

**Vermont Agency of Transportation BUILD Project  
Section 106 Public Comment Notice  
Friday May 15, 2020**

<https://vtrans.vermont.gov/highway/project-delivery-environmental/cultural-resources/documents>

In partnership with the Federal Railroad Administration (FRA), the Vermont Agency of Transportation is inviting you to provide comments on the draft Programmatic Agreement (PA) proposed for VTrans' Better Utilizing Investments to Leverage Development (BUILD) project to satisfy responsibilities under 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act of 1966, as amended.<sup>1</sup>

Section 106 consultation under the National Historic Preservation Act of 1966 (NHPA) requires federal agencies, including FRA, to identify and consider the potential effects of its actions on historic properties through a collaborative framework for seeking, discussing and considering views on how potential adverse effects on historic properties resulting from a proposed Federal action should be addressed. Furthermore, at this stage in project development, the identification, evaluation, and assessment of effects to archaeological sites cannot fully be determined and will require a phased approach as memorialized in Stipulations VII and VIII of the draft BUILD PA.

Please, use the contact template below to submit comments or email both **Laura A. Shick**, FRA Supervisory Environmental Protection Specialist at [Laura.Shick@dot.gov](mailto:Laura.Shick@dot.gov) and **Lydia Kachadoorian**, RPA 15668, FRA Environmental Protection Specialist at [Lydia.Kachadoorian@dot.gov](mailto:Lydia.Kachadoorian@dot.gov).

**All comments must be received in writing by May 30<sup>th</sup>, 2020.**

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<sup>1</sup> The review process is known as Section 106 and additional information can be found at: <https://vtrans.vermont.gov/environmental-manual/permitting/historical/section-106> and <http://www.achp.gov/citizensguide.html>.

**PROGRAMMATIC AGREEMENT**  
AMONG  
THE FEDERAL RAILROAD ADMINISTRATION,  
THE VERMONT STATE HISTORIC PRESERVATION OFFICER,  
AND  
THE VERMONT AGENCY OF TRANSPORTATION,  
REGARDING THE  
BETTER UTILIZING INVESTMENTS TO LEVERAGE DEVELOPMENT  
(BUILD) TRANSPORTATION DISCRETIONARY GRANT PROJECT to  
REHABILITATE or REPLACE (29) EXISTING RAILROAD BRIDGES ON THE  
BENNINGTON AND RUTLAND RAILROAD  
in RUTLAND and BENNINGTON COUNTIES, VERMONT

**WHEREAS**, rehabilitation or replacement of 29 existing railroad bridges between Rutland, Vermont and Hoosick, New York along a 57.82-mile section of the former Bennington and Rutland Railroad (B&R) (hereafter known as the Project), is necessary to accommodate projected regional freight and operational safety requirements as well as address structural and operational deficiencies that do not permit the safe and efficient operation of modern freight cars at modern speeds (Appendix A, Project Location Map); and

**WHEREAS**, the Vermont Agency of Transportation (VTrans) is the Project Sponsor and owns the B&R line including its bridges, culverts, other infrastructure, and the right-of-way (ROW) associated with the rail corridor; is managing the Project to facilitate the passage of 286,000-pound carloads at a speed of 40 miles per hour; and will implement the Project in phases; and

**WHEREAS**, the U.S. Department of Transportation (USDOT) is providing funding under the Fiscal Year 2018 Better Utilizing Investments to Leverage Development (BUILD) transportation discretionary grant program to VTrans and the USDOT's Federal Railroad Administration (FRA) is obligating and administering the grant for final design and construction of the Project; and

**WHEREAS**, FRA's funding constitutes a federal action requiring review under the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 *et seq.*) and is considered an Undertaking under Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. § 306108) (NHPA), as amended, and its implementing regulations at 36 C.F.R part 800 (hereinafter collectively referred to as Section 106); and

**WHEREAS**, FRA has coordinated Section 106 compliance with the NEPA process for the Project and is preparing a Categorical Exclusion worksheet; and

**WHEREAS**, in a letter dated February 28, 2020, FRA initiated consultation with the Vermont Division for Historic Preservation, which serves as the State Historic Preservation Officer (SHPO), pursuant to 36 C.F.R. § 800.3(c) and established the proposed Area of Potential Effects (APE), which is limited to non-contiguous portions of the existing railroad ROW; identified historic properties in the APE (36 C.F.R. § 800.4); and applied the criteria for adverse effect (36 C.F.R. § 800.5(a)(1)) to historic properties in the APE; and

Commented [KL(1): **FRA NOTES FOR FINAL VERSION**

**\*\*\*Check Overall Formatting**

- Lettering/Numbering
- Spacing
- Margins
- Underlining
- Italics
- Capitalization
- dates
- archaeology vs archeology

**\*\*\*Check legal citations for consistency with The Bluebook: A Uniform System of Citation**  
•e.g. 36 C.F.R. § 800.3(c)(1)

**\*\*\*Check Stipulation Cross References**

- I.Roles and Responsibilities
- II.Documentation Standards
- III.Timeframes, Communication and Document Review
- IV.Design Review for Replacement Bridges
- V.Treatment Measures for Architectural Resources
- VI.Treatment Measures for Archaeological Resources
- VII.Post-Review Discoveries
- VIII.Project Modifications and Changes
- IX.Monitoring and Reporting
- X.Dispute Resolution
- XI.Adoptability
- XII.Amendments
- XIII.Termination and Withdrawal
- XIV.Duration, Effective Date, and Execution

**\*\*\*Verify Appendices**

- Appendix A, Project Location Map
- Appendix B, Architectural Survey
- Appendix C, Archaeological Resource Assessment Survey
- Appendix D, Adverse Effect Determinations Table
- Appendix E, Correspondence
- Appendix F, Contacts

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**WHEREAS**, in this letter FRA referenced technical studies conducted by VTrans for both historic architecture and archaeology within the Project area, as documented in the 2019 reports *Architectural Resource Identification Survey: BUILD Grant – Resource Identification of 31 Railroad Bridges (2019)* and *Archaeological Resource Assessment Survey: BUILD Grant – Resource Identification of 31 Railroad Bridges* (Appendices B and C, respectively); and

**WHEREAS**, in this letter FRA determined that the B&R line is eligible for inclusion in the National Register of Historic Places (NRHP) under Criteria A and C as a linear historic district (hereafter B&R Railroad Historic District) with an approximate period of significance spanning 1853-1963, and that all B&R rail bridges in Vermont included in the Project scope are considered contributing elements of this historic district except for Bennington County Bridges Number 58 in Shaftsbury and Number 61 in Arlington; and

**WHEREAS**, in this letter FRA also determined the Project will have an adverse effect on historic properties as a result of the demolition and replacement of eight (8) B&R rail bridges and disinvestment of two (2) B&R rail bridges along the NRHP-eligible B&R Railroad Historic District (Appendix D, Adverse Effect Determinations Table); and

**WHEREAS**, SHPO concurred with FRA’s identification of historic properties and effects finding in a letter dated March 17, 2020 (Appendix E, Correspondence); and

**WHEREAS**, pursuant to 36 C.F.R. § 800.3(f)(1), in a letter dated February 28, 2020 FRA invited the towns of Arlington, Clarendon, Dorset, Manchester, Shaftsbury, and Wallingford; the City of Rutland; and the Rutland Historical Society to consult in the Section 106 process regarding the effects of the Project on historic properties. The following parties accepted the invitation to be a Consulting Party by email: the Town of Clarendon accepted on March 2, 2020, the Town of Dorset accepted on March 4, 2020, and the Town of Wallingford accepted on March 17, 2020; and

**WHEREAS**, pursuant to 36 C.F.R. § 800.3(f)(2), in a letter dated March 10, 2020, FRA invited the following Federally recognized Indian tribes (herein collectively referred to as “Tribes”) to participate in the Section 106 process as Consulting Parties: the Mashantucket Pequot Tribe, the Penobscot Nation, the Stockbridge-Munsee Band of Mohican Indians, and the St. Regis Mohawk Tribe, and the Stockbridge-Munsee Band of Mohican Indians responded on May 4, 2020 requesting future consultation as the project advances to ensure that any area(s) outside of the current proposed APE are evaluated and/or surveyed for potential below-ground archaeological resources, and no response was received from the other Tribes; and

**WHEREAS**, FRA has determined that a Programmatic Agreement (PA) prepared in accordance with the Section 106 regulations (36 C.F.R. § 800.14(b)) is appropriate to resolve adverse effects of the Project on historic properties because the exact nature and extent of effects to above- and below-ground historic properties are not fully known at this stage of Project design, and the Section 106 regulations (36 C.F.R. § 800.4(b)(2)) allow for a phased approach to identification and evaluation; and

**WHEREAS**, through consultation, FRA has determined that the Project has the potential to affect archaeological resources (both precontact and historic period), but that the identification of and

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effects on archaeological resources, which may be historic properties, cannot be fully determined based on the current level of Project design; and

**WHEREAS**, through consultation, FRA has elected to complete the final identification, evaluation, and effects assessment on archaeological resources in a phased manner, pursuant to 36 C.F.R. § 800.4(b)(2) and § 800.5(a)(3), and in accordance with the ongoing consultation process specified in this PA developed pursuant to 36 C.F.R. § 800.14(b); and

**WHEREAS**, based on the current level of Project design provided by VTrans as of the date of execution of this PA, FRA anticipates the rehabilitation and repair of 19 bridges will be exempt from Section 106 review under the *Section 106 Program Comment to Exempt Consideration of Effects to Rail Properties Within Rail Rights-of-Way* (Program Comment) issued by the Advisory Council on Historic Preservation (ACHP) on August 17, 2018; and

**WHEREAS**, as VTrans advances Project design, it is possible there may be additional adverse effects to the B&R Railroad Historic District through the demolition and replacement of additional rail bridges and/or the repair or rehabilitation of rail bridges that FRA determines are not exempt under the Program Comment, and such effects will be addressed through this PA; and

**WHEREAS**, VTrans has documented the 29 rail bridges that are included in the Project through bridge inspection reports, architectural surveys, photographs, and written narrative, and FRA and SHPO do not require further documentation of the bridges before VTrans proceeds with the repair, replacement, or divestment of the bridges; and

**WHEREAS**, FRA has invited VTrans, as the Project Sponsor, designer, and owner of the B&R line to participate in this PA as an Invited Signatory with responsibilities under this PA, and VTrans has accepted; and

**WHEREAS**, in accordance with 36 C.F.R. § 800.6(a)(1), FRA notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination and intention to enter into a PA with specified documentation by electronic submittal dated February 28, 2020, and the ACHP, by letter dated March 16, 2020, declined to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii); and

**WHEREAS**, FRA sought and considered the views of the public regarding Section 106 for this Project by making the draft PA available to the public for review and comment from May 15, 2020 to May 30, 2020 through the following VTrans website: <https://vtrans.vermont.gov/highway/project-delivery-environmental/cultural-resources/documents>, and FRA considered comments received when finalizing the PA; and

**NOW, THEREFORE**, FRA and SHPO as Signatories and VTrans as an Invited Signatory (together the Signatories) agree that the Project will be implemented in accordance with the following stipulations in order to take into account the effects of this undertaking on historic properties.

**STIPULATIONS**

**I. ROLES AND RESPONSIBILITIES**

**A. FRA**

1. FRA has the primary responsibility to ensure the provisions of this PA are carried out.
2. FRA is responsible for all government-to-government consultation with Federally-recognized Indian tribes.

**B. VT SHPO**

1. The VT SHPO will review and approve submittals as specified in this PA.

**C. VTrans**

1. Pursuant to 36 C.F.R. § 800.2(c)(4), FRA authorized VTrans to initiate consultation and prepare any necessary analyses, documentation, and recommendations on its behalf, but FRA remains legally responsible for all findings and determinations, including determinations of eligibility and effects of the Project, as well as resolution of objections or dispute resolution.
2. VTrans will ensure that all work carried out pursuant to this PA is done by or under the direct supervision of a qualified professional in the disciplines of Archaeology, Architectural History and/or Historic Architecture who meets the relevant standards outlined in the *Secretary of the Interior's Professional Qualifications Standards* (48 F.R. 44738-9, (September 29, 1983)) and *Guidelines for Archeology and Historic Preservation* 48 FR 44716 (September 29, 1983).

**D. Consulting Parties**

1. Consulting parties include local governments and/or organizations with a demonstrated interest in the Project who have already participated in, or who may later join in as consulting parties in the Section 106 process due to the nature of their legal and/or economic relationship to the Project or affected properties, or their concern with the Project's effects on historic properties.
2. Consulting parties may participate in on-going consultation, as prescribed by this PA.

**II. DOCUMENTATION STANDARDS**

All surveys, studies, reports, plans, and other documentation prepared or performed pursuant to this PA will be consistent with pertinent standards and guidelines outlined in Archaeology and Historic Preservation: *Secretary of the Interior's (SOI) Standards and Guidelines* (48 F.R. 44716-44742, September 29, 1983) including, as applicable: *Secretary of the Interior's Standards for Historical Documentation* (48 F.R. 44728-30); *Secretary of the Interior's Standards for Architectural and Engineering Documentation* (48 F.R. 44730-34); *Secretary of the Interior's Standards for Archeological Documentation* (48 F.R. 44734); *Historic American Engineering Record Guidelines for Historical Reports* (National Park Service 2008, updated December 2017); *Historic American Buildings Survey Guide to Field Documentation* (National Park Service, May 16, 2011); and, *Historic American Buildings Survey Guidelines for Historical Reports* (National Park Service 2007). In addition, documentation will also follow the ACHP's *Section 106 Archaeology Guidance* (2009), the ACHP's *Recommended Approach for*

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*Consultation on Recovery of Significant Information from Archaeological Sites* (1999), and VDHP's *Guidelines for Conducting Archaeology in Vermont* (2017) and *Historic Sites and Structures Survey* standards, or subsequent revisions or replacements to these documents.

### **III. TIMEFRAMES, COMMUNICATION AND DOCUMENT REVIEW**

- A. All time designations are in calendar days unless otherwise stipulated. If a review period ends on a Saturday, Sunday or Federal holiday, the review period will be extended until the next business day.
- B. All review periods start on the day the documents are received by the relevant parties, which constitutes notification, unless otherwise stipulated in this PA.
- C. VTrans, in coordination with FRA, will send all notifications required by this PA by email and/or other electronic means, unless a mailed notification is requested by a recipient.
- D. For purposes of communication pursuant to this PA, contact information for each of the Signatories, the consulting parties, and Tribes is provided in Appendix F. Names and contact information therein may be updated, as needed, without an amendment to this PA. It is the responsibility of each Signatory and consulting party to immediately inform FRA and VTrans of any change in contact information.
- E. Unless otherwise stated elsewhere in this PA, SHPO and the consulting parties will provide comments to VTrans and copy FRA.
- F. The Signatories and the consulting parties will have up to thirty (30) days from the date of receipt to review and provide written comments to VTrans and FRA on documents stipulated in this PA. At FRA's discretion, FRA may consider written requests timely received and with adequate justification to extend this review period or may determine that an additional round of review of draft documents is necessary. VTrans will notify SHPO, Consulting Parties and Tribes of FRA's decision in writing including specifying review timeframes.
- G. If a Consulting Party does not provide written comments within the timeframes specified in this PA, VTrans will proceed to the next step in the review process following approval by FRA and SHPO.
- H. If the Signatories and/or the consulting parties object to or recommend extensive revisions to submissions stipulated in the PA, VTrans, in coordination with FRA, will work to respond to the recommendations and resolve disputes in a timely manner and at the lowest appropriate staff level.
- I. If FRA, in coordination with VTrans cannot resolve a dispute within thirty (30) days, FRA may elect to follow the dispute resolution process identified in Stipulation IX to resolve any such dispute.
- J. In exigent circumstances (e.g., concerns over construction suspensions or delays), all parties agree to expedite their respective document review and dispute resolution obligations within seven (7) days.

### **IV. DESIGN REVIEW FOR REPLACEMENT BRIDGES**

- A. Design Review
  1. To the extent practicable, VTrans will make technically and economically reasonable efforts to ensure that the design of replacement bridges within the B&R Railroad Historic District is compatible with the historic property in

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- form, materials, scale, and other character-defining features.
2. VTrans will share 30 percent, 60 percent, and 90 percent Project plan sheets and specification documents with SHPO and the consulting parties for concurrent review and comment in accordance with Stipulation III, and will provide these documents to FRA for review and acceptance in accordance with the Project’s grant agreement.
3. VTrans will consider design review comments provided by SHPO and the consulting parties to the extent practicable and feasible. However, VTrans’ final plans for the design of the new rail bridges accepted by FRA must meet FRA’s bridge safety standards.
4. VTrans will provide a brief explanation to SHPO and/or consulting parties if certain design recommendations cannot be implemented because of safety considerations.

### **V. TREATMENT MEASURES FOR ARCHITECTURAL RESOURCES**

VTrans will mitigate all Project-related adverse effects to architectural historic properties per the procedures below.

- A. Program Comment Property-Based Approach for Railroads in Vermont
  1. To facilitate future transportation project planning, to streamline Section 106 reviews of future undertakings related to rail lines in Vermont, and to create a meaningful document that will provide a significant, positive contribution to the scholarly body of research on Vermont railroads, VTrans will develop a proposal under the Program Comment Property-Based Approach to designate “excluded historic rail properties.”<sup>1</sup>
  2. VTrans’ proposal will include an identification and evaluation of all rail properties on three rail lines in the state of Vermont. The selected rail lines (which will be the study area as defined in the Program Comment) will be determined by VTrans through coordination with SHPO and will include lines VTrans anticipates performing significant upgrades/maintenance on in the future. The selected lines will also be geographically distributed throughout the state to capture a representative sample of Vermont’s rail resources.
  3. VTrans will coordinate with SHPO regarding appropriate data collection and desktop and field survey methodologies and documentation formats for its proposal.
  4. VTrans will seek input from SHPO and other appropriate stakeholders in development of its proposal, in accordance with USDOT’s *Final Guidance for Implementing the Optional Property-Based Approach to Exempting Consideration of Effects to Rail Properties within Rail Rights-of-Way under*

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<sup>1</sup> For the definition of “excluded historic rail properties” and implications for future Section 106 undertakings, see the *Section 106 Program Comment to Exempt Consideration of Effects to Rail Properties Within Rail Rights-of-Way* issued by the ACHP on August 17, 2018 (83 Federal Register 42920, available at <https://www.govinfo.gov/content/pkg/FR-2018-08-24/pdf/2018-18329.pdf>) and USDOT’s *Final Guidance for Implementing the Optional Property-Based Approach to Exempting Consideration of Effects to Rail Properties within Rail Rights-of-Way under Section 106 of the National Historic Preservation Act* published on October 11, 2019 (<https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/transportation-policy/353721/pb-guidancefinal10-11-2019508compliant.pdf>).

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### *Section 106 of the National Historic Preservation Act<sup>2</sup>*

5. VTrans will submit its proposal to FRA within four (4) years of the date of execution of this PA.
6. As required by the Program Comment, FRA will designate “excluded historic rail properties”, based on VTrans’ proposal and following opportunities for public input, within 12 months of receipt of VTrans’ proposal.

## **VI. TREATMENT MEASURES FOR ARCHAEOLOGICAL RESOURCES**

VTrans will identify, evaluate and assess Project effects on archaeological resources per the procedures below.

- A. VTrans will ensure that no ground-disturbing activities associated with the Project take place in areas subject to archaeological investigation until the required fieldwork has been completed, reviewed and approved by FRA and SHPO, and a VTrans SOI qualified archaeologist has provided the VTrans Project Manager with written notification that the location has been approved for commencement of ground-disturbing activities.
- B. VTrans may phase archaeological investigations for each bridge location, but Stipulations VI.C through VI.F must be completed for each bridge location prior to VTrans’ commencement of Project-related ground-disturbing activities.
- C. Defining Archaeological APEs
  1. The archaeological APE is subject to change as Project plans advance. The 2019 archaeological resource assessment utilized a generic APE of 15 meters (50 feet) long, along each bridge approach and 15 meters (50 feet) wide extending 7.5 meters (25 feet) from the center of track. Therefore, VTrans will define, and revise as necessary, the Project APE for archaeology (36 C.F.R. § 800.16(d)). The archaeological APE will include the Project’s limits of disturbance, which consists of the area in which ground disturbance is expected to take place, and will include excavation sites, construction staging areas, material disposal sites, temporary access roads, utility and storm water management sites, and off-site mitigation sites.
  2. VTrans will document its proposed archaeological APE in narrative and graphic formats (e.g. illustrated on design plans). VTrans will submit the proposed APE to FRA and SHPO for review and approval in accordance with Stipulation III.
- D. Phase I Investigation: Reconnaissance and Identification Surveys
  1. At the appropriate stages of Project engineering design, as determined by VTrans in coordination with FRA, VTrans will develop proposal(s) for Phase I archaeological investigations of the Project’s archaeological APE. VTrans will submit proposal(s) to FRA, SHPO and Tribes for review in accordance with Stipulation III. The proposal(s) will include information to further refine the archaeological context, sensitivity, and predictive models for the location(s) of potential sites within the archaeological APE. Once VTrans has received approval on the Phase I survey proposal(s) from FRA and SHPO, VTrans may commence fieldwork.
  2. After the completion of Phase I fieldwork and associated analysis, VTrans will

<sup>2</sup> <https://www.transportation.gov/sites/dot.gov/files/docs/mission/office-policy/transportation-policy/353721/pb-guidancefinal10-11-2019508compliant.pdf> (October 11, 2019)

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ensure that technical report(s) containing the results and proposed recommendations for additional archaeological testing, if appropriate, are prepared. VTrans will submit reports(s) to FRA and SHPO for approval and will provide Tribes the opportunity for review in accordance with Stipulation III.

- E. Phase II Investigation: Evaluation Studies
1. As necessary, VTrans will ensure that Phase II survey(s) to evaluate the NRHP eligibility of any intact archaeological resources that may be affected by the Project are prepared.
  2. VTrans will submit proposal(s) for Phase II archaeological investigations to FRA and SHPO for approval and will provide Tribes the opportunity for review in accordance with Stipulation III. Once VTrans has received approval on the Phase II survey proposal(s) from FRA and SHPO, VTrans may commence fieldwork.
  3. After the completion of Phase II fieldwork and associated analysis, VTrans will submit technical report(s) to the other Signatories and Tribes for concurrent review in accordance with Stipulation III. The report(s) will contain the results along with VTrans proposed NRHP eligibility recommendations and findings of effect pursuant to 36 C.F.R. § 800.5. If adverse effects seem likely, VTrans will include proposed avoidance and/or minimization, strategies in the report(s).
- F. Phase III Investigation: Data Recovery Studies and Alternative Mitigation Strategies
1. If adverse effects cannot be avoided, VTrans will prepare a Phase III data recovery plan(s) and/or alternative mitigation proposal(s). VTrans will submit these proposal(s) to FRA, SHPO, and Tribes for concurrent review in accordance with Stipulation III. At a minimum, each Phase III data recovery proposal will include:
    - a. A list of research questions to be addressed, with a discussion of their relevance and importance;
    - b. Methods to be used for fieldwork and laboratory analysis, with a justification of their cost-effectiveness and how they apply to the particular sites and the research questions;
    - c. A schedule for completing field and laboratory work, and submitting draft and final documents for review and comment;
    - d. Methods to be used in managing and curating artifacts, data, and other records;
    - e. Procedures for evaluating and treating unanticipated discoveries consistent with the provisions of Stipulation VII;
    - f. A procedure for documenting the completion of fieldwork and releasing sites for construction activities; and
    - g. Provisions for disseminating the research findings to the consulting parties, professional peers, and the public pursuant to Stipulation VI.H.
  2. Once archaeological mitigation proposals(s) have been approved by FRA and SHPO, VTrans will complete all Phase III fieldwork prior to authorizing construction to proceed within the specified location.
  3. After the completion of archaeological mitigation proposal(s), VTrans will submit technical report(s) to FRA and SHPO for approval and will provide Tribes the opportunity for review in accordance with Stipulation III.
- G. Curation
1. VTrans will ensure all materials and records resulting from archaeological investigations conducted for the Project are curated at the Vermont Archaeology Heritage Center (VAHC), unless VTrans cannot obtain clear title, Deed of Gift,

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or curation agreement for the collection. All collections transferred to VAHC will be prepared according to the “Collections Policies and Procedures of the Vermont Archaeology Heritage Center” (2015).

2. VTrans will notify FRA, SHPO and Tribes when materials are ready to be transferred to the VAHC.

### **H. Confidentiality**

1. If disclosure of location information could result in the disturbance of a cultural resource, all Signatories to this PA will ensure shared data, including data concerning the precise location and nature of historic properties, archaeological sites, and properties of religious and cultural significance to Tribes, are protected from public disclosure to the greatest extent permitted by law, in accordance with 36 C.F.R. § 800.11(c), Section 304 of the NHPA, Section 9 of the Archeological Resource Protection Act of 1979, Executive Order No. 13007 on Indian Sacred Sites dated May 24, 1996, and Protection of Archaeological Information of Vermont Statutes (22 V.S.A. § 761).
2. Consulting Parties are not entitled to receive information protected from public disclosure.

## **VII. POST-REVIEW DISCOVERIES**

- A. Pursuant to 36 C.F.R. § 800.12(a)(2), VTrans will develop an Unanticipated Discoveries Plan (UDP) to be included in Project construction and bidding documents for contractor/team use if a previously undiscovered archaeological or cultural resource that is or could reasonably be a historic property is encountered during construction, or a previously known historic property will be affected in an unanticipated manner. The UDP will incorporate procedures for interacting with the media, a chain of contact, stop-work requirements, and other appropriate provisions. VTrans will submit the UDP to the other Signatories and Tribes for concurrent review in accordance with Stipulation III.
- B. In the event of an unanticipated discovery, VTrans will require its contractor to immediately cease all ground disturbing and/or construction activities within a minimum 50-foot radius buffer zone of the discovery. VTrans will also halt all work in surrounding areas where additional subsurface remains can reasonably be expected to be present. VTrans, in consultation with FRA, may seek written SHPO concurrence of a smaller buffer based on facts in the field specific to the discovery. Work in all other areas of the Project may continue.
- C. VTrans will notify the other Signatories and Tribes, within 48 hours of the discovery (36 C.F.R. § 800.13(b)(3)). If appropriate, FRA will also identify and invite additional consulting parties to consult on post-review discoveries.
- D. VTrans will investigate the discovery site and evaluate the resource(s) according to the professional standards and guidelines in Stipulation II. VTrans will prepare and submit a written document containing a proposed determination of NRHP eligibility for the resource(s) and an assessment of effects on historic properties to the other Signatories, the consulting parties, and Tribes, for a seven (7) day concurrent review. FRA will make the final determination of eligibility and assessment of effects based on the information obtained within this consultation period. If SHPO and/or Tribes do not concur with the eligibility or effects determination, FRA may elect to assume eligibility and/or adverse effects for expediency.
- E. If FRA determines the unanticipated discovery is eligible for listing in the NRHP and

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adverse effects cannot be avoided, VTrans, in consultation with FRA, will propose in writing to SHPO, participating Tribes, and consulting parties, treatment measures to resolve adverse effects, which may be those in Stipulation V. These parties will have seven (7) day to review and comment on the proposed treatment measures. FRA will consider comments to the fullest reasonable extent. After approval by FRA, VTrans will carry out the treatment measures.

- F. VTrans will ensure construction-related activities within the buffer zone do not proceed until FRA, in consultation with SHPO determines that (1) the located resource is not NRHP- eligible, or (2) the agreed upon treatment measures for historic properties have been completed or can be completed within a specified time period after construction-related activities have resumed without harming the resource.
- G. Human Remains
1. If human remains are encountered during construction, VTrans will require its contractor to immediately halt subsurface disturbance in that portion of the Project area and immediately secure and protect the human remains and any associated funerary objects in place in such a way that minimizes further exposure or damage to the remains from the elements, looting, and/or vandalism.
  2. In accordance with 13 V.S.A. § 3761 (Unauthorized Removal of Human Remains), 13 V.S.A. § 3764 (Cemeteries and Monuments – Grave markers and historic tablets) and 18 V.S.A. § 5212 (Permit to Remove Dead Bodies), and supplanting laws or regulations, VTrans will immediately notify the appropriate Police Department to determine if the discovery is subject to a criminal investigation by law enforcement and notify the Signatories within 24 hours of the initial discovery.
  3. If a criminal investigation is not appropriate, VTrans will ensure compliance with any applicable State and local laws pertaining to human remains, burial sites, and funerary objects.
  4. In the event the human remains encountered could be of tribal origin, FRA will immediately notify the appropriate Tribes and consult with the Signatories to determine the treatment plan for the tribal human remains and any associated funerary objects. The treatment plan will be reviewed in accordance with Stipulation III. Once the treatment plan has been approved by FRA and SHPO, VTrans will implement the plan.
  5. If the remains are not of tribal origin, VTrans will, as appropriate, develop a research design/treatment plan for the appropriate treatment of the remains and any associated artifacts, consistent with procedures and guidelines contained in this PA and submit the design and plan to the Signatories and the consulting parties for concurrent review in accordance with Stipulation III. Once the research design/treatment plan has been approved by FRA and SHPO, VTrans will implement the plan.
  6. VTrans will ensure the contractor does not proceed with work in the affected area until FRA, in consultation with SHPO, and/or the consulting parties and Tribes, as appropriate, determines the development and implementation of an appropriate treatment plan, research design/treatment plan, or other recommended mitigation measure is complete. However, work outside the area of the discovery may continue.

**VIII. PROJECT MODIFICATIONS AND CHANGES**

- A. Certain project modifications and changes will not require additional consultation under this PA. Additional consultation will not be required under the following conditions:
1. The approved APE reduces in size;
  2. There is no change to the effects finding; and
  3. Less than five years have passed since historic properties, excluding archaeological resources, were identified within the APE.
- B. If additional consultation is not required, VTrans will submit a memorandum detailing the reasons why such consultation is not required to FRA for review. FRA will include the approved memorandum in its Project file.
- C. If additional consultation is required for Project changes that could potentially affect historic properties, including those not previously identified within the original Project APEs, VTrans will submit written documentation, including Project plan sheets or sketches showing the modification, a brief explanation why the change is needed, and any documentation relevant to compliance with the terms of this PA to the Signatories, consulting parties, and Tribes, as appropriate, for review and comment in accordance with Stipulation III.
- D. Historic Architecture
1. VTrans will refine the APE as needed, in consultation with FRA and SHPO, including but not limited to, when the APE is expanded and/or bridges initially identified by VTrans for repair are later identified for replacement. Once a new APE is defined, VTrans will conduct any required additional architectural survey to identify historic properties listed in or eligible for listing in the NRHP. VTrans will prepare and submit one or more technical document(s) containing the results of the supplementary architectural survey, together with the proposed identification of historic properties and assessment of effects on architectural historic properties according to the criteria of adverse effects (36 C.F.R. § 800.5), to the Signatories and consulting parties for concurrent review in accordance with Stipulation III.
  2. B&R Railroad Historic District
    - a. If FRA determines the Program Comment is not applicable and the Project modifications will contribute to the adverse effects to the B&R Railroad Historic District, those adverse effects will be mitigated through completion of Stipulation V.
  3. Historic Properties Outside of the B&R Railroad Historic District
    - a. If FRA, in consultation with SHPO, determines the Project modifications will result in adverse effects to historic architectural properties located outside of the B&R Railroad Historic District, VTrans will develop a proposal for treatment measures to resolve the adverse effect.
    - b. VTrans will provide the proposal to FRA and SHPO for approval and will provide the opportunity for review by consulting parties in accordance with Stipulation III.
    - c. Following approval by FRA and SHPO, VTrans will carry out the treatment measures.

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### **E. Archaeology**

1. Documents associated with Project modifications with the potential to impact archaeological deposits will be addressed pursuant to Stipulation III.
2. If FRA determines the Project modifications will result in unanticipated adverse effects to archaeological resources, VTrans will mitigate these effects in accordance with Stipulation VI.F.

## **IX. MONITORING AND REPORTING**

- A. Following the execution of this PA until it expires or is terminated, VTrans will provide the Signatories, consulting parties, and Tribes an annual summary report detailing work undertaken pursuant to its terms. Such report will include any proposed scheduling changes, any problems encountered, and any disputes or objections received as a result of VTrans efforts to carry out the terms of this PA.
- B. VTrans will submit the summary report to the other Signatories, the consulting parties, and Tribes annually on the 31<sup>st</sup> of January. Within thirty (30) days of receipt of the summary report, the other Signatories may request a meeting to discuss the contents as a group. This meeting may occur in person or by teleconference or web meeting.

## **X. DISPUTE RESOLUTION**

- A. Any Signatory to this PA or Tribe may object to any proposed action(s) or the manner in which the terms of this PA are implemented by submitting its objection to FRA in writing, after which FRA will consult with the Signatories to resolve the objection. If FRA determines such objection cannot be resolved, FRA will, within fifteen (15) days of such objection:
  1. Forward all documentation relevant to the dispute, including FRA's proposed resolution, to the ACHP (with a copy to the Signatories). ACHP will provide FRA with its comments on the resolution of the objection within thirty (30) calendar days of receiving documentation.
  2. If the ACHP does not provide comment regarding the dispute within thirty (30) calendar days, FRA will make a final decision on the dispute and proceed accordingly.
  3. FRA will document this decision in a written response that takes into account any timely comments received regarding the dispute from ACHP and the Signatories and provide them with a copy of the response.
  4. FRA will then proceed according to its final decision.
  5. The Signatories remain responsible for carrying out all other actions subject to the terms of this PA that are not the subject of the dispute.
- B. A Consulting Party to this PA or a member of the public may object to the manner in which the terms of this PA are being implemented by submitting its objection to FRA in writing. FRA will notify the other Signatories of the objection in writing and take the objection into consideration. FRA will consult with the objecting party, and if FRA determines it is appropriate, the other Signatories for not more than thirty (30) calendar days. Within fifteen (15) calendar days after closure of this consultation period, FRA will provide the Signatories, Consulting Parties, and the objecting party with its final decision in writing.

## **XI. ADOPTABILITY**

If another Federal agency not initially a party to the PA receives an application for a license, permit, or funding for the Project as described in this PA, that agency may fulfill

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its Section 106 responsibilities by stating in writing it concurs with the terms of this PA and notifying the Signatories that it intends to do so. Such an agreement will be evidenced by an amendment to this PA that describes the roles and responsibilities of the new Signatory, affirms the party's concurrence with the terms of the PA, and is filed with the ACHP.

**XII. AMENDMENTS**

Any Signatory to this PA may request that it be amended, whereupon that party will immediately consult with the other Signatories within thirty (30) days (or another time period agreed to by all Signatories) to consider such an amendment. FRA will be responsible for developing and distributing any resulting amendment among the other Signatories for execution in the same manner as the original PA. The amendment will be effective on the date FRA files a copy signed by all Signatories with the ACHP.

**XIII. TERMINATION AND WITHDRAWAL**

- A. If any Signatory to this PA determines its terms will not or cannot be carried out, that party will immediately notify the other parties in writing and consult with them to seek resolution or amendment per Stipulation XII. If within sixty (60) days (or another time period agreed to by all Signatories) a resolution or amendment cannot be reached, any Signatory may terminate the PA upon written notification to the other Signatories. A Consulting Party does not have the ability to terminate the PA.
- B. If the PA is terminated, then, prior to work continuing on the Project, FRA must either, (1) execute a new PA (36 C.F.R. § 800.6) or (2) request, consider, and respond to the comments of the ACHP under 36 C.F.R. § 800.7. FRA will notify the other Signatories, the consulting parties, and Tribes as to the course of action it will pursue.
- C. If FRA determines it does not have an Undertaking relating to this Project, FRA may withdraw from participation in this PA entirely upon ninety (90) days written notification to the other Signatories.

**XIV. DURATION, EFFECTIVE DATE, AND EXECUTION**

- A. Duration
  - 1. This PA will expire when all of its terms have been completed or in seven (7) years from the date of its execution, whichever comes first, unless the Signatories agree to an extension via amendment in accordance with Stipulation XII. If FRA or VTrans anticipate the need for an extension, either party will initiate the amendment process at least three months prior to expiration date of the PA.
- B. Effective Date
  - 1. This PA will become effective upon execution by all Signatories and FRA's subsequent filing with the ACHP.
- C. Counterparts
  - 1. This PA may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.
- D. Electronic Copies
  - 1. Within one (1) week of the last signature on this PA, VTrans will provide each Signatory with one high quality, legible, full color, electronic copy of the fully-executed PA and all its appendices fully integrated into one, single document.

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2. If the electronic copy is too large to send by e-mail, VTrans will make copies available for the other Signatories through an online site or through another suitable, electronic means.
3. VTrans will also make the PA available to the public on the Project website within thirty (30) days of execution.

Execution of this PA by the Signatories, its subsequent filing with the ACHP by FRA, and implementation of its terms demonstrate that FRA has considered the effects of this Undertaking on historic properties, afforded the ACHP a reasonable opportunity to comment, and satisfied its responsibilities under Section 106 of the NHPA and its implementing regulations.

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**PROGRAMMATIC AGREEMENT  
AMONG  
THE FEDERAL RAILROAD ADMINISTRATION,  
THE VERMONT STATE HISTORIC PRESERVATION OFFICER,  
AND  
THE VERMONT AGENCY OF TRANSPORTATION,  
REGARDING THE  
BETTER UTILIZING INVESTMENTS TO LEVERAGE DEVELOPMENT  
(BUILD) TRANSPORTATION DISCRETIONARY GRANT PROJECT to  
REHABILITATE or REPLACE (29) EXISTING RAILROAD BRIDGES ON THE  
BENNINGTON AND RUTLAND RAILROAD  
in RUTLAND and BENNINGTON COUNTIES, VERMONT**

**SIGNATORY SIGNATURE PAGE**

**Federal Railroad Administration**

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Marlys Osterhues, Chief  
Environment and Project Engineering Division  
Office of Railroad Policy and Development

Date

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**SIGNATORY SIGNATURE PAGE**

**Vermont Division for Historic Preservation**

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Laura V. Trieschmann  
Vermont State Historic Preservation Officer

Date

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**INVITED SIGNATORY SIGNATURE PAGE**

**Vermont Agency of Transportation**

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Joseph Flynn  
Secretary, Vermont Agency of Transportation

Date