

From: [C. Montange](#)
To: Kate.Marcopul@dep.nj.gov; mnelson@achp.gov; [Hill, Jocelyn](#); [Peter Baker](#); gucciardos@comcast.net; [Andrea Ferster](#); [Esther Wintner](#); [Sam Pesin](#); hpnajc@gmail.com; harscoveassoc@gmail.com; dskaeese@aol.com; ghulings@hcnj.us; [Francesca Giarratana](#); [P. Maha](#); jclandmarks@gmail.com; greg@nynjbaykeeper.org; mail@nynjbaykeeper.org; kmoore@padnajaic.org; kelly@preservationnj.org; benjaminbernouy@yahoo.com; wpanews@gmail.com; info@jcvillage.org; jloichinger@achp.gov; Andrea.Tingey@dep.nj.gov; mcrowley@embankment.org; [R. Bruce Donald](#); [Maggie O'Neill](#); [Tabachnick, Alan](#); [Peter Pfohl](#)
Cc: [Gosselin, Danielle](#); [Betsy Merritt](#); [Vickie Hyman](#); [Chris Albanese](#)
Subject: Re: Hold the Date – Section 106 of the National Historic Preservation Act Consulting Parties Webinar/Meeting on June 8, 2023 re: Conrail's proposed abandonment of the Harsimus Branch in Jersey City, NJ, Docket No. AB-167 (Sub-No. 1189X).
Date: Wednesday, May 31, 2023 6:11:30 PM
Attachments: [city2oea167-1189x0001.pdf](#)
[image001.png](#)

To: all consulting parties and OEA representatives in AB 187-1189X Section 106 proceeding (Harsimus Branch and related historic resources)

Please find attached a letter responsive to matters raised in the below May 10 submission. A copy of this letter is also being submitted as Environmental Correspondence to be docketed in the record for this proceeding.

On Wednesday, May 10, 2023 at 02:40:34 PM PDT, Peter Pfohl <pap@sloverandloftus.com> wrote:

Dear Consulting Parties and OEA representatives: Please find the attached letter on behalf of the LLCs and the Albanese Organization in reply to the below submission. A copy of this letter has also been separately filed with the STB as Environmental Correspondence to be docketed in the record for this proceeding.

Regards,

Peter Pfohl



PETER A. PFOHL
 PAP@SLOVERANDLOFTUS.COM
 SLOVER & LOFTUS LLP

DIRECT: (202) 454-4419 | MAIN: (202) 347-7170 | CELL: (202) 288-4072
 1224 SEVENTEENTH ST. N.W., WASHINGTON, D.C. 20036
 WWW.SLOVERANDLOFTUS.COM

From: C. Montange <c.montange@frontier.com>

Sent: Monday, May 8, 2023 4:05 PM

To: Kate.Marcopul@dep.nj.gov; rnelson@achp.gov; Hill, Jocelyn <jocelyn.hill@conrail.com>; Peter Baker <pbaker@jcnj.org>; gucciardos@comcast.net; Andrea Ferster <aferster@railstotrails.org>; Esther Wintner <esther.wintner@gmail.com>; Sam Pesin <pesinliberty@earthlink.net>; hpnajc@gmail.com; harscoveassoc@gmail.com; dskaese@aol.com; ghulings@hcnj.us; Francesca Giarratana <fgiarratana@hcnj.us>; P. Maha <mahastein2@yahoo.com>; jclandmarks@gmail.com; greg@nynjbaykeeper.org; mail@nynjbaykeeper.org; kmoore@padnajc.org; kelly@preservationnj.org; benjaminbernouy@yahoo.com; wpanews@gmail.com; info@jcvillage.org; Peter Pfohl <pap@sloverandloftus.com>; jloichinger@achp.gov; Andrea.Tingey@dep.nj.gov; mcrowley@embankment.org; R. Bruce Donald <bruce@greenway.org>; Maggie O'Neill <moneill@jcnj.org>; Tabachnick, Alan <alan.tabachnick@stb.gov>

Cc: Gosselin, Danielle <danielle.gosselin@stb.gov>; Betsy Merritt <emerritt@savingplaces.org>

Subject: Re: Hold the Date – Section 106 of the National Historic Preservation Act Consulting Parties Webinar/Meeting on June 8, 2023 re: Conrail's proposed abandonment of the Harsimus Branch in Jersey City, NJ, Docket No. AB-167 (Sub-No. 1189X).

Mr. Tabachnick: As long time counsel for Jersey City, Embankment Preservation Coalition and RTC, I wish among other things to provide a brief update germane to Section 106.

1. Consolidated Rail Corporation withdrew without explanation from participation in settlement negotiations at about the time they appeared about to result in preservation of the Harsimus Branch corridor about two years ago. Although the assign of Conrail's chosen developer (the eight Hyman LLCs) has continued negotiations as to a portion of the corridor at issue in this proceeding, evidently in order to obtain development permission from Jersey City, those negotiations have not resulted in a settlement agreement as to any portion of the Harsimus Branch. Thus although the Harsimus Branch (including the Harsimus Embankment) has been determined eligible for protection under Section 106 of the National Historic Preservation Act, neither Conrail nor its chosen developer nor the assign of the chosen developer has agreed to measures that will preserve any portion of it or to protect it from demolition. Conrail's chosen developer and Conrail sought demolition permits for the Embankment and initiated demolition of stanchion, stopped only by my clients seeking relief at STB because of Conrail's unlawful sale of the property to its chosen developer prior to any STB abandonment authorization and prior to required initiation let alone completion of the Section 106m process. This is highly prejudicial and amounts to subversion of the process. Moreover, then and to this day, the entire Embankment has remained under threat of demolition. Once STB concludes its processes, the Branch and Embankment will be unprotected from destruction by demolition and otherwise. This result was exactly what was anticipated by Conrail when it sold and transferred the eight blocks containing the Embankment to the eight Hyman LLCs in 2005 without first applying for, much less obtaining, abandonment authorization from STB as required by law.

To the extent Conrail, STB, and the developer or its assigns claim STB as a result of the unlawful sale/transfer can not afford any relief that results in actual preservation of the Harsimus Branch or the Embankment, they not only are admitting but also insisting that a foreclosure of meaningful comment under Section 106 has already occurred.

There should have been **no** sale or transfer of this property before completion of the Section 106 process. The foreclosure of comment that has been admitted is and was contrary to the interest of any agency or party supporting historic preservation, and is not in the public interest of the State, Hudson County, or my clients. It is simply not consistent with a meaningful Section 106 process. My clients reserve all rights.

2. My clients oppose any MOA that purports to conclude the Section 106 process without actual preservation of the Harsimus Branch/Embankment. Any such MOA simply embodies a foreclosure of comment.

3. My clients would welcome an opportunity to review the current draft of the MOA which STB's Office of Environmental Analysis has presumably developed prior to any meeting, whether that meeting be virtual, on-line, or in person. We request OEA to supply its current draft.

4. An on-line or virtual meeting is no substitute for an actual in-person meeting in Jersey City so that individual citizens have an opportunity to participate in the Section 106 process as is required by law. Again, my clients reserve all rights.

I will be outside the United States from June 1 (evening) through June 25, and thus unable to participate in a June 8 virtual meeting. I request re-scheduling, or even better and consistent with number 3 above, that OEA substitute an actual meeting in Jersey City for the proposed virtual meeting at a point in either the last week of May or after June 26. If OEA goes ahead with its proposed virtual meeting, I request a recording or equivalent be prepared and made accessible, and reiterate my clients' position that it is not a substitute for an actual meeting, and in addition that it does not without much more address the foreclosure of comment that seems already admitted. In short, any meeting at this point appears meaningless as comment that is meaningful is foreclosed.

Charles Montange

for Jersey City, Embankment Preservation Coalition, and RTC

On Friday, May 5, 2023 at 08:18:04 AM PDT, Tabachnick, Alan <alan.tabachnick@stb.gov> wrote:

The Surface Transportation Board's Office of Environmental Analysis is hosting an online Section 106 Consulting Parties meeting on June 8, 2023 in the pending rail-line abandonment proceeding referenced above. The meeting will be held virtually and will start at 2:00pm EST and conclude at 4:00pm EST.

The purpose of this meeting is to update the Consulting Parties on the case and the status of the Section 106 process, to present the draft Memorandum of Agreement which has been revised after receiving Consulting Party comments, and to provide an opportunity for the Consulting Parties to comment on the updates.

Meeting details, including the agenda, log-in information, and other logistics will be circulated to the Consulting Parties at least two weeks prior to the June 8th meeting. We encourage your participation at the meeting and request that you focus your comments on the updated information presented.

We look forward to meeting with you, providing you with an update on the status of the case and the Section 106 process, and hearing your comments.

Alan Tabachnick

Federal Preservation Officer

Surface Transportation Board

Office of Environmental Analysis

395 E St SW

Washington, DC 20423

202-245-0367 (o)

202-934-8469 (c)

alan.tabachnick@stb.gov

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET
SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

31 May 2023

Danielle Gosselin

Director, Office of Environmental Analysis

Alan Tabachnick

Preservation Officer

Surface Transportation Board

395 E St. SW

Washington, D.C. 20423

Re: Environmental Comment in
AB 167-1189X (Conrail/Harsimus Branch)
and related proceedings

Dear Ms. Gosselin and Mr. Tabachnick:

By letter dated May 10, 2023, Peter A. Pfohl, an attorney at Slover & Loftus, filed (on Slover & Loftus letterhead without address) a letter that purports to be an "environmental comment" in Consolidated Rail Corporation - Abandonment Exemption - Hudson County, N.J., AB 167 - 1189X (STB document number EI 32847). Mr. Pfohl published his letter by email attachment to a host of federal, state and local officials and members of the public interested in AB -167-1189X. The focus of Mr. Pfohl's letter is not on environmental or historic preservation issues. Instead, it amounts (a) to a complaint that City of Jersey City ("City"), Rails to Trails Conservancy ("RTC"), and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition") (collectively, "City, et al.") continue to adhere to their legal positions (and in particular continue to seek meaningful federal relief) in the Surface Transportation Board's ("STB's") Section 106 process, and (b) to an ad hominem attack on City, et al.'s rail counsel (Montange) for continuing to advocate City, et al.'s positions. This letter is a responsive comment on behalf of City, et al., to the Pfohl May 10 letter ostensibly for the developer parties (identified as "the LLCs

(identified as "the LLCs and Albanese Organization, Inc., or "Albanese"). Mr. Pfohl's letter does reference an alleged "voluntary plan" to mitigate the adverse impacts of abandonment. That disclosure should be pursued under Section 106 and not employed (as Mr. Pfohl purports to do) as an excuse to end the Section 106 process.

I.

Mr. Pfohl in his letter complains of "Mr. Montange's fabricated ad hominem attacks" without identifying any. He claims these attacks "appear to have no end and lack any kind of civil restraint" but he fails to identify a single instance of incivility. He accuses his rhetorical nemesis (Mr. Montange) of "shameless" and "spurious and untruthful missives" (again, without citation or identification of any). Most troubling, he calls for STB to impose unspecified sanctions on City, et al.'s counsel and inappropriately attempts to interfere with the attorney-client relationship between the City and its rail counsel by urging the City to "remove Mr. Montange from any further settlement discussions."¹ All of these ad hominem attacks are based on Mr. Pfohl's apparent distress over the well-founded and well-supported legal positions advanced by the City's rail counsel in this proceeding.

Apart from inappropriately criticizing counsel's travel schedule, Mr. Pfohl does not identify, much less show, any fraud, chicanery, ex parte or otherwise unlawful conduct, or any action beyond the bounds of the law on the part of City, et al., or its attorneys, that would or could violate any ethical standard, including those outlined by the Board in 49 C.F.R. 1103.21.

On the other hand, Conrail did purport to sell a key eight blocks of the Harsimus Branch (a line requiring STB pre-authorization for any such sale) to some of Mr. Pfohl's clients (the LLCs), and STB has repeatedly said that sales of lines without STB's prior authorization (exactly what occurred here)

¹ Since Mr. Montange has not been involved in any settlement discussions (much less with Mr. Pfohl) since Conrail dropped out of any such discussions some two plus years ago, it appears that Mr. Pfohl is either being false and misleading or mistaking Mr. Montange for some other adversary.

is "unlawful."² In addition, one set of Mr. Pfohl's clients (the LLCs) did tear out a stanchion, forcing City, et al. to seek relief at STB in the early months of 2006. The tear-out does implicate what is now an acknowledged Section 106-protected property. Conrail joined in the LLCs' (Mr. Pfohl's clients) demolition requests aimed at destruction of the historic Embankment property. To bring pressure against City, et al. to forego efforts to preserve the property at issue for historic preservation and other public interest reasons, Mr. Pfohl's clients (i.e., the LLCs) sued various combinations of the City, its officers, its attorneys (including the undersigned), RTC and Coalition or their attorneys, in state court. Many of these suits have been stayed pending STB's final action in AB 167-1189X. These efforts to derail preservation will come back to life when STB jurisdiction ends. Thus, contrary to the legal position of attorney Pfohl and his clients, STB jurisdiction is demonstrably preventing adverse effects on the historic resources at issue in AB 167 (Sub-no. 1189X) and those resources will obviously be adversely impacted if STB jurisdiction is removed absent actual and meaningful mitigation before STB jurisdiction is removed.

Before a line is abandoned and demolished, STB must comply with Section 106 of the National Historic Preservation Act, allowing meaningful comment and an examination of means to mitigate adverse impacts flowing from loss of federal jurisdiction and rail line abandonment. That simply did not happen, and never could happen here under the developer/Conrail theory of the case, because Conrail unlawfully sold off the line without even seeking abandonment authorization. Conrail and the developer parties take the position that STB can do nothing about this abuse. No amount of bluster on the part of the developer community or by their attorneys can alter that fact.

Mr. Pfohl wishes to end crucial STB jurisdiction as soon as possible and complains of delay. But STB has explained that railroads that engage in unlawful de facto abandonments may face, among other things, not only delay in obtaining abandonment authority but also various sanctions, including financial penalties, being barred from use of expedited

² E.g., Consummation of Rail Line Abandonments, STB Ex Parte 678, slip op. at 4, served April 23, 2008. This is not the only unlawful sale of a line by Conrail during the relevant period.

procedures, and the agency "seeking a legal remedy against the railroad in a court of law."³

Mr. Pfohl's letter intimates that his clients may implement a "plan" to preserve the eight Embankment blocks in some fashion if STB jurisdiction is ended. He references a "voluntary plan" for mitigation once STB jurisdiction is gone. While the City and the Coalition have been participating in what they hope are good faith discussions with the LLCs and Albanese regarding a mitigation plan to resolve the dispute, City, RTC and Coalition firmly believe this "plan" must be incorporated into the MOA or otherwise be binding in order to serve as mitigation. Neither the developers nor Conrail have entered into any binding undertaking to preserve any historic resource. Absent a binding commitment, there is no mitigation for loss of federal jurisdiction. The "plan" that Mr. Pfohl relies upon if incorporated into the MOA, or otherwise made binding, would presumably provide at least some meaningful mitigation. As it stands, the Pfohl letter amounts to an effort to persuade agencies with jurisdiction to do nothing by claiming that the only thing currently preserving crucial historic resources must be removed in favor of no protection at all. If Mr. Pfohl's clients have a plan that is meaningful, then it should and must be set forth appropriately in the MOA or otherwise made binding. That would finally amount to actual mitigation.

II.

While this Board's ethical standards for practitioners do not govern either Mr. Pfohl or City, et al.'s counsel (they are attorneys governed by the standards of the D.C. and Washington bars respectively), the Board's standards are instructive, both as to Mr. Pfohl's ad hominem (personal abuse) and his attacks on City, et al.'s legal positions.

As to the ad hominem:

- "In conducting a case, it is improper for a practitioner to ... engage in personal abuse of other practitioners." 49 C.F.R. 1103.25(c). Mr. Pfohl engaged in personal abuse as identified in the quoted expressions from his May 10 letter referenced in the second paragraph of this letter. Particularly inappropriate is Mr. Pfohl's attempt to interfere with the relationship of rail counsel and its clients ("my clients are

³ Id., slip op. p. 4.

convinced that a settlement will never be reached as long as Mr. Montange serves as counsel for the City Parties").

As to City, et al.'s legal position:

- "A practitioner shall put forth his best effort to maintain and defend the rights of his client." 49 C.F.R. 1103.21. Mr. Pfohl's attack appears to focus on the efforts of counsel for the City, et al. to advance credible legal positions, which we expect will be fully vindicated by the courts.
- "Fear of disfavor of the Board ... should not cause a practitioner to refrain from the full discharge of his duty." Id. Mr. Pfohl invites the Board to show disfavor when City, et al. (through their counsel) disagree with the Board or with OEA.
- "The client is entitled to the benefit of any and every remedy and defense authorized by law." Id. Mr. Pfohl appears to reject the notion that City, et al., are entitled to any and every remedy authorized by law, at least if inconsistent with the mis-perceived interests of the developer parties.⁴
- "The client may expect his counsel to assert every ... remedy or defense [authorized by law.]" Id. Mr. Pfohl appears to reject this or wish to argue that City, et al. should not expect this of its counsel if the remedies are inconsistent with Mr. Pfohl's views of the developers' (his clients') interests.

In the circumstances and for the reasons given above, Mr. Pfohl's letter should be expunged from the record, or at least all of the sentences containing the materials quoted in the second paragraph as well as similar materials should be stricken.⁵ Failure to respond to any statement or argument in

⁴ Mr. Pfohl professes particular disgust for City's invocation of the "OFA" remedy (Pfohl at 3), but that remedy is available for public entities seeking former freight rail corridors for light and passenger rail uses, the Harsimus Branch is identified as a light rail corridor in City planning documents, and STB personnel long ago suggested the OFA remedy to City, et al.'s attorney when City, et al. inquired of the agency's public assistance office concerning remedies for de facto abandonment.

⁵ While STB is not involved in adjudicating tort law, Mr. Pfohl and his law firm should note that Mr. Pfohl's letter has defamatory content and, in calling for Mr. Montange's dismissal by his clients, arguably implicates one or more business torts.

Mr. Pfohl's letter should not be construed as an admission that the statement is true.

III.

For the record, City, et al., understand the purpose of Section 106 to be mitigation of adverse impacts on historic resources. If, as Mr. Pfohl claims, the developer parties have a "voluntary plan" to do this, then that should be presented as part of the Section 106 process, discussed, and incorporated as appropriate into the "MOA" discussed to the extent it mitigates the adverse effects flowing from loss of STB jurisdiction. Otherwise, "[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance" constitutes an adverse effect. 36 C.F.R. 800.5(a)(2)(vii). Documenting resources such as the Embankment or putting signs up about them is not preserving them or mitigating adverse effects.

Absent a binding commitment and implementation of a bona fide preservational "voluntary plan," the only meaningful alternative mitigation which can be implemented is to preserve agency jurisdiction over the Harsimus Branch, at least until Mr. Pfohl's clients are willing to commit to their plan. This can be done in one of two ways: (1) deny abandonment authority, or (2) grant Conrail discontinuance authority only (CSX and NS could also be granted discontinuance authority in their companion proceedings). Granting discontinuance rather than abandonment is an option to allow parties to work out differences involving transfer of title for corridor preservation. Compare Chicago & N.W. Transp. - Abandonment - Between Norfolk and Chadron, NE, AB 1 (Sub-no 230) (ICC served April 27, 1992) (authorizes discontinuance only so as to allow parties to work out preservational plan) with Chicago & N.W. Transp. - Abandonment Exemption - Between Norfolk and Merriman, NE, AB 1 (Sub-no. 249X), served June 2, 1994 (grants authorities for preservational plan, part trail, part continued rail). Discontinuance would keep the Embankment and Branch intact and under STB jurisdiction, presumably preventing further demolition

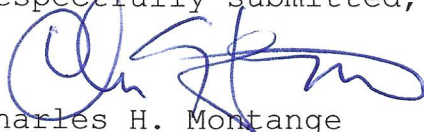
City, et al. and its attorneys reserve all rights to pursue relief in any appropriate forum in response to such conduct or continued conduct.

while the parties worked out a means to preserve historic resources.

Failure to respond to other arguments or assertions by Mr. Pfohl should not be construed as an admission. City, RTC and Coalition reserve all rights and arguments.

City, RTC and Coalition request that this letter not only be treated as a response to the May 10 letter by Mr. Pfohl to Ms. Gosselin and Mr. Tabachnick (EI 32847), but also included in the environmental comments in this proceeding.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Charles H. Montange', is written over the typed name.

Charles H. Montange
For City of Jersey City,
Rails to Trails Conservancy,
and Pennsylvania Railroad Harsimus
Stem Preservation Coalition

cc. (all by e-mail attachment) Peter Pfohl, Esq., all parties known to be served by or on behalf of Mr. Pfohl