

Michele R. Donato

A Professional Corporation
Attorney at Law

P. O. Box 145
106 Grand Central Avenue
Lavallette, NJ 08735

Phone: (732) 830-0777
Telefax: (732) 830-0778
Email: mdonato@MicheleDonatoEsq.com

October 31, 2018

Office of Environmental Analysis
Surface Transportation Board
Attn: Victoria Rutson and Joshua Wayland
395 E Street, S.W.
Washington, D.C. 20423

Re: Harsimus Abandonment Proceeding,
STB Docket No. AB 167 (Sub-No. 1189X)

Dear Ms. Rutson and Mr. Wayland:

The LLCs¹ respectfully request that the Office of Environmental Analysis (“OEA”) immediately initiate formal consultation with the New Jersey State Historic Preservation Office (“NJ SHPO”) and other appropriate parties to develop a Memorandum of Agreement (“MOA”) under Section 106 of the National Historic Preservation Act (“NHPA”) pursuant to 36 CFR § 800.6(c).

Initiation of Section 106 MOA discussions at this time is necessary to ensure the full participation of the NJ SHPO and the Board in the parties’ ongoing Section 106 MOA discussions, to assist in resolving differences over the scope and elements of an appropriate MOA, and to facilitate the orderly and timely completion of the Section 106 process while avoiding further delay in a proceeding that has already been delayed excessively.

Background

As described in the September 24, 2018 letter to OEA (copy enclosed), Consolidated Rail Corporation (“Conrail”), Jersey City Embankment Associates LLC (“Albanese Organization”), and the LLCs are engaged in good faith settlement discussions with the City of Jersey City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and the Rails to Trails Conservancy. The overall approach of these discussions is to allow abandonment of the Harsimus Branch, to advance the commitment to provide a continuous right-of-way from Marin Boulevard to CP Waldo, to afford the opportunity to advance a public park, and to adjust the redevelopment plan to accommodate these goals for the development proposed by the Albanese

¹ The LLCs consist of 212 Marin Boulevard, LLC.; 247 Manila Avenue; LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

Organization. As part of those negotiations, the parties have met on several occasions and have exchanged drafts of a Section 106 MOA. In addition, the parties are in the process of preparing an Omnibus Settlement Agreement to address local land use ordinances and other details of the redevelopment. Although these documents have distinct purposes, the two agreements are designed in combination to resolve all ongoing disputes over the abandonment of the Harsimus Branch in a manner that will reasonably satisfy and balance historic preservation, public interest, and property development objectives.

Charles Montange is in initial disagreement with Conrail, the LLCs, and the Albanese Organization regarding the scope of a Section 106 MOA. Mr. Montange seeks to include land use and design details in the MOA that are properly included in the Omnibus Agreement. Our position is that the STB has only limited jurisdiction to impose historic preservation conditions, and local land use agreements are not within that jurisdiction.

During the October 22, 2018 meeting with the NJ SHPO, Conrail, the Albanese Organization, and the LLCs, the OEA and STB counsel participated by telephone, along with the Advisory Council on Historic Preservation (“ACHP”). There was agreement among the participants that the detailed requirements of the parties’ settlement on land use should be contained in an Omnibus Settlement Agreement rather than in a Section 106 MOA. Because of the STB’s limited jurisdiction and the more general nature of an MOA, the MOA is an inappropriate vehicle to address detailed governance of land use and redevelopment ordinances, post-abandonment land acquisition and preservation on the Harsimus Branch, and even more so on property outside of the Harsimus right-of-way.²

Further, the ACHP’s comments during the October 22 meeting suggest there is some confusion over whether the Section 106 MOA process can proceed without an assessment of effects of the abandonment, even though the parties have already engaged in substantive good faith MOA discussions, including measures that go far beyond what the Board could possibly order under its limited jurisdiction.

Our review of the Section 106 regulations and relevant case law support our position that the MOA is a vehicle to resolve substantive issues more generally and provide some flexibility on mitigation beyond mere documentation of historic properties. Most importantly, the Section 106 regulations are not intended to delay or stymie resolution of abandonment proceedings. This is particularly true here in that the benefits from the proposed development of a right-of-way and park far exceed any legal requirements.

² As it has repeatedly recognized in this proceeding and elsewhere, the Board lacks jurisdiction over post-abandonment development activities and has limited ability to impose historic preservation conditions other than documentation without the applicant’s consent.

Immediate Commencement of Section 106 MOA Negotiations Is Necessary

Formal initiation of Section 106 MOA negotiations at this time fully complies with Section 106 and Board rules and procedures, and is necessary and justified for the following reasons:

First, formal initiation of the Section 106 MOA process is required to assist the parties and facilitate further ongoing settlement discussions, including agreement on a MOA that will be acceptable to the STB, the NJ SHPO, and the ACHP. Under governing NHPA regulations, “[t]he agency official [OEA] shall consult with the SHPO/THPO and other consulting parties . . . to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties” (36 C.F.R. § 800.6(a)), and “shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party” (*id.* at § 800.6(a)(2)). While the parties have consulted with OEA and the NJ SHPO on their settlement discussions generally, the specific elements of an MOA that have been initially discussed and exchanged have not been shared with OEA or NJ SHPO to date. Because the OEA has the ultimate responsibility for consultation, outreach, and execution of a potential MOA, formal initiation of the Section 106 MOA process by OEA is necessary at this time to enable all responsible entities, including the NJ SHPO and OEA, to collaborate in good faith on reasonable and appropriate mitigation. MOA initiation is also required at this time to ensure that the MOA discussions proceed in conformance with appropriate agency guidance and rules, and that the MOA includes elements and stipulations that are reasonable and appropriate.

Second, formal Section 106 MOA initiation is necessary because the parties have already encountered some disagreement over the appropriate elements and scope of an MOA, as opposed to which elements belong more appropriately in the Omnibus Settlement Agreement, including property disposition. Disposition of specific properties, including properties outside of the railroad right-of-way involved in the pending abandonment proceeding is outside of the STB’s jurisdiction. Initiation of Section 106 MOA discussions at this time will help guide the parties on the appropriate elements and scope of an MOA versus the Omnibus Settlement Agreement, minimize and alleviate possible disputes, and facilitate orderly MOA discussions.

Third, there is no need to delay any longer formal Section 106 MOA discussions because the MOA elements that the LLCs, the Albanese Group, and Conrail have already proposed go far beyond what the Board could ever require. As the STB explained in the Addendum to the Cultural Resources Identification Report, the only involuntary mitigation that the Board can impose is documentation of historic property. Anything more can only be the product of the parties’ voluntary agreement. The Board has no authority to order any involuntary mitigation on non-carriers at all, or to require a carrier to undertake additional mitigation measures, such as donating property for preservation purposes, or imposing a restrictive covenant upon a deed.³ Because the parties are discussing voluntary mitigation to avoid, minimize, or mitigate potential adverse effects and to preserve a right-way-corridor that go well beyond what the Board could

³ *Consolidated Rail Corp. – Abandonment Exemption – in Lancaster & Chester Counties, PA*, AB-167 (Sub.-No. 1095X) (STB served Oct. 24, 2002) at 7 (“*Lancaster Abandonment*”).

ever impose through the Section 106 process regardless of the effects, there is no reason to delay the development of an MOA until after the Board prepares a report summarizing the potential effects to historic properties. It appears from comments at the October 22 meeting that the SHPO mistakenly believes that the proposed demolition of the first block of the embankment is a presumed adverse effect. The STB's jurisdiction is limited to the rail line infrastructure and bridges. Further, the suggestion by SHPO staff that mitigation must be "commensurate" with effects is a mistaken understanding of the jurisdiction of the STB. It is noteworthy that these considerations may be relevant to a future review by the New Jersey Historic Sites Council of the proposed park to be developed by the City.

Fourth, initiation of Section 106 review is necessary to streamline the NHPA review process and end continuing punitive proceeding delays. It has been over a decade since the historic and environmental review was initiated by Conrail, over four years since the Board reinitiated the review, and over two years since the Board reinitiated Section 106 consultation under the NHPA. Ms. Rutson emphasized in the conference call on October 22 that the extreme delay in the historic and environmental reviews contravenes Board rules, NHPA guidance, and Congressional and Administration directives for timely completion of abandonment applications and environmental review. The delay is especially egregious given the limited size of the abandonment of a line of railroad that has been out of service for over 25 years (rail service ceased in 1992) and is wholly unsuitable for continuing freight rail service in an urban area.⁴ Timely initiation and completion of the Section 106 MOA process is fully warranted and necessary under the circumstances to allow for fair and expeditious NHPA completion.

Fifth, while there are compelling reasons to initiate the Section 106 MOA process at this time, as stated above, there are no rules or requirements that preclude initiation and development of a MOA in this circumstance or support further delay. To the contrary, the NHPA's governing rules at 36 C.F.R. § 800.3(g) specifically provide that the agency, together with the SHPO and other consulting parties, may expedite consultation and address multiple steps simultaneously in the NHPA review process where appropriate, as long as there is adequate opportunity for public comment. The STB has also endorsed such concurrent review. *Lancaster Abandonment, supra*, at 7 n.9 (citing *Friends of the Atglen-Susquehanna Trail, Inc. v. STB*, 252 F.3d 246, 252 (3d Cir. 2001), and 36 C.F.R. § 800.3(g), and stating that "[a]gency officials and consulting parties can expedite the section 106 process by addressing multiple steps simultaneously where appropriate, as long as the consulting parties and the public have an adequate opportunity to express their view").

Additionally, in appropriate circumstances the Board has entered into a final MOA even where the historic properties have not yet been identified and where the effects have not yet been summarized, finding that "there is nothing in the ACHP regulations that precludes entering into an MOA to satisfy the section 106 requirements where the effects on historic properties have not

⁴ Further delay in the review process also undermines the National Transportation Policy to minimize the need for Federal regulatory control over the rail transportation system, require fair and expeditious handling and resolution of all proceedings brought to the Board, require fair and expeditious regulatory decisions, and reduce regulatory barriers to exit from the industry. 49 U.S.C. §§ 10101(2), (7) & (15).

yet been determined.” *Montana Dep’t. of Commerce – Acquisition Exemption – Certain Lines of Burlington N. R.R. Cent. Mont. Rail, Inc. – Lease and Operation Exemption – Certain Lines of the State of Montana*, F.D. 31218 et al. (STB decided Dec. 18, 1990), 1990 WL 300648 at *3.

In this exempt abandonment application, the Board has completed its identification of all potentially affected historic properties and the LLC’s are not asking the Board to refrain from completing its summary of effects. Instead, the LLC’s are only requesting the Board to formally initiate the MOA consultation process at this time concurrently with its review of the effects and mitigation.

Any insistence by SHPO and the ACHP on an unnecessary prolonged consecutive process puts form over substance. If these agencies require slavish interpretation of unspecified rules, when the rules actually accommodate and provide for concurrent review of the Section 106 review steps, then the SHPO should not be accommodated in its request to submit comments after the 30-day comment period allowed under the governing rules. Not only does that approach extend the public comment period beyond that permitted under the rules, it also distorts the process. The SHPO should be commenting as an independent agency. Its comments should not be rebuttal or support for other comments.

For the above reasons, the OEA should formally initiate Section 106 MOA discussions among the interested parties as soon as possible to help ensure an orderly and final resolution of the Section 106 process, while also ensuring proper and adequate coordination amongst the affected parties, the OEA, the NJ SHPO, and the ACHP. Additionally, OEA should allow the assessment of effects and mitigation to be considered concurrently. Lastly, the OEA should not provide the SHPO additional time to comment beyond that permitted under the governing rules.

The LLCs appreciate your prompt attention to this request. We thank you for your continued perseverance.

Respectfully submitted,



Michele R. Donato

Enclosure

cc: Peter J. Baker, Esq. (by email transmission only)
Charles H. Montange, Esq. (by email transmission only)
Robert M. Jenkins, III. Esq. (by email transmission only)
Kevin J. Coakley, Esq. (by email transmission only)
Jonathan M. Broder, Esq. (by email transmission only)
Eugene T. Paolino, Esq. (by email transmission only)
Victoria Hyman on behalf of the LLCs (by email transmission only)
Rachel Crandley, Conrail (by email transmission only)
Craig Keats, Esq., STB (by email transmission only)

MAYER • BROWN

Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101

Main Tel +1 202 263 3000
Main Fax +1 202 263 3300
www.mayerbrown.com

Robert M. Jenkins, III
Direct Tel +1 202 263 3261
Direct Fax +1 202 263 5261
rmjenkins@mayerbrown.com

September 24, 2018

Victoria Rutson
Director, Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Consolidated Rail Corporation—Abandonment
Exemption—In Hudson County, NJ, STB Docket
No. AB 167 (1189X)

Dear Ms. Rutson:

For several months, the City of Jersey City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and the Rails to Trails Conservancy (the “City Parties”) have been in negotiations with Conrail, the LLCs and Jersey City Embankment Associates LLC, an affiliate of the Albanese Development Corporation, which is a reputable developer and the contract vendee from the LLCs for a portion of the property known as the Embankment, about settling the various disputes that have arisen in connection with the abandonment of the Harsimus Branch in a way that will satisfy reasonable historic preservation objectives, reasonable public interest and reasonable property development objectives. Those negotiations have progressed to the point that the parties anticipate exchanging a draft omnibus settlement agreement and a draft Section 106 MOA by October 15, followed by the exchange of comments on those drafts and a meeting of the parties in Jersey City on November 16, with the purpose of ironing out any remaining differences. We are optimistic that this process will not only settle the parties’ disputes but also result in a Section 106 MOA that will be acceptable to the STB, the New Jersey SHPO, and the ACHP.

I have been authorized to file this letter on behalf of the negotiating parties.

Sincerely yours,

Robert M. Jenkins III

Robert M. Jenkins III

Counsel for Consolidated Rail Corporation

Victoria Rutson
September 24, 2018
Page 2

cc:

Katherine Marcopul
Administrator and Deputy State Historic
Preservation Officer
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation
P.O. Box 420
Trenton, NJ 08625-0420

Charles H. Montange, Esq.
426 NW 162nd Street
Seattle, WA 98177

Peter J. Baker
Corporation Counsel
City of Jersey City
280 Grove Street
Jersey City, NJ 07302

Maureen Crowley, Coordinator
Embankment Preservation Coalition
263 Fifth St
Jersey City, NJ 0730

Andrea Ferster
General Counsel
Rails to Trails Conservancy
2121 Ward Court NW, 5th Floor
Washington, DC 20037

Michele R. Donato, Esq.
106 Grand Central Avenue
P.O. Box 145
Lavallette, NJ 08735

Eugene T. Paolino
Genova Burns
30 Montgomery Street, 11th Floor
Jersey City, NJ 07302

Jonathan M. Broder
Vice President—General Counsel and
Corporate Secretary
Consolidated Rail Corporation
1717 Arch Street, Suite 1310
Philadelphia, PA 19103

Kevin J. Coakley
Connell Foley LLP
85 Livingston Avenue
Roseland, NJ 07068

Barbara A. Miller
Attorney
Office of the General Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Joshua Wayland
Environmental Protection Specialist
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423