

BEFORE THE SURFACE TRANSPORTATION BOARD

301133

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Office of Proceedings

September 30, 2020

Part of

Public Record

Consolidated Rail Corporation -)
Abandonment Exemption -) AB 167 (Sub-no. 1189X)
In Hudson County, NJ)

Motion for Extension of Time for Comments on the
"Draft Supplemental Environmental Assessment"
On behalf of City of Jersey City,
Rails to Trails Conservancy and
Pennsylvania Railroad Harsimus Stem Embankment
Preservation Coalition

City of Jersey City, Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition, and Rails to Trails
Conservancy ("City et al") hereby move for an extension of time
to file comments on the "draft supplemental environmental
assessment" (DEA) served September 10, 2020, in this proceeding,
until thirty (30) days following the issuance of a final
"Memorandum of Agreement" for purposes of Section 106 of the
National Historic Preservation Act, 54 U.S.C. 306108.

The comment period on the DEA currently expires on October
19, 2020.

As the cultural resource report prepared by the consultant
retained by Conrail to assist the Board recognizes, loss of
federal jurisdiction over the Harsimus Branch as proposed by
license applicant Consolidated Rail Corporation will have severe
adverse impacts on a variety of historic assets protected under

Section 106 of the National Historic Preservation Act (NHPA). These adverse impacts are exacerbated by Conrail's prior unlawful¹ flouting of the pre-abandonment approval requirements imposed by the ICC Termination Act, esp. 49 U.S.C. 10901, et seq. These requirements cannot be waived by this agency, but should be enforced in a meaningful way that holds the public harmless from adverse consequences flowing from prior unlawful evasion by Conrail and its chosen developer.

Adverse impacts for National Environmental Policy Act (NEPA) purposes include adverse impacts on historic assets.² Yet the DEA appears to defer all analysis of these grievous adverse impacts to the agency's section 106 process. This puts the cart before the horse.³ The agency cannot purport to analyze adverse

¹ Accord, Consummation of Rail Line Abandonments... ("Policy Statement"), Ex Parte 678, served April 23, 2008, slip at 4: "In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then be adversely affected" (emphasis added). The *Policy Statement* indicated that the agency would do whatever necessary to prevent a railroad from prejudicing meaningful 106 review through destruction of 106 assets on a rail line prior to abandonment authorization.

² 40 C.F.R. §§ 1502.16(a)(8), 1508.1(g)(1) & (m).

³ As the federal Advisory Council on Historic Preservation has advised "**NEPA and Section 106**: "NEPA requires that all federal agencies ensure an environmental review is completed when they

environmental impacts in advance of completion of the Section 106 process and cannot make assumptions about the outcome of that process and/or the impacts on historic assets in advance of its completion.

By email bearing date of September 25, 2020, Alan Tabachnick (attached), Historic Preservation Specialist for the Surface Transportation Board (STB) Office of Environmental Analysis (OEA), indicated that STB OEA intends to hold a virtual public meeting with limited ability to comment which will include, inter alia, initial Section 106 consultation relating

propose a federal action. Each federal agency develops its own internal NEPA regulations to implement this review process. NEPA covers a broader scope of resources than Section 106; however, federal agencies should coordinate their compliance with NEPA and Section 106 and consider their Section 106 responsibilities as early as possible in the NEPA process. Agencies should plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. Applicants should remember that consultation under Section 106 is different from public involvement under NEPA and requires more interaction with consulting parties. Applicants need to be familiar with NEPA documents and their possible use for Section 106. When a project is categorically excluded from NEPA review, Section 106 review may still be required. *Section 106 must be completed before an agency signs a decision document for NEPA* (e.g., a Record of Decision)." <https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit>) (emphasis added) See also 36 C.F.R. § 800.8(a)(3) ("Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

to "Resolution of Adverse Effects."⁴ The meeting is scheduled for October 27, 2020. Mr. Tabachnick indicates in his September 25 email that the agency intends to circulate a "draft Memorandum of Agreement" (draft MOA) which would "include a number of mitigation items to resolve the project's adverse effect." Mr. Tabachnik states that the draft MOA will be circulated approximately two weeks before the October 27, 2020, meeting, or on or about October 13, 2020. Although City et al. have requested and been accorded consulting party status, to date none has been consulted on the terms of the draft MOA, none has seen a draft MOA, and all have been asked not to submit a proposed MOA, or presumably even suggestions as to same. City et al. expect to have input into the final MOA, even if they have had none on the initial draft MOA. City et al. do not believe the format of the virtual meeting, with limited time to provide comment, will be adequate for commenting purposes, and assume that an appropriate amount of time (at least 30 days) will be allocated to the consulting parties and members of the public to submit written comments on any draft circulated, per the Section 106 regulations. 36 C.F.R. § 800.6. In addition,

⁴ The OEA has already determined that the STB/Conrail licensing action proposed in this proceeding (authorization for abandonment and loss of STB jurisdiction over Harsimus Branch) will result in a multitude of adverse effects. See, e.g., Cultural Resources Effects Report Addendum (Nov. 2019) in AB 167-1189X.

the Advisory Council on Historic Preservation must be afforded an opportunity to comment as well. *Id.* § 800.6(b).

As the foregoing makes clear, the final MOA, and the extent to which it does or does not provide meaningful mitigation of the adverse impacts on historic sites (including destruction and loss of same) flowing from loss of agency jurisdiction, will obviously have a major impact on the comments of City et al. on the DEA. While City et al. hope that a MOA can be reached between all the relevant stakeholders and consulting parties, the STB, as the DEA acknowledges, cannot unilaterally impose that mitigation without the active consent and participation of the consulting parties on the terms of that MOA, which has not yet taken place.⁵

⁵ Contrary to implied conclusions in the DEA, this is not an ordinary or lawful abandonment. To the contrary, it is an after-the-fact proceeding which should be aimed at remedying the adverse impacts flowing from an unlawful de facto abandonment in which the railroad (Conrail) engaged in an illegal anticipatory demolition of an historic asset (the Harsimus Embankment) by selling it to a developer (the Hyman LLS) and then (among other things) joining in the developer's applications for demolition permits utterly to destroy the section 106-protected asset. In these circumstances, OEA is simply in legal error in claiming that the agency can do nothing to "regulate" or take into account what Conrail and the developer do as soon as the agency rubberstamps the abandonment exemption Conrail is belatedly seeking. If Conrail wishes to promptly conclude the environmental and historic preservation processes in this proceeding, either for itself or for its chosen developer, then it should negotiate with City et al. in good faith. Indeed, if it but negotiated a railbanking agreement, the whole NEPA and NHPA process would be resolved under recent STB precedent, for the property would remain under STB jurisdiction indefinitely.

City et al. therefore move that the comment period on the DEA be extended until 30 days after STB circulates its final MOA. In all events, calling for comments on the DEA to be filed by October 19 interferes with analysis of the projected draft MOA and with consequent preparation by City et al to provide such comment as can be made in the brief period which STB OEA projects will be available before the the October 27 virtual meeting.

Conclusion

The comment period on the DEA should be extended until 30 days after a final MOA under section 106 is circulated to the parties.

Respectfully submitted,
s/

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See STB's recent decision in Norfolk Southern Railway Co. - Ab Ex. - in Hudson and Essex Counties, N.J., AB 290 (Sub-no. 408X), served Sept. 29, 2020, slip at pp. 4-5.

Attachment (Tabachnick email)

Certificate of Service

The undersigned hereby certifies service by posting the foregoing in the US Mail, postage pre-paid, first class or priority mail, this 30th day of September 2020 addressed to the parties on the STB service list in this proceeding at their addresses per that list.

s/ Charles H. Montange

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Tabachnick, Alan

To: Section 106 Consulting Parties From: Alan...

Fri, Sep 25 at 10:52 AM

Subject: Harsimus Branch Abandonment Section 106 Consulting Parties Meeting

To: Section 106 Consulting Parties

From: Alan Tabachnick, Historic Preservation Specialist, Surface Transportation Board,
Office of Environmental Analysis

Re: Invitation to Section 106 Consulting Parties Virtual Meeting on Oct. 27, 2020

re: Conrail's proposed abandonment of the Harsimus Branch in Jersey City, NJ, Docket No.
AB-167 (Sub-No. 1189X).

The Surface Transportation Board's Office of Environmental Analysis (OEA) is hosting a "Virtual" Section 106 of the National Historic Preservation Act (NHPA) Consulting Parties meeting, on October 27, 2020, in the pending rail-line abandonment proceeding referenced above, in which Consolidated Rail Corporation (Conrail) has proposed to abandon the Harsimus Branch rail line in Jersey City, NJ. The meeting will be held virtually due to ongoing safety concerns related to COVID-19 and will start at 7:00 pm and conclude at 9:00 pm.

The purpose of this meeting is to continue consultation and to move into the Resolution of Adverse Effects phase, Step 4 of the NHPA's Section 106 process. The agenda for the meeting is attached to this email. OEA will be presenting a summary of the cultural resource studies to date. Please see below for links to those studies:

Notice of Intent to Initiate Case (March 2008)

<https://dcms-external.s3.amazonaws.com/MPD/78432/85257CA7006C955B8525740A00775CDD/221808.PDF>

Notice of Exemption (APE Report is attached as Appendix A) (January 2009)

<https://dcms-external.s3.amazonaws.com/MPD/78432/85257CA7006C955B852575370053C8F3/224298.PDF>

Cultural Resources Identification Report (May 2017)

<https://dcms-external.s3.amazonaws.com/MPD/62491/258688F3EFADEE3985258116006EE98E/39672.pdf>

Cultural Resources Identification Report Addendum (October 2018)

<https://dcms-external.s3.amazonaws.com/MPD/62491/D7588919E40D596785258324004F7FF5/46660.pdf>

Cultural Resources Effects Report (March 2019)

<https://dcms-external.s3.amazonaws.com/MPD/62491/DF1AE62735B66773852583CC004D7711/39674.pdf>

Cultural Resources Effects Report Addendum (November 2019)

<https://dcms-external.s3.amazonaws.com/DCMS External PROD/1573851472371/47353.pdf>

Additionally, OEA will be presenting a draft Memorandum of Agreement for review by the consulting parties. The draft MOA will include a number of mitigation items to resolve the project's adverse effect, and we are very interested in hearing from the consulting parties regarding these proposed mitigation items, and potentially others that could be considered. Approximately two weeks prior to the meeting, OEA will be circulating the draft MOA to all the consulting parties, which will initiate the formal 30-day review period. The meeting on October 27th falls approximately mid-way during that review period.

During the meeting, the consulting parties will have the opportunity to submit both oral and written comments. Detailed access information for the meeting will be provided after participants complete and submit the registration form (link provided below).

We encourage your participation in the meeting and have allocated sufficient time for each individual to “hold the floor” for an allotted 5 minutes. After the time expires, our moderator will ask you to conclude your remarks so that additional participants can speak.

Virtual Meeting Technology

In preparation for the “virtual” meeting, you will be sent a technology survey via email that will solicit input from you on your access to various internet platforms and tools. We will use the survey results to make both attendance and participation at the meeting as easy and effective as possible. **Meeting Registration (Required)**

If you wish to participate virtually in the live meeting:

- **Please use the following link to complete the registration form no later than 5:00 pm on October 26th, 2020:**
https://docs.google.com/forms/d/e/1FAIpQLSe7jDLZK7GQSZ1oy44bBgT_6B9hBU_7XTg0o50ovITAM05SA/viewform
- The day before the meeting (October 26, 2020), you will receive an email with meeting login information.

Meeting Platform Tutorials (Optional)

After submitting the registration form, you will be emailed information about optional virtual meeting platform tutorials, during which you can troubleshoot potential technology issues and/or familiarize yourself with the meeting platform. You may explore the platform independently by entering an open “test room.” Or, you may request a one-on-one tutorial with the meeting’s technology coordinator, whose contact information will be provided in the registration confirmation email. The tutorial links *are not* the same as the meeting link.

Please note that the meeting will be recorded so that we accurately document everyone’s comments.

We look forward to meeting with you and hearing your comments, especially your thoughts on resolving adverse effects on historic properties as a result of this proposal.

Alan Tabachnick

Historic Preservation Specialist

Office of Environmental Analysis

Surface Transportation Board

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Harsimus Branch Abandonment Project
Section 106 Consulting Parties Meeting | Draft Agenda

October 27, 2020 | 7 – 9 PM

Location: RingCentral virtual platform, meeting link to be provided on 10/26

- I. Welcome, Ground Rules & Purpose (5 min) – *Justice & Sustainability Associates and Surface Transportation Board*
- II. Presentation (30 min)
 - Project Site History – *Richard Grubb & Associates*
 - Section 106 Review Process – *Surface Transportation Board*
 - Resolving Adverse Effects – *Surface Transportation Board*
- III. Comment Period (85 min) – *Justice & Sustainability Associates*
 - Each person wishing to make a comment will be allowed up to 5 minutes
- IV. Adjourn – *Justice & Sustainability Associates*