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EI - 33242

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Ms. Daniele Gosselin, Director
Mr. Alan Tabachnick, Federal Preservation Officer
Office of Environmental Analysis
Surface Transportation Board
395 E St. SW
Washington, D.C. 20423

Re: Conrail – Abandonment Exemption – in Hudson County,
AB 167 (Sub-no. 1189X), and related cases (unlawful de facto
Abandonment of Harsimus Branch)

Dear Ms. Gosselin and Mr. Tabachnick:

These comments are on behalf of City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“City et al”), consulting parties in this proceeding.

Summary. On December 20, 2023, the LLCs and the Albanese Organization (“LLCs/Albanese” or “developer interests”) through one of their counsel (Mr. Pfohl) filed yet another letter (“Additional Pfohl Letter”) (EI 33212 on the environmental comments website) with the Office of Environmental Analysis (“OEA”). The Additional Pfohl Letter is so riddled with mistakes and misrepresentations that it must be corrected for the record. The letter also embodies a major concession by the LLCs/Albanese: the developer interests contend that certain measures embodied in a 2022 redevelopment plan are “unanimously supported” and will protect historic resources in Blocks Two to Eight of the rail line at issue here. In order for that representation to be accurate, OEA must incorporate those measures into the Memorandum of Agreement (“MOA”) portion of the Section 106 process and issue a new draft MOA that

encompasses those measures and similarly protects historic resources in Block One of the line.

I.

Contrary to the LLCs/Albanese claim in the Additional Pfohl Letter that City et al. advocated termination of the consultation in our December 14 letter to OEA (EI 33209), City et al. merely pointed out that if STB ignored SHPO comments and terminated the Section 106 process as advocated by the developer interests then STB would be required to follow the procedures set forth for seeking comments by the Advisory Council on Historic Preservation (“ACHP”), per binding ACHP regulations at 36 C.F.R. 800.6 - .7.¹ City et al. obviously believe consultations should continue. City et al. and numerous other parties in this proceeding have repeatedly advocated an overhaul of the draft MOA. The current draft MOA has no protections for the historic resources and facilitates their loss. It should be revised to provide meaningful protection. In particular, City et al. and others have repeatedly advocated protection of the Embankment parcels as provided in Redevelopment Plans and other City planning documents. See Exhibit A, attached hereto.

Contrary to the LLCs/Albanese claim in the Additional Pfohl Letter that the historic resources involved in this proceeding are protected in Jersey City by local land use requirements manifest in the 2022 Sixth Street Embankment Redevelopment Plan (“2022 Plan”), that plan is not effective or enforceable. It thus affords no protection at the local level. This is apparent on the face of the document that Mr. Pfohl supplied to OEA in his December 20 letter on behalf of the developer interests: the 2022 Plan is expressly contingent on execution of a settlement agreement and certain other actions.² But the LLCs/Albanese are refusing to finalize any settlement agreement. To the contrary, they have admitted to City et al. that the negotiations are “stalled.”³

¹ According to ACHP regulations, SHPO could also formally terminate the process, but there is no reason for SHPO to do so.

² See third whereas clause to Ord. 22-090 and second paragraph on p. 3 of the 2022 Redev. Plan, as attached to Additional Pfohl letter, document EI 33212, dated Dec. 20, 2023.

³ This term is used in the Term Sheet (actually entitled “Deal Sheet”) referenced in Additional Pfohl Letter (LLC/Albanese admission).

LLCs/Albanese also fail to disclose to OEA that there is a separate redevelopment plan (“Luis Munoz Marin Boulevard (Henderson Street) Redevelopment Plan,” initially revised in 2012 in an early effort to accommodate the LLCs, that relates to Block One of the Embankment (sometimes referred to as the “Marin Block”). (The Marin Redevelopment Plan is divided into several “districts” and encompasses Block One of the rail line’s historic Embankment in its “District Two.”) The Marin Redevelopment Plan as to District Two is also contingent upon a settlement.⁴ If there were a settlement and the settlement were implemented, then the Marin Plan would allow 400 units of residential housing and 200 units of hotel use in two skyscrapers on the Marin Block. It presumably also embodies “unanimously supported” protection for the historic resources in Block One by requiring, inter alia, retention of a 30-foot corridor for rail and trail use, and of the stone walls of the Embankment. But the LLCs/Albanese now claim that the 2012 plan for the Marin Block is “not economically feasible” and are thus “stall[ing]” any settlement.⁵ Because there is no settlement, the Marin Redevelopment Plan, like the 2022 Plan for Blocks Two to Eight, is also not effective or enforceable. Thus, contrary to Mr. Pfohl’s misplaced rhetoric, there is currently no redevelopment plan that protects anything on the Harsimus Branch. Instead, both Plans state that absent a settlement prior zoning applies. The LLCs/Albanese do not discuss pre-existing zoning. Development consistent with prior zoning would exacerbate not protect the abandonment’s adverse effects on historic properties. The LLCs/Albanese have so far not claimed otherwise.

The LLCs previously brought a legal proceeding specifically to ensure that prior zoning of adjacent areas was applicable to the rail line they unlawfully purchased from Conrail in 2005.⁶ That case -- 247 Manila Avenue LLC et al v. Jersey City Zoning Board of Adjustment, NJ Superior Court, Appellate Division, No. A-6226-08T3 (January 4, 2011) (<https://caselaw.findlaw.com/court/nj-superior-court-appellate-division/1551377.html>) – ruled in their favor. Because the relevant Redevelopment Plans are unenforceable and ineffective absent a

⁴ See Luis Munoz Marin Boulevard Redev Plan as amended through May 8, 2019, available at <https://data.jerseycitynj.gov/explore/dataset/luis-munoz-marin-boulevard-redevelopment-plan/information/>. At *id.* p. 6, the Plan states that it is contingent upon settlement, and if settlement does not take place, zoning reverts to pre-existing zoning.

⁵ Quotes are from the “Deal Sheet” (termed by Additional Pfohl letter a “term sheet”) as provided to NJ councilman on or about Dec. 13/14, 2023).

⁶ The actual prior zoning was construed by the City to be for railroad purposes only.

settlement, the relevant zoning is that applicable to adjoining areas (basically R 4 – high rise residential -- for Block One of the Embankment and R 2 – single family residential) for the other blocks pursuant to the 247 Manila Avenue decision. The pre-existing (applicable) zoning does not preserve any historic resources on the Harsimus Branch. Moreover, the LLCs/Albanese interests cannot cite anything in local law that protects the historic resources in question. To the contrary, the LLCs have numerous cases pending in state court (currently stayed pending a final order from STB) seeking to invalidate or otherwise overturn or evade any meaningful state and local protections flowing from City Historic Landmark designations pertaining to the Embankment Parcels. If the LLCs/Albanese were now to claim that anything in pre-existing law assuredly protects the historic resources, they would in effect be admitting that the LLCs’ state court litigation to invalidate all such protections is frivolous.

The only thing that provides meaningful protection to the historic resources at this time is continued STB jurisdiction. So long as STB does not authorize abandonment, the developer interests cannot resume their previously commenced destruction of the Embankment or otherwise undertake development that would adversely impact the historic resources at issue in this case.

Contrary to the demands of the LLCs and Albanese, there is no reason to conclude this proceeding unless and until enforceable protection is afforded to the historic assets in question. The LLCs and Albanese, in breaking off (their current expression is “stalling”) settlement negotiations for the umpteenth time, have indicated that moving forward with the planned development on Block One is “not economically feasible.”⁷ Assuming the LLCs and Albanese do not wish to proceed due to current economic conditions, there is ample time to agree to measures that would protect the historic resources in lieu of continued STB jurisdiction, and which can be implemented while AB 167 (Sub-no. 1189X) remains pending at STB. This is especially true since LLCs/Albanese have emphasized that there is “unanimous support” for those protections embodied in the 2022 Plan. Moreover, STB has ample time to consider measures that will actually protect the Embankment without worrying about disrupting the developer plans, especially since those measures have unanimous support.

In other words, since the protections in the 2022 Plan are unanimously supported, as the LLCs/Albanese claim, then there should be no problem with

⁷ These are the words used in the “term sheet” (entitled “Deal Sheet”) referenced in Additional Pfohl Letter.

adopting the measures embodied in that Plan as voluntary mitigation to be incorporated in the draft MOA to resolve the adverse effects on historic resources flowing from the abandonment.⁸ In that event, STB is not imposing or enforcing local land use requirements but instead is adopting a voluntary agreement that actually protects historic resources from destruction. That agreement would then be an enforceable commitment rather than an unenforceable “plan” that the developer interests are elsewhere rendering ineffective.

If this approach is not pursued, then OEA in the MOA should advise the Board that the agency can meaningfully protect the historic assets in this case by one or more of the following means: (1) denying abandonment in whole or in part, (2) invalidating the deeds Conrail issued to the LLCs in 2005 without an abandonment authorization (thus returning ownership to the status quo before the unlawful de

⁸ Although City et al. wholeheartedly welcome the LLCs/Albanese support of the 2022 Redevelopment Plan, City et al. find mystifying the false claim in the Additional Pfohl Letter that City et al. have sought “to hide the Redevelopment Plan from OEA, the SHPO and the ACHP.” Additional Pfohl letter at p. 3. This is ridiculous. City et al as well as other commenters have frequently referenced the redevelopment plans (note the plural, there are two plans) in comments. See various quotes and citations in Exhibit A, a document compiled by the Embankment Preservation Coalition from a recent virtual hearing before OEA and from related written comments dealing with the draft MOA. OEA has heretofore refused to consider these matters because it claimed to view them as imposition of local land use regulation as opposed to measures in the nature of mitigation contained in the MOA, evidently by voluntary agreement. Since the LLCs/Albanese argue that the measures in the 2022 Redevelopment Plan are “unanimously supported,” and further that they adequately protect historic assets in Blocks Two to Eight, it follows that the measures should and must be incorporated into the draft MOA as part of a voluntary agreement. The LLCs/Albanese in the Additional Pfohl letter in essence claim that the provisions in the 2022 Redevelopment Plan are applicable anyway, so based on their own representations, this imposes no burden upon them.

Mr. Pfohl asks three rhetorical questions on p. 3 of his letter in connection with his charge that City et al. have attempted to conceal the Plan from OEA. The questions are all couched in impertinent terms, and the answer to all three is “no.” City et al. look forward to incorporating the measures in the 2022 Plan into the MOA now that the LLCs/Albanese not only have stressed to OEA that those measures are unanimously supported but also because the developer interests urge the Board to treat the measures as already applicable.

facto abandonment), and/or (3) requiring Conrail to re-acquire the property sold in 2005 (again, allowing the playing field to be returned to what it would be now but for the unlawful 2005 de facto abandonment). In addition, the OEA should recommend the imposition of a public use condition barring any sale of the properties except for public use for a period extending 180 days from the date of effectiveness of any abandonment authorization. 49 U.S.C. 10905.

Just as the unanimously supported provisions of the 2022 Plan relating to Blocks Two to Eight should be incorporated into the MOA, the uncontested parts of the pertinent portions of the Luis Munoz Marin Boulevard Plan [in particular, the historic resource protection conditions for District Two (which is Block One of the Embankment)] should now be incorporated into the MOA process as mitigation measures affording at least some protection to historic resources on Block One.

II.

At the same time as they offer up the measures in the 2022 Redevelopment Plan as conditions in which they agree to provide bona fide protection to historic assets, the LLCs/Albanese seek again to cut-off discussion about the MOA. As justification for termination of the consultation, Mr. Pfohl claims that further discussion of meaningful protection of historic assets “undermines the need for finality in the Section 106 review as required under governing precedent.” Additional Pfohl letter at 3. The only alleged “governing precedent” cited by the LLCs/Albanese is Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989). Marsh is not relevant. In Marsh, the question was whether a final Environmental Impact Statement for a dam already under construction needed to be supplemented on the basis of two documents arising well after the final EIS was adopted. In contrast, STB is not being called upon to supplement an MOA that was previously prepared pursuant to a timely abandonment licensing request by Conrail. (In truth, Conrail never timely sought an abandonment authorization for any of the Harsimus Branch.) The question here is devising meaningful protection for historic resources involved in this proceeding in the first instance and in the face of unlawful conduct by Conrail in conjunction with the LLCs (namely, an unlawful de facto abandonment and transfer of property without required pre-authorization⁹). In all events, the Marsh case did not involve Section 106 of the

⁹ STB, Consummation of Rail Line Abandonments ..., Ex Parte 678, served April 23, 2008 (STB doc. 38903), slip op. p. 4: “In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When

National Historic Preservation Act and simply has no germaneness here. And it certainly does not negate 36 C.F.R. 800.6-.7 if STB does terminate the Section 106 process.

The developers' argument is also forestalled by agency statements and precedent. First, as indicated in Exhibit A at p. 8, OEA advised commenters that there was no time limit on submitting comments on the draft MOA. Second, the agency has warned railroads and those doing business with them that de facto abandonments without STB prior authorization were unlawful and that parties participating in them could face substantial delays because, inter alia, the agency was obligated to fully comply with the NEPA and Section 106 processes. See note 9 supra. Conrail clearly engaged in an unlawful de facto abandonment here. Third, the agency long ago conceded that abandonments under 49 C.F.R. 1152.50 (the kind involved here) would be stayed until all NEPA and Section 106 issues were resolved. In particular, ICC, STB's predecessor, committed to "stay any individual abandonment of an out-of-service line if environmental issues are raised and cannot be resolved through a Commission decision before the exemption would otherwise become effective." Illinois Commerce Commission v. ICC, 848 F.2d 1246, 1260 (D.C. Cir. 1988) (citing ICC/U.S. Brief). No showing of irreparable injury or success on the merits is required for such a stay. Thus, the existing stay is appropriately continued for further consideration of measures to meaningfully protect the historic assets.

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.** The Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them. **Railroads that take such actions may find not only that obtaining abandonment authority is delayed,** but that the Board will require historic preservation training for the railroad's staff members who are involved with abandonment projects and require the railroad to document the in-house measures that it will implement to prevent such actions from occurring in the future. Other possible actions the Board may take include restricting the railroad's future ability to employ expedited procedures to obtain abandonment authority, imposing a financial penalty, and seeking a legal remedy against the railroad in a court of law." (Emphasis added.)

It is also germane that the LLCs/Albanese and Conrail have brought the delays to date on themselves. New Jersey's Title Standards Manual provides that parties should not engage in purchase of Conrail property without first obtaining proof of an abandonment authorization or "proof that none was required."¹⁰ The LLCs did neither. The Albanese Organization got involved after the federal court had determined that the Harsimus line was subject to the STB's abandonment jurisdiction, and therefore clearly knew that an unlawful de facto abandonment had occurred. All developer interests (and Conrail) also knew at all relevant times that historic resources were implicated in the property in question. None of the developer interests in this case are innocent purchasers; all are complicit with Conrail in its unlawful sale of the line prior to receiving STB abandonment authorization. Rather than calling on STB to rubberstamp prior unlawful conduct by doing nothing to meaningfully protect the historic assets in question here, they should cooperate in establishing robust protection for the assets before STB authorizes abandonment.

City et al. would be happy to work with the developer interests, NJ SHPO, and STB to negotiate and if appropriate sign an MOA that contains measures (per the "unanimously supported" plan identified by the developer interests) that actually protect the historic resources that are adversely affected in the event this agency authorizes an abandonment of the Harsimus Branch in this proceeding. This requires far more than either (1) "documentation" and "signage" (the only thing so far provided in the draft MOA), or (2) obfuscation (e.g., asserting land use regulations are applicable when they are contingent on settlement), delays in reaching settlement due to constantly changing demands, misrepresenting local law while at the same time contesting the validity of any meaningful local law germane to this proceeding (all that heretofore has been on offer from the LLCs and/or Albanese).¹¹

Now that the LLCs/Albanese parties essentially admit that adequate protection as manifest in the 2022 Redevelopment Plan is "unanimously supported," it would be arbitrary and capricious and contrary to law to fail to incorporate these protections as measures to mitigate harm to historic resources in the draft MOA.

¹⁰ L. Fineberg, Handbook of New Jersey Title Practice at 98-4 to 6 (2d ed. 2000) and 98-1-6 (ed. 2005).

¹¹ Failure to respond to other specific claims or alleged facts in the Additional Pfohl letter does not mean that City et al concede any such claims or allegations. To the contrary, it is an indication that the claims or issues are irrelevant or so obviously false as not to merit comment.

Similarly supported provisions in the 2012 Marin Plan, as amended, can be incorporated as well.

This is tendered as an environmental comment. Contrary to contentions in the Additional Pfohl letter, STB rules governing “pleadings” do not apply, but if leave to file this response to the Additional Pfohl letter is required, then City et al. request that such leave be granted, because the Additional Pfohl letter (1) is rife with misrepresentations that must be addressed to complete the record, and (2) in essence supports voluntary incorporation of the undertakings in the 2022 Redevelopment Plan into the MOA, or at least suggests that is a way forward.

City, et al., by the signature of its counsel below certifies service by email upon the attached list of consulting parties by STB OEA as of the date of e-filing.

Respectfully submitted,
s/ **Charles H. Montange**
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Att. (Exhibit A)
cc. Consulting Parties

Exhibit A. AB-167-1189X Section 106 Process: Selected Environmental Comments by Representatives of City et al, Other Consulting Parties, and Members of the Public

Note: The comments below show – contrary to assertions by the LLCs/Albanese - that City et al. and others have provided ample, repeated notice to STB OEA of local plans that should be considered in the STB Section 106 process as ways to avoid, minimize, or mitigate adverse effects to historic resources that are likely to occur from abandonment of the Harsimus Branch without historic preservation protections.

The last Environmental Comment below, by an officer of STB OEA, is germane to the LLCs/Albanese assertions as to timeliness of comments.

These comments are selected from the STB’s own Environmental Comments records, accessible at <https://stb.gov>.

Comments from Officers, Members, or Representatives of Consulting Parties

1. “Since the current owners of the Harsimus Embankment – the LLCs – have repeatedly and publicly stated their willingness to preserve key portions of the Embankment for preservation and trail purposes, an obvious alternative is incorporating this mitigation plan as binding commitment in a Memorandum of Agreement signed by all consulting and concurring parties. A conditioned abandonment that is subject to the provision of an enforceable MOA requiring the preservation of the Embankment will resolve this seeming unending controversy and would serve as a model for future Section 106 consultations.”¹
2. “STB should expand consultation so that all interested parties can consider potential mitigation - those listed in these comments and those suggested by others. This action is necessary to comply with NHPA and Section 106 regulations.”²
3. “...the apparent assigns (Albanese parties) of Conrail’s chosen developer (the Hyman Limited Liability Companies) that unlawfully purchased part of the regulated line from Conrail have notified STB OEA that options exist. These options presumably will not harm Conrail in any way and will preserve most of the Embankment. OEA should be encouraging public and private preservation options, not ignoring them.”³

¹ EI -33010, July 14, 2023, Andrea Ferster, Rails to Trails Conservancy, p. 2.

² EI 33001, July 14, 2023, Maureen Crowley, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, p. 2

³ EI 33001, p. 3

4. “Although OEA has said STB can consider voluntary mitigation, it has refused to make that consideration part of the Section 106 process, even when notified by the assign of Conrail’s chosen developer that they have a voluntary mitigation plan. The agency is thus not only ignoring the demolition intent but seemingly discouraging efforts to assuage it.”⁴
5. “Despite the to-date critically flawed process, STB OEA could still explore, in the Section 106 process, actions that could result in true mitigation, not the so-called mitigation of documentation and signage currently in the draft MOA. These possible actions include, but are not limited to, the following:
...
G. STB can explore the voluntary mitigation plan about which it was notified by the LLCs/developer attorney and cooperate with litigating partners to make it binding, thus clearing the way to abandonment with conditions that would preserve historic resources.”⁵
6. “We encourage STB OEA to take an active role now, while STB has jurisdiction, to help make those plans, currently embodied in two Redevelopment Plans contingent on settlement of litigation, binding.”⁶
7. “Why is the OEA not exploring voluntary mitigation? As notified by the LLCs? As reflected in Redevelopment Plans?”⁷
8. “We believe that there are true mitigation alternatives that would result in an MOA that could satisfy all consulting parties, if given the attention these deserve in the Section 106 process.”⁸
9. “... We ask the STB and the other state and federal historic preservation agencies who are potential signatories to the Memorandum of Agreement not to sign it until it contains provisions to address Conrail's unlawful conduct and permanently preserve the Harsimus Cove Embankment. We understand that preservation plans have been negotiated and approved by the LLCs, the LLCs' selected developer, the Embankment Preservation Coalition, Jersey City and other appropriate stakeholders. We believe that those preservation plans should be included in any Memorandum of Agreement or other disposition of these proceedings by the STB. Only then will the adverse effects of

⁴ EI 33001, p. 3.

⁵ EI 33001, p 20.

⁶ EI 33001, p. 31.

⁷ EI 33001, p. 32.

⁸ EI 33001, p. 33.

Conrail's conduct be minimized and mitigated.”⁹

10. “The Surface Transportation Board Office of Environmental Analysis must not reward rail companies by turning a blind eye to unlawful sales of regulated railroads. Conrail must be held accountable for its unlawful sale. Please engage consulting parties and the public in considering ways to avoid, minimize and mitigate adverse effects to historic resources. Do use Section 106 of which my organization Bike JC is a consulting party, to consider Master Plans, Redevelopment Plans, development issues, and the STB's own powers to mitigate adverse effects.”¹⁰
11. “...We ask the STB and the other state and federal historic preservation agencies who are potential signatories to the Memorandum of Agreement not to sign it until it contains provisions to address Conrail’s unlawful conduct and permanently preserve the Harsimus Cove Embankment. We understand that preservation plans have been negotiated and approved by the LLCs, the LLCs’ selected developer, the Embankment Preservation Coalition, Jersey City and other appropriate stakeholders. We believe that those preservation plans should be included in any Memorandum of Agreement or other disposition of these proceedings by the STB. Only then will the adverse effects of Conrail’s conduct be minimized and mitigated. This submission was unanimously adopted by the membership of the Harsimus Cove Association at its regular meeting on October 9, 2023.”¹¹
12. “... is STB holding a Section 106 review that has considered with consulting parties ways to "avoid, minimize or mitigate adverse effects to historic resources,"? No. We don't believe so. Do these ways exist? We say yes they do. Jersey City's Council has passed a redevelopment plan that would preserve seven of the eight blocks. Another one is waiting for a developer to make last minute changes, we hope, and these are important for settlement. Please OEA, facilitate the settlement by reviewing these plans as part of this process, not undermine it by signaling that the agency proposes to cease historic protections.”¹²
13. “...My department is responsible for the planning, design and implementation of the City's critical, public infrastructure, including streets, transit, parks, public spaces, municipal buildings, and other public facilities. The Harsimus Branch embankment contributes substantial historical significance, and a unique sense of place to the fabric of Jersey City. I cannot emphasize enough how deeply concerned we are about the risk of losing this historic structure if the STB abandons the Harsimus Branch at this juncture,

⁹ EI-33118, 10/12/2023. Beatriz Bofill, Bike JC.

¹⁰ EI-33153, 11/3/2023. Beatriz Bofill, Bike JC.

¹¹ EI-33116, 10/11/2023. Tom Monahan_President, Harsimus Cove Association.

¹² EI-33150 Transcript of Sept 28, 2023, Case: Harsimus Branch Abandonment, Section 106 Public Meeting. Ace Reporters, Inc., Maureen Crowley, Embankment Preservation Coalition, pp.29-30.

without strong requirements for its preservation and public use in line with our redevelopment plan and many city master plans. Our resiliency master plan locates the embankment in a priority area within a watershed district, which includes four downtown historic districts that will suffer a tremendous loss if the Harsimus Branch and its embankment are removed from federal jurisdiction. Among the goals of this plan are to create a Jersey City that is resilient against flooding, and to create a socially resilient community using tactics like preserving historic neighborhoods and structures. The embankment deserves to be protected as a historic structure, and has a vital role to play in providing protection from the impacts of climate change on its surrounding community. Local laws are not enough to protect it from adverse effects. Our adaptation master plan goes further to recommend creating embankments, and raising land in some areas of this district, which would serve to protect from both rainfall, flooding and storm surge. Our bicycle master plan in alignment with our climate action plan, calls for investment in alternatives to single occupancy vehicles, and for reduction in vehicle miles traveled. The plan includes a Harsimus Branch embankment as a key active mobility corridor that will provide a safe and attraction option for walking and biking for people of all ages and abilities. Finally, our greenway connectivity plan identifies the Harsimus Branch embankment as a high priority connection that would advance the east coast greenway, a greenway with a planned route that spans the entire coast from Maine to Florida. The main coalition [sic] of the Jersey City Division of Planning, with input from my department, recently worked with a developer of Hudson Exchange Property on this gap, to include a landing for pedestrian and biking bridges across Marin Boulevard that would join the embankment with a public plaza at the Hudson Exchange location. My department has the expertise to consult on ways to avoid, minimize and mitigate adverse effects that would stem from the release of the Harsimus Branch from federal jurisdiction. I ask the STB to include us in a robust process to do so. Jersey City, and all of our partners have put considerable energy into our redevelopment plan that still allows for private development, with minimal impact to this historic embankment. We have a rare opportunity to protect a significant piece of Jersey City's history, and we need the STB to take a strong stance in support of its protection. We appreciate this Board giving it the attention and consideration that this project deserves.¹³

14. "... My name is Austin Sakong. I've lived in Jersey City since 2005. I'm a Commissioner on the Jersey City Historic Preservation Commission. I'm a Board member of the Embankment Preservation Coalition. I'm an actively practicing architect. I'm also an educator who teaches urban design at Columbia and NYU. And I want to begin by acknowledging the awe inspiring work and vision of the many members of the Jersey City community represented here today. Community members who have been at this for decades now, through every imaginable, procedural, legal and political hurdle. You know, nowadays, I think everyone talks about green infrastructure, and it's easy to see why,

¹³ EI-33150. Transcript. Barkha Patel, Director of the Department of Infrastructure for the City of Jersey City, pp.16-18.

right? You turn on the news and there's always some story about some city struggling with heatwaves, about flooding, you know, massive species die offs, but the community members that you're hearing from today had the foresight, long before any of these issues were daily headlines, to transform this remnant of 20th Century infrastructure into a new 21st Century piece of green infrastructure. And this was a vision I think to connect history to future, to an infrastructure that absorbs carbon, cleans the air, promotes ecological diversity, captures storm water and mitigates urban heat effect, all the while making plain the opportunity for open public space. And it's a vision that is as astonishing for being so ahead of its curve, and it is deeply pragmatic because after all, these are all functions that the embankment already performs today. *And importantly, it's a vision that the City of Jersey City has recognized, and incorporated into its redevelopment plan. The Harsimus Branch and the 6th Street embankment are now recognized in the City's master plans, and further, development projects around the embankment have already been designed, and the construction is underway today to incorporate the continuous ecological corridor that the Harsimus Branch provides. And I think it's important that the STB recognize this work that has gone into all these plans, and at the very least, include them in the MOA.* As a practicing architect, I just want to say imagine the cost of designing and building, and paying for something that does all the things that the embankment is already doing now. Imagine how audacious and innovative it would be to propose a brand new mile long eight acre forest through a dense downtown anywhere else in the country. But in fact, this is what the embankment already is, and that we, as a society, would consider abandoning it with no substantive conditions, that we would entertain discarding such an asset in favor of interpretative signs and a website I think speaks not only to our collective inability to protect the heritage of our past, but also our inability to protect the viability of our future. So I ask the STB to follow this community's lead, to honor this vision that they've been fighting for for decades, and which has now become an integral part of Jersey City's planning. And I think this means that *the STB should exercise their authority fully within their jurisdiction to reinstate our community's rights, to fully protect the historic embankment, to reject this MOA in its current form, to acknowledge that the way that Section 106 process has been conducted has been fundamentally flawed, to prevent establishing a tremendously damaging precedent, and to restore the possibility of a better future in Jersey City...*” [italics our emphasis]¹⁴

15. “...As part of the local land use process, the JC HPC [Jersey City Historic Preservation Commission], planning board and City Council have set up a framework of what meaningful preservation action looks like. By adopting redevelopment plans that preserve the embankment for open space, trail and transportation uses, the HPC, City, Embankment Coalition, and many other consulting parties have long been advocating for the STB to take full advantage of its regulatory authority, and to take action that reflect

¹⁴ EI-33150. Transcript. Austin Sakong, Board member, Embankment Preservation Coalition, pp. 41-43.

the need to preserve this structure that is vital to the history of Jersey City. The guidance on how to do this is there. The STB just needs to act on it....”¹⁵

16. “.... My name is Ayla Schermer. I'm a Jersey City resident, and the President of Bike JC, which is one of the lead consulting parties to the Section 106 process. We are an advocacy organization whose mission is to make Jersey City safe and welcoming for bicyclists. We wholeheartedly support the plan set forth by the City of Jersey City, and by the Embankment Preservation Coalition to preserve the historic Harsimus Branch embankment, and turn it into a public good that meets our city's modern needs. Jersey City is a dense urban area, with a dire lack of green and open spaces. The historic embankment has immense potential to be transformed into just that, a one of a kind, peaceful, concrete urban oasis for both recreation and transportation. It serves as a critical link in many local, regional and even national greenway plans. For example, as many others have said, there are proposals to connect the Embankment to the nearby Hudson River waterfront greenway, the future Bergen arches greenway, the future Hudson greenway and even the east coast greenway running all the way from Maine to Florida. The embankment is also an essential element of many local master plans that were developed based on robust public outreach. The Jersey City greenway connectivity plan and bike master plan, are two of many such examples...”¹⁶
17. “We thank the city of Jersey City, and the Jersey City Council members for investing resources to develop and push forward the *6th Street redevelopment plan*. [emphasis ours] The City has partnered with the community, local nonprofits and developers to create a plan to protect and include public access designs to the embankment, and the urban forest for residents and visitors. The embankment is a public asset we cannot lose. The City's actions demonstrates that they have heard Jersey City residents, and developed a master plan to protect the embankment and the surrounding area. Again, we urge the STB to do the same.”¹⁷

Selected Comments by Members of the Public Not Consulting Parties

1. “Do use Section 106 to consider Master Plans, Redevelopment Plans, development issues, and the STB’s own powers to mitigate adverse effects.”¹⁸
2. “Now is the time to explore ways to truly mitigate the adverse effects and write it into a binding MOA.”¹⁹

¹⁵ EI-33150. Transcript. Maggie O'Neil, Principal Historic Preservation Specialist for the City of Jersey City, p. 83.

¹⁶ EI-33150. Transcript. Ayla Schermer, Bike JC President, p. 107.

¹⁷ EI-33150. Transcript. Paula Mahayson [sic – actually Paula Mahayosnand], President, Jersey City Parks Coalition, p. 144.

¹⁸ EI-33065. Rebecca Missel, NJ-08 For Progress.

¹⁹ EI-33102. Debra Kagan, New Jersey Bike & Walk Coalition

3. "...It would be negligent and shameful not to respect the nearly quarter century of work dedicated embankment coalition volunteers to develop a vision for the Harsimus Branch historic embankment structure that respects and preserves its historic character and natural integrity. Its connection with urban neighborhood surroundings, and its potential as a link on the east coast greenway. *That vision, expressed in the coalition video and redevelopment plans written by City planners, through the cooperation of both the coalition, and its adversaries in litigation, and reviewed by the public, integrates historic preservation, development, active and passive recreation, and habitat. It has overwhelming public support.* [emphasis ours] It's mind numbing and heartbreaking that this vision and plans for the embankment keep hitting road blocks that are not yet in development. I can't say it better than this sentence from the Embankment Preservation Coalition website, "Thoughtful treatment of the Harsimus Branch can set a precedent for cities around the world, demonstrating that healthy ecology and infrastructure are compatible, not competitors." Realizing the vision for the Harsimus Branch would instantly set Jersey City in the forefront of the green city movement, please use the powers of your agency to protect the public interest in this matter. Do not actively contribute to this historic resource's vulnerability by removing it from federal jurisdiction with no historic preservation conditions." ²⁰
4. "...I strongly urge the Surface Transportation Board to reconsider its draft memorandum of agreement, which would in no way mitigate adverse effects to the Harsimus Branch resulting from a Board decision to permit abandonment of the rail line.... My understanding is that the City has plans that provide such mitigation, and these should be reviewed as part of the Section 106 process. It's your obligation to conduct your review that seeks ways to avoid, minimize, or mitigate adverse effects, not to assume these will happen..." ²¹
5. "I want to support the comments made on July 14th by the Embankment Preservation Coalition, the Jersey City Landmark Conservancy, the National Trust for Historic Preservation, and the Rails to Trails Conservancy. We urge you to consider master plans and redevelopment plans. Currently, redevelopment plans in Jersey City contingent on litigation [sic] would allow for the preservation of the embankment historic structure for future use as a park, and possible future light rail infrastructure.... We urge you to, as per Section 106, explore ways to avoid, minimize or mitigate adverse effects to the Harsimus Branch and other historic resources. We ask you to conduct a more robust review process that includes the effects of development versus preservation as a public good. If the STB cannot impose the ways to mitigate adverse effects to the Harsimus Branch, then abandonment permission should not be granted. A no action alternative is preferable to destruction of this resource." ²²

²⁰ EI-33150. Transcript. Cynthia Sanford, pp. 51-53.

²¹ EI-33150. Transcript. John Delman, p. 73.

²² EI -33150. Transcript. Eleana Little, p. 121.

6. "...As others have said, there are already plans proposed to ... preserve the embankment." ²³

Other Comments from Public That Question Assertions by LLCs/Albanese

1. "I did want to mention you know, to the gentleman, I think his name is Peter Pfohl earlier, you know, unfortunately sir, there's a mention a lot of developers, a lot of law firms working with developers have over the last 15 years that I've been here, made callous promises about what they were and were not going to do, you know, to kind of get through the legal process. And you know, I would say 70, 80, 90 percent of them have broken their promises, and that's why we need, you know, the STB to be, you know, to exercise their power and preserve the space for the people of Jersey City." ²⁴
2. "... I totally support what everyone has said, except for Peter Pfohl and the person from Albanese representative here. ...you know, developers are relentless, and even if we say they're not going to do this, they're not going to do that, they're relentless. ..." ²⁵
3. "Just to rebut what the lawyer at Albanese had to say. You know, I believe... the developer had a deal, there was a compromise to allow one portion of the embankment to be built into a high-rise. But you can look it up. Conrail, the developer, they pulled out of that deal. The city did not pull out, the Embankment Coalition did not pull out. They clearly believe that STB is going to be the determining factor whether they can build or not, and that the local regulation mentioned from Jersey City is something that they will easily be able to fight. If the STB allows for abandonment, the developer has zero interest in following the regulations the city has laid out, and this will be litigated for probably another ten years at least..." ²⁶

STB OEA Response to Commenter re Timeliness of Comments

1. "...There is no set deadline for the submission of written comments but we would appreciate them as soon as possible. Also, there is not timeline for the Board to make a decision on the case. We still need to finish the Section 106 process and then after that the Board will consider the environmental record, the merits of the case, and consider all of the public input prior to making its decision. So there are still a number of steps to go through which will all take time." ²⁷

²³ EI-33150. Transcript. Ben Schwartzbach. pp. 141-142.

²⁴ EI 33150. Transcript. Kamal Shah, p. 157-159.

²⁵ EI 33150. Transcript. Donna Ristorrucci, p. 163.

²⁶ EI-33150. Transcript. Thomas Shen p. 165.

²⁷ EO-3846, Oct 2, 2023. Alan Tabachnick, Federal Preservation Officer, Surface Transportation Board Office of Environmental Analysis, in email exchange with James Bruso, a member of the public.