Sebastian Town West, two historic districts that are listed on the National Register. Indeed, the Draft Determination includes nothing about these listed sites, even though the current Florida East Coast Railway ("FECR") corridor runs right along the Old Sebastian Town East for approximately 600 feet, and in close proximity to the Old Sebastian Town West for about 200 feet. These two historic districts are notable not only for their combined 28 contributing historic structures, but also for the quiet, small town ambiance they currently enjoy. Most of the structures within the two districts are single-family dwellings made from vernacular wood that were built by the area's early settlers. In fact the existing contributing buildings and streetscapes are deliberately mindful of the early settlement of the town. The residents of the Sebastian area have a strong appreciation for the area's history and there is an ongoing effort to preserve and restore the structures within the two historic districts. By failing to so much as identify these resources, the Draft Determination neglected to consider the adverse effects that high speed rail operations would have on their historic residential character. As a result, no attention was paid to how such impacts could be avoided or mitigated.

Likewise, both the DEIS and the Draft Determination miss a number of eligible and potentially eligible archaeological resources that could be affected by the Proposed Project. For example, the "Gifford Bones" site is an area that has yielded fossilized bones of ground sloth, camel, mastodon and other animals for decades. It is recognized in the Florida Master Site File as FMSF #8IR07. However, the Gifford Bones is not so much as identified in either the DEIS or the Draft Determination. According to a recent update that was filed with the Florida Master Site File, the boundary line for Gifford Bones is located east and west of US Hwy 1 and north and south of the North Relief Canal (a.k.a. Houston Creek). The referenced update also recommends that any work conducted within 500 meters of the North Relief Canal be monitored. Since under the Proposed Project a second track will be

added to the North Relief Canal Bridge and the existing track will be reinforced, the effect of such work on the Gifford Bones site must be addressed and mitigated appropriately.

In addition to the Gifford Bones site, there are numerous other potentially significant archaeological sites along the FECR corridor. Prehistoric artifacts have been found at several locations in the vicinity of the Proposed Project site, and there is good reason to conclude that an archaeologically sensitive area runs along the coastal ridge carrying the AAF right of way for the entire length of Indian County, and beyond. There is no indication in the Draft Determination that any attempt was made to identify archaeological sites within this sensitive area. Although the document first represents that borings were taken in the Area of Potential Effect ("APE"), it later makes clear that no such testing was performed within the FECR right- of- way. As a result of this faulty methodology, archaeological resources of potentially immense value were not addressed in the Section 106 review. Considering the significance of the omissions described above, it is likely that equally important resources were overlooked in local jurisdictions other than Indian River County.

3. The Draft Determination Provides No Substantive Information Regarding the Effects of the Construction and Operation of the Proposed Project on the Resources It does Identify.

The Draft Determination provides virtually no factual basis to support its conclusions. While it makes reference to the Cultural Resources Assessment report previously attached to the DEIS, that report is nothing more than a catalogue of some of the resources within the APE. No analysis of how the Proposed Project would *affect* those resources is provided, even though a "Determination of Effects Case Study" report apparently was prepared, because it was previously referenced, but not attached to the DEIS.

Thus, the Draft Determination includes no discussion at all of the effects of project construction on nearby cultural resources. Instead of providing such information, it claims that "specific construction effects cannot be estimated at this time because they depend on several factors yet to be determined, such as: final design, location of material staging, access to work areas, materials to be used, specific construction methodologies, and identification of borrow areas or excess placement areas" However, AAF claims to be ready to begin construction of the Proposed Project almost immediately, so as to commence operations in 2017. In fact, 90 percent plans have been completed for several portions of the Proposed Project and are almost complete for the remainder. As a result, the information needed to perform a proper analysis of construction effects should be readily available, and such analyses should be prepared and provided to the consulting parties for discussion in the Section 106 process.

The Draft Determination is equally devoid of meaningful information concerning the effects of operational noise and vibration on cultural resources. It makes no mention of the fact that as a result of improvements effectuated by the Proposed Project the speed of freight trains would increase dramatically, nor does it discuss the potential adverse effects that such altered freight operations would have on cultural resources. Moreover, the document masks the noise impacts of the new passenger train operations by baking one potential mitigation measure – wayside horns -- into the impacts analysis. By doing so, it avoids any discussion of mitigation other than wayside horns, and does not address the effects that operation of those horns would have on any nearby resources. Likewise, the document contains only one conclusory statement regarding the potential vibration impacts that the Proposed Project would have on subsurface archaeological sites, concluding -- with no supporting facts in the Draft Determination, DEIS or underlying cultural resources reports -- that such impacts would have no adverse effects.

Similarly, the Draft Determination brushes aside any visual effects the Proposed Project may have on cultural resources by characterizing it as simply “returning the FECR corridor to its ... historic use as a passenger rail line,” and contending on that basis that it would not introduce any new visual elements. But 52 freight and high speed trains barreling by historic residential districts and structures at an *average of up to 90 miles an hour* (as noted in the document) is hardly equivalent to the historic service provided on the line. By contending otherwise the Draft Determination neglects to address the measures that could be put into place to avoid or minimize such adverse effects.

The County notes that one significant site omitted from the DEIS – the Vero Man site -- is now at least mentioned in the Draft Determination. However, the analysis with respect to that resource is riddled with mistakes, unsupported assumptions and unsubstantiated conclusions. For example, the document inaccurately describes the footprint of the potential artifact bed within the site, failing to recognize that it does not lie only to the west of the rail corridor, but stretches from west to east in an area that spans and includes the existing tracks and the “direct effects” APE. Moreover, the document includes no real analysis of the effects of the Proposed Project on this significant site. It simply states, with no apparent factual support, that all of its artifacts are buried deep underground, and would not be affected by either construction activities (which are not described at all) or vibration resulting from high speed freight and passenger train operation (with no supporting analysis provided). Considerably more analysis is required for a proper Section 106 evaluation.

David Valenstein

June 10, 2015

Page - 6 -

The County is hopeful that your May 19 letter is the first step in initiating a Section 106 review of the Proposed Project that conforms to the NHPA Regulations, rather than a last minute attempt to shore up the deficiencies in the review conducted so far. We stand ready to participate with FRA, the Proposed Project sponsor, and all the other consulting parties that have thus far been excluded, to identify potentially affected cultural resources, assess the effects of the Proposed Project on those resources, and develop appropriate mitigation. As you are aware from our previous correspondence, the County believes that the participation of the Advisory Council on Historic Preservation is warranted under the circumstances in this matter. Accordingly, we are providing ACHP with a copy of this letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dylan Reingold". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Dylan Reingold
County Attorney

c: Christopher Wilson
Charlene Vaughn
Advisory Council on Historic Preservation
401 F Street NW, Washington, DC 20001