

Ms. Pamela Stephenson  
Division Administrator  
Federal Highway Administration  
55 Broadway, 10th Floor  
Cambridge, MA 02142  
Attn: Ms. Damaris Santiago

Dear Ms. Stephenson:

Pursuant to your letter of January 26, 2012, I am submitting herewith my comments concerning the revised Memorandum of Agreement (MOA) dated January 23, 2012 and the January 4, 2012 teleconference.

### The Revised Memorandum of Agreement

I have carefully reviewed the revised MOA and compared it with the original MOA of November 8, 2011 and have the following comments.

With respect to revised Section II., "Further Consultation," of the MOA, in my opinion, the consultation required by Section 106 has been fully complied with by FHWA and MassDOT and no further consultation is necessary. The proposal in Section II to conduct additional consultation with the Section 106 consulting parties, though I believe unnecessary, is laudable and clearly demonstrates FHWA's and MassDOT's commitment to continued consultation with the parties even after execution of the MOA.

In Section IV of the revised MOA, FHWA and MassDOT propose to provide information about the new MRB to "any person or entity" that may seek a National Register DOE for the new MRB. I suggest that the parties to which such information is to be provided, pursuant to a request under the MOA, be limited to the Section 106 consulting parties. Any party outside the MRB Section 106 proceeding can seek the same information under a FOIA or similar request. This suggestion is simply to reduce to potential administrative burden on FHWA and MassDOT in the event multiple requests are made.

In Section III, "Archival Documentation," I appreciate the addition I requested to Paragraph F. to provide all Section 106 consulting parties with a copy of the compact disc containing all photographic and paper archival documentation.

On an editing note, in the fifth "Whereas" paragraph on page 1 of the revised MOA, the Keeper's DOE notification was dated October 1, 2010 rather than October 31, 2010.

Notwithstanding my foregoing comments, I will sign the revised Memorandum of Agreement as a concurring Section 106 consulting party.

### The January 4, 2012 Teleconference

I agree with the majority of the participants that the January 4, 2012 teleconference addressed concerns that the Advisory Council and some consulting parties have expressed regarding the administrative record and responses to comments of the parties. I disagree with the Friends' assessment of FHWA's and MassDOT's compliance with Section 106.

During the January 4, 2012 teleconference, the Friends' representative repeatedly argued that MassDOT did not conduct a "genuine consultation" under Section 106 (Transcript at 6, 9, 10, 11). The main thrust of his argument is that MassDOT did not meet or consult independently with the Forest Products Laboratory (FPL) or Mr. John Smolen, the Ohio bridge expert retained by the Friends.

Of course, the Friends or any other consulting party has the right to retain experts and consultants to assist them in the Section 106 proceeding. However, under Rules promulgated by the Advisory Council governing Section 106 consultation, namely, 36 C.F.R. §§ 800.2(a)(4), 800.2(c)(5), 800.4(f), and 800.4(f)(3), neither FHWA nor MassDOT is obligated to meet with or consult independently with anyone who is not a designated consulting party. Consider the burden on FHWA and MassDOT if every consulting party in this Section 106 proceeding retained one or more experts and consultants.

While nothing in the Rules appears to prohibit consultation with non-parties to a Section 106 proceeding (e.g., URS and HDR are MassDOT technical consultants), it is inappropriate to fault or criticize FHWA and MassDOT for not meeting independently with FPL and Mr. Smolen. That is especially so when the comments of both FPL and Mr. Smolen have been made of record in this Section 106 proceeding. In fact, Mr. Smolen has actively participated in every Section 106 meeting to date.

The Friends' representative also argued (Tr. at 9) that "genuine consultation" requires a "meeting of the minds," a legal term of art which means "a necessary requirement to the formation of a contract or agreement." However, there is nothing in the Section 106 Rules (36 C.F.R. Part 800) that requires FHWA or MassDOT to reach agreement or a "meeting of the minds" with the Friends or any other consulting party. Under Section 106, FHWA and the Advisory Council are the only necessary parties to an agreement (MOA).

Finally, I wish to thank FHWA for approving my request for consulting party status in the MRB Section 106 proceeding. In addition, I am particularly appreciative of the hard work, perseverance and professionalism displayed by FHWA and MassDOT personnel involved with the MRB Project and for the fulfillment of their responsibilities under Section 106.

Respectfully submitted,

George Myers  
MRB Consulting Party