

**PROGRAMMATIC AGREEMENT**

**AMONG**

**THE FEDERAL RAILROAD ADMINISTRATION,**

**THE VIRGINIA STATE HISTORIC PRESERVATION OFFICER, THE NORTH CAROLINA STATE HISTORIC PRESERVATION OFFICER, THE VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION, THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RAIL DIVISION,**

**AND**

**THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING**

**COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT FOR THE PROPOSED SOUTHEAST HIGH-SPEED RAIL PROJECT**

**WHEREAS**, the Federal Railroad Administration (FRA) proposes to provide federal financial assistance to construct the infrastructure to support high-speed passenger rail service in the travel corridor from Washington, District of Columbia, through Richmond, Virginia, including the Hampton Roads, Virginia region, and Raleigh, North Carolina, to Charlotte, North Carolina, collectively referred to as the Southeast High-Speed Rail (SEHSR) project (Project), with construction by the North Carolina Department of Transportation (NCDOT), Rail Division, and the Virginia Department of Rail and Public Transportation (DRPT) (each, a State Rail Transportation Agency and together, the State Rail Transportation Agencies); and

**WHEREAS**, the SEHSR Project involves the development, implementation, and operation of high-speed passenger rail service in an approximately 500-mile travel corridor from Washington, D.C., to Charlotte, and includes both modifications to the rail corridor to accommodate high-speed rail and changes to the surrounding road system to eliminate at-grade crossings; and

**WHEREAS**, the SEHSR Project involves construction of improvements, such as upgrading existing facilities, construction of new rail and rail facilities, rerouting road corridors, creating overpasses and underpasses at existing crossings, and closing some crossings outright, within a long-established surface transportation corridor crossing multiple states; and

**WHEREAS**, the SEHSR Project constitutes an undertaking subject to Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA), 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. Part 800; and

**WHEREAS**, in light of the length of the SEHSR Project corridor, the complexity of carrying out improvements to an operating railroad, and the need to identify funding sources incrementally, the State Rail Transportation Agencies intend to implement the SEHSR Project through a phased process focusing on individual constructible elements of the corridor (each hereinafter referred to as a "portion of the SEHSR Project"); and

**WHEREAS**, each portion of the SEHSR Project also constitutes an undertaking subject to Section 106 of the NHPA and its implementing regulations; and

**WHEREAS**, FRA partners with the relevant State Rail Transportation Agencies for each portion of the SEHSR Project for the implementation of the Section 106 process and proposes to delegate to the NCDOT and DRPT certain tasks pertaining to consultation, identification of historic properties, evaluation of historic significance, assessing effects to historic properties, and resolving adverse effects to historic properties through this Programmatic Agreement (PA); and

**WHEREAS**, FRA has elected to develop this PA pursuant to 36 C.F.R. § 800.14(b) to provide a consistent process for considering the effects of each portion of the SEHSR Project on historic properties and resolving adverse effects where appropriate; and

**WHEREAS**, the FRA and the Federal Highway Administration (FHWA), in cooperation with NCDOT and DRPT, completed a Tier I final environmental impact statement and record of decision in July and October 2002, respectively, for the SEHSR Project corridor from Washington, D.C., to Charlotte in accordance with the National Environmental Policy Act (NEPA), which established the purpose and need for the Project and determined the preferred corridor for detailed analysis, and intend to complete detailed Tier II environmental studies for individual portions of the larger corridor; and

**WHEREAS**, the FRA, in cooperation with DRPT, completed a Tier I environmental impact statement and record of decision for the SEHSR Project corridor from Richmond to Hampton Roads, in accordance with NEPA, which determined the preferred corridor for detailed analysis in southeastern Virginia and intends to complete detailed Tier II environmental studies for individual improvements within the larger corridor; and

**WHEREAS**, the FRA and the State Rail Transportation Agencies (and other state departments of transportation that may participate in the future) will coordinate the Tier II NEPA documents individually with the appropriate state historic preservation offices (SHPO), as appropriate; and

**WHEREAS**, the signatories to this PA anticipate that additional portions of the SEHSR Project outside of the Washington, D.C., to Charlotte corridor will be proposed for preliminary engineering and approval of NEPA documentation, including the corridor between Charlotte and Atlanta, Georgia, and intend to provide a process to allow consideration of those additional portions under this PA; and

**WHEREAS**, the signatories to this PA also anticipate that other federal agencies not involved in the Tier I environmental reviews discussed above are likely to have responsibility for permitting, assisting, funding, or approving portions of the SEHSR Project implemented in the Tier II process and intend to provide a process for allowing those other federal agencies to satisfy their Section 106 responsibilities for those undertakings through compliance with this PA; and

**WHEREAS**, the FRA has initiated consultation with the Virginia State Historic Preservation Office (VA SHPO) and the North Carolina State Historic Preservation Office (NC SHPO) pursuant to 36 C.F.R. § 800.3(c) and will continue to consult with the appropriate SHPO under the terms of this PA in order to identify historic properties, assess the effect of the SEHSR Project on identified historic properties, and, when necessary, resolve adverse effects to historic properties; and

**WHEREAS**, the FRA notified the Advisory Council on Historic Preservation (ACHP) of the SEHSR Project in a letter dated June 22, 2010, and the ACHP elected to formally participate in this consultation in a letter dated July 14, 2010; and

**WHEREAS**, pursuant to 36 C.F.R. § 800.2(c)(5), NCDOT and DRPT have recognized the following groups as consulting parties to the undertaking: American Battlefield Protection Program, Battersea, Inc., Brunswick County Historical Society, Chesterfield Historical Society, Civil War Preservation Trust, Historic Richmond Foundation, National Park Service (NPS) - Petersburg Division, NPS - Richmond Division, and Preservation North Carolina; and

**WHEREAS**, the FRA, pursuant to 36 C.F.R. § 800.2(c)(5) had recognized the Virginia Council on Indians (VCI) as a consulting party, but the Virginia General Assembly dissolved the VCI by act of legislation effective July 1, 2012, and the FRA shall now consult directly with individual Virginia state recognized Indian tribes as appropriate; and

**WHEREAS**, the FRA, pursuant to 36 C.F.R. § 800.2(c)(2) invited the Catawba Indian Nation in 2009 and then again in November 2015 to participate as a consulting party for the Richmond to Raleigh portion of the SEHSR project, and they agreed to participate as a consulting party, and the FRA shall continue to consult with the Catawba Nation; and

**WHEREAS**, the FRA and State Rail Transportation Agencies have shared information about the SEHSR Project with the public multiple times via the NEPA process, including 18 public hearings held after publication of the Tier I DEIS in 2001 and eight public hearings held after publication of the Tier II DEIS for the Richmond to Raleigh portion of the SEHSR project in 2010, numerous local government and small group meetings, and more than a dozen meetings with individual property owners described in the Tier II DEIS and FEIS for the Richmond to Raleigh portion of the SEHSR project; and a draft of this PA has been included in the Tier II FEIS for the Richmond to Raleigh portion of the SEHSR project and posted on the SEHSR Project website; and

**NOW, THEREFORE**, in anticipation of the SEHSR project, potential funding and development related to thereto, and in order to comply with the NHPA and related regulations, the FRA, DRPT, NCDOT, VA SHPO, NC SHPO and the ACHP (hereinafter "Signatories") agree that the SEHSR Project shall be implemented in accordance with the following stipulations to ensure that potential effects on historic properties are taken into account.

### **STIPULATIONS**

The FRA, in coordination with the relevant State Rail Transportation Agencies, shall ensure that the following measures are carried out:

#### **I. PRINCIPLES**

A. The relevant State Rail Transportation Agencies, in coordination with the FRA, commit to plan, design, and implement the SEHSR Project in accordance with the best practices and measures available at the time to avoid or minimize effects to historic properties within the Area of Potential Effects (APE), including buildings, structures, sites, objects and districts.

B. The relevant State Rail Transportation Agencies, in coordination with the FRA, shall, to the maximum extent possible, undertake such planning and actions as may be necessary to avoid or minimize harm to any National Historic Landmark (NHL) that may be directly and adversely affected by the SEHSR Project.

C. The relevant State Rail Transportation Agencies, in coordination with the FRA, shall seek, discuss, and consider the views of the other Signatories and the other consulting parties for each portion of the SEHSR Project concerning design and construction options.

D. The relevant State Rail Transportation Agencies, in coordination with the FRA, shall identify and take into account all direct, indirect, and cumulative effects on historic properties relating to the SEHSR Project.

E. FRA shall allow adequate time to consult with Tribal Historic Preservation Officers and Indian tribes that have identified areas within the APE as being of religious and cultural significance to them.

F. The relevant State Rail Transportation Agencies, in coordination with the FRA, commit to work with the Signatories and other consulting parties to consider and develop, where reasonable, feasible, and cost effective, corridor-wide, landscape-oriented, or other such broader mitigation measures to resolve individual and cumulative adverse effects on historic properties in those areas, including the historic rail corridor.

## **II. PROFESSIONAL QUALIFICATIONS AND STANDARDS**

A. All cultural resource work carried out pursuant to this PA shall be conducted by or under the direct supervision of an individual or individuals who meet, at a minimum, the Secretary of the Interior's Professional Qualifications Standards for Preservation Professionals (48 Fed. Reg. 44738-44739 (September 29, 1983)).

B. In preparing all archaeological studies resulting from this PA, the preparer shall take into account the ACHP's publications, *Section 106 Archaeology Guidance* (2009) and *Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites* (1999) as well as state-specific archaeological guidelines on best practice and procedure, as applicable.

C. In preparing all architectural studies resulting from this PA, the preparer shall take into account guidelines on specific architectural projects issued by the U.S. Department of the Interior/National Park Service (such as the Bulletin entitled *How To Complete the National Register Registration Form*) and state-specific guidelines on best practices and procedures, as applicable.

## **III. IDENTIFICATION OF CONSULTING PARTIES FOR EACH PORTION OF THE PROJECT**

The relevant State Rail Transportation Agency, in coordination with the FRA and in consultation with the appropriate SHPO, shall identify potential consulting parties for each portion of the SEHSR Project and invite those parties to consult on that portion. Consulting parties may include, but are not limited to, both Federally and State-recognized Indian tribes, county and municipality governments within the APE, established state-wide, regional, county and municipality historical organizations, and resource owners.

## **IV. DOCUMENTATION**

A. The relevant State Rail Transportation Agency, in coordination with the FRA, shall ensure that all documentation developed in accordance with this PA meets the appropriate state documentation standards and is in accordance with 36 C.F.R. § 800.11(d) and (e).

B. Any technical reports prepared pursuant to this PA shall be consistent with the federal standards entitled *Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines* (48 Fed. Reg. 44716-44742 (September 29, 1983)), the *Guidelines for Preparing Identification and Evaluation Reports for Submission Pursuant to Sections 106 and 110, National Historic Preservation Act*, and state-level guidelines for the completion of cultural resource reports, as applicable.

## **V. IDENTIFICATION OF PROJECT SPECIFIC APE FOR PORTIONS OF THE SEHSR PROJECT**

The State Rail Transportation Agencies, in coordination with the FRA, and in consultation with the appropriate SHPOs, will comply with 36CFR 800.4 and 36CFR 800.16(d) to determine the initial APE for each portion of the SEHSR Project within their state. Due to the immense variability in the project footprint and surrounding areas where alterations to a resource's setting and feeling could occur (viewshed) throughout the SEHSR Project corridor, the APE is not prescribed herein, but rather will be derived per state to assure that applicable, contextual conditions are met.

The APE for subsurface deposits will be, at a minimum, the project Limits of Disturbance, which includes the footprint wherein modifications may occur (both permanent and temporary). This includes any modifications to the rail line itself, additional sidings, station locations, modified roadways to eliminate at-grade crossings, or any other alteration associated with the Project. The APE for above-ground resources will include, at a minimum, the viewshed and any anticipated limits of the auditory increase caused by the undertaking. This may include properties within a 300- to 500-foot buffer of the rail centerline or any additional resources that have the potential to be visible from the Project. The exact parameters of the APE will be determined by the SHPO prior to any identification-level studies.

## **VI. IDENTIFYING AND EVALUATING HISTORIC PROPERTIES**

The relevant State Rail Transportation Agency, in coordination with the FRA, and in consultation with the appropriate SHPO and other consulting parties, shall develop and implement a scope of work to identify historic properties in accordance with state procedures within the APE of each portion of the SEHSR Project in accordance with 36 C.F.R. § 800.4. This includes consideration of all architectural properties over 50 years in age within the project corridor and evaluation of resources to determine NRHP eligibility. Identification of historic properties within the APE of each portion of the SEHSR Project shall be considered valid for a period of five (5) years, after such time the identification must be reevaluated before that portion may move forward to right-of-way acquisition and final design.

## **VII. ASSESSING EFFECTS TO HISTORIC PROPERTIES**

The relevant State Rail Transportation Agency, in coordination with the FRA and the appropriate SHPO, shall make every reasonable effort to avoid or minimize adverse effects to historic properties when developing each portion of the SEHSR Project.

As each individual portion of the SEHSR Project is identified, the State Rail Transportation Agencies, in coordination with the FRA, shall utilize survey results to review the construction proposal, identify historic properties, evaluate historic properties, and make a finding of “No Historic Properties Affected” and “No Adverse Effect,” where appropriate.

A. The State Rail Transportation Agency shall provide a description of historic properties and an effect finding to the appropriate SHPO and any other identified consulting parties for a thirty (30) day review. Upon SHPO concurrence with the identification of historic properties and either a “No Historic Properties Affected” or “No Adverse Effect” finding, no further consultation for that portion of the SEHSR Project is required and that portion may move forward to construction.

B. Where the State Rail Transportation Agency proposes a finding of “No Adverse Effect” with conditions, it shall include in its submittal to the appropriate SHPO those conditions that would avoid adverse effects to historic properties. The SHPO and other consulting parties shall have thirty (30) days to review the finding and proposed conditions. Upon SHPO and other consulting parties’ concurrence with this finding and the proposed conditions, no further consultation for that portion of the SEHSR Project is required and that portion may move forward to right-of-way acquisition and final design with the proposed conditions in place.

C. Where the State Rail Transportation Agency cannot avoid adverse effects to historic properties and proposes a finding of “Adverse Effect” for a particular portion of the SEHSR Project, it shall continue consultation with the appropriate SHPO and other consulting parties as set forth in Stipulation VIII below.

## **VIII. RESOLVING ADVERSE EFFECTS TO HISTORIC PROPERTIES**

A. When the State Rail Transportation Agency proposes a finding of adverse effects to historic

properties, it shall notify FRA. FRA shall initiate consultation with the appropriate SHPO and other consulting parties, interested federal and state recognized Indian tribes, and ACHP. FRA and the State Rail Transportation Agency shall develop a Memorandum of Agreement to identify measures to avoid, minimize, and mitigate the adverse effects prior to beginning any work on that portion of the SEHSR Project.

1. FRA shall identify other consulting parties pursuant to 36 CFR § 800.2(c)(5);
  2. FRA shall submit an analysis of alternative mitigation measures to the appropriate SHPO and other consulting parties along with other background information; and
  3. FRA shall negotiate with the appropriate SHPO and other consulting parties a project outcome that takes into account historic properties along with project goals.
- B. The State Rail Transportation Agency shall submit a draft of each MOA to the appropriate SHPO for review and comment and shall ensure that all comments received within thirty (30) days of SHPO's receipt of the draft MOA are addressed in the final MOA.
- C. In accordance with § 800.6(b)(1)(iv), FRA will submit to ACHP one (1) copy of the final executed along with the documentation prepared in accordance with § 800.11(f) **prior to** approving the undertaking. FRA will provide copies to the other consulting parties who may have a vested interest in a particular property.

#### **IX. USE OF THIS PA BY OTHER FEDERAL AGENCIES AND FOR OTHER PROJECTS RELATED TO THE SEHSR**

A. In the event that a federal agency other than FRA is considering funding, permits, licenses or approvals for the SEHSR Project beyond those that were originally the basis of this agreement, and the undertaking remains unchanged, such funding or approving federal agency may become a signatory to this PA at its discretion to comply with its Section 106 responsibilities for the undertaking. To become a signatory to this PA the agency official must provide written notice to the Signatories that his/her agency agrees to the terms of this PA, specifying the extent of the agency's intent to participate in this PA, and whether the agency intends to designate the FRA as the lead Federal agency for the undertaking. The participation of the agency is subject to approval by the respective SHPO and ACHP, who must respond to the written notice within 30 days or the approval will be considered implicit. Any other modifications to the PA will be considered in accordance with Stipulation XIII.

B. In the event that FRA proposes additional SEHSR projects that were not originally considered in the SEHSR Tier I NEPA documentation, such as improvements to adjacent rail networks that would benefit mobility within the larger corridor, it may follow the terms of this PA to fulfill its Section 106 responsibilities for those additional projects provided that it first notifies the appropriate SHPO and ACHP, and consults with any interested federal and state recognized Indian tribe(s), local government(s), and identified consulting parties on the potential use of this PA for the additional project(s).

#### **X. POST REVIEW DISCOVERIES**

A. Human Remains. In the case of an unanticipated discovery of human remains or burials during construction activities, the State Rail Transportation Agency shall halt construction in the immediate area of the discovery, secure the area, and follow the provisions of the relevant state burial law(s).

B. Historic Properties. In the event of an unanticipated discovery of historic properties during construction activities related to project implementation in the immediate area of the discovery or an unanticipated adverse effect on historic properties, the State Rail Transportation Agency shall halt construction, secure the area, and consult with the FRA, appropriate SHPO, ACHP, and other consulting

parties in accordance with 36 C.F.R. § 800.13(b).

## **XI. DISPUTE RESOLUTION**

### **A. Objection by Signatory**

1. Should any Signatory to this PA object in writing to the FRA to any determinations made pursuant to this PA, including the identification of historic properties, a proposed effect finding, or conditions to avoid adverse effects to historic properties, or the manner in which the terms of this PA are implemented, the FRA shall first consult with the objecting party to resolve the objection. If the FRA determines that the objection cannot be resolved through such consultation after a period of 30 days, the FRA shall then consult with all Signatories to resolve the objection. If the FRA then determines that the objection cannot be resolved through consultation after a period of 30 days, the FRA shall forward all documentation relevant to the objection to the ACHP, including the FRA's proposed response to the objection.

2. Within thirty (30) calendar days after receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

- a. Advise the FRA that the ACHP concurs with the FRA's proposed response to the objection, whereupon the FRA will respond to the objection accordingly; or
- b. Provide the FRA with recommendations, which the FRA shall take into account in reaching a final decision regarding its response to the objection; or
- c. Notify the FRA that the objection will be referred for comment pursuant to 36 C.F.R. § 800.7(a)(4), and proceed to refer the objection and comment. The FRA shall take the resulting comment into account in accordance with 36 C.F.R. § 800.7(c)(4).

Should the ACHP not exercise one of the above options within thirty (30) calendar days after receipt of all pertinent documentation, the FRA may move forward with its proposed response to the objection.

3. The FRA shall take into account any ACHP recommendation or comment provided in accordance with this stipulation with reference only to the subject of the objection; the FRA's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.

### **B. Objection by a Consulting Party or Member of the Public**

Should any consulting party or member of the public raise a timely and substantive objection related to historic preservation and pertaining to the manner in which the terms of this PA are carried out, at any time during its implementation, the FRA shall take the objection into account by consulting with the objector to resolve the objection. When the FRA responds to an objection, it shall notify the Signatories and consulting parties of the objection and the manner in which it was resolved. The FRA may request the assistance of a Signatory or a consulting party to resolve the objection.

## **XII. AMENDMENTS**

This PA may be amended when such an amendment is agreed to in writing by all the Signatories. The amendment will be effective on the date a copy signed by all of the Signatories is filed with the ACHP.

### **XIII. TERMINATION**

If any Signatory to this PA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other Signatories to attempt to develop an amendment. If within thirty (30) days (or other time period as agreed to by the Signatories) an amendment cannot be reached, any Signatory may terminate the PA upon written notification to the other Signatories. Once the PA is terminated and prior to work continuing on the SEHSR Project, the FRA must follow 36 C.F.R. Part 800 for each individual undertaking, or execute a new PA pursuant to 36 C.F.R. § 800.14(b). The FRA shall notify the Signatories as to the course of action it will pursue.

Execution of this PA by the Signatories and the implementation of its terms is evidence that FRA has taken into account the effects of the SEHSR Project on historic properties and has afforded the ACHP an opportunity to comment.

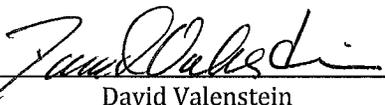
### **XIV. BI-ANNUAL REPORTING AND MONITORING**

On the first day of June 2017 and in every other year in which this PA remains in force, the relevant State Rail Transportation Agency (or Agencies) shall prepare a report reviewing the implementation and achieved outcomes of the terms of this PA and to determine whether amendments are needed. The report will be submitted to FRA for 30 day review and comment. FRA will provide comments to the relevant State Rail Transportation Agency to revise in accordance with FRA comments. Within 30 days, the relevant State Rail Transportation Agency will resubmit the report to FRA, who will distribute it to the Signatories and consulting parties.

### **XV. DURATION**

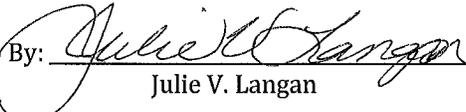
This PA shall be effective the date of execution by the last Signatory. The effective date of this PA shall not change should another agency become a signatory to this PA pursuant to Stipulation IX. The Signatories agree that this Agreement shall expire fifteen (15) years after the date of the last Signatory signature. The Signatories to this PA or their successors shall consult nine (9) months prior to the expiration of this PA on the need to renew or amend this PA.

FEDERAL RAILROAD ADMINISTRATION

By:  Date: 3-23-2016  
David Valenstein

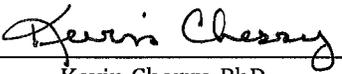
Title: Chief, Environment and Planning Division

VIRGINIA STATE HISTORIC PRESERVATION OFFICER

By:  Date: 2-17-16  
Julie V. Langan

Title: Director, Department of Historic Resources

NORTH CAROLINA STATE HISTORIC PRESERVATION OFFICER

By:  Date: 2/9/2016  
Kevin Cherry, PhD

Title: North Carolina State Historic Preservation Officer

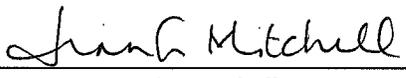
ADVISORY COUNCIL ON HISTORIC PRESERVATION

By:  Date: 4/12/16  
~~Charlene Vaughn, AICP~~  
Reid Nelson, Director

Title: Assistant Director, Office of Federal Agency Programs

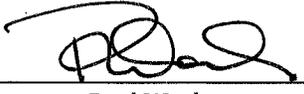
INVITED SIGNATORIES

VIRGINIA DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION

By:  Date: 2/10/2016  
Jennifer Mitchell

Title: Director, Virginia Department of Rail and Public Transportation

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RAIL DIVISION

By:  Date: Feb. 5, 2016  
Paul Worley

Title: Director, NCDOT Rail Division