

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB NO. AB 167 (SUB-NO. 1189X)

**CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION – IN
HUDSON COUNTY, NEW JERSEY**

STB NO. AB 55 (SUB-NO. 686X)

**CSX TRANSPORTATION, INC. – DISCONTINUANCE EXEMPTION – IN HUDSON
COUNTY, NEW JERSEY**

STB NO AB 290 (SUB-NO. 306X)

**NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE
EXEMPTION – IN HUDSON COUNTY, NEW JERSEY**

NOTICES OF EXEMPTION

**COMMENTS OF CONSOLIDATED RAIL CORPORATION
ON CULTURAL RESOURCES IDENTIFICATION REPORT**

Consolidated Rail Corporation (“Conrail”) files these comments on the Cultural Resources Identification Report (“Report”) issued by the Board’s Office of Environmental Analysis (“OEA”) on May 5, 2017. As the Board and OEA are aware, Conrail, from the beginning of these proceedings, has had considerable doubts about whether any historical preservation proceedings were justified, as a matter of law, under Section 106 of the National Historic Preservation Act (“NHPA”). As the Report acknowledges, in an abandonment proceeding, the Section 106 analysis is typically limited to considering the effects of removing a line from the nation’s rail transportation system and the immediate effects of traffic diversion

and salvage. Report at ii, 1-3. Here, because traffic ceased and the rail infrastructure was removed decades ago, no such effects are reasonably foreseeable or even possible.

Because of the “unique circumstances” of this case, however, OEA has determined to go further and examine the potential effects of “reasonably foreseeable” post-abandonment reuses of the properties underlying the Harsimus Branch right of way (“Embankment” properties) that Conrail sold to third parties (the “LLCs”) in 2005. *Id.* Accordingly, the Report proceeds to identify two post-abandonment possibilities.

One is that the City of Jersey City (“City”) acquires the Embankment properties and uses them for a variety of possible public purposes—all of which the Report determines are “speculative.” *Id.* at ii, 1-5, 1-8. The Report is able to conclude only that, if the City were to acquire the Embankment properties, its actions with regard to them—whatever they turn out to be—would involve “basic preservation.” *Id.*

The second possibility is that the LLCs are allowed to proceed, and do proceed, with residential development applications that they filed with the City in 2005, 2007, and 2012—all of which would involve demolition of the Embankment. *Id.* at ii-iii, 1-8.

While the Report acknowledges that the “uncertainties” surrounding the development of the Embankment properties make it “questionable whether any third-party reuse of the Embankment is reasonably foreseeable under the NHPA,” the Report nevertheless concludes that the City’s and LLCs’ “plans” for the Embankment properties will be considered by OEA. *Id.* at iii, 1-5, 1-8. In particular, because the LLCs have sought approval for their plans, the Report assumes for purposes of Section 106 review that residential development is “reasonably foreseeable.” *Id.* at 1-8.

This conclusion is not supported by the facts. Notably missing from the Report is any mention of the fact that the LLCs' development plans have been repeatedly rejected by the responsible City agencies. Although the Report recognizes that the Embankment properties have been designated a Municipal Landmark by the Jersey City Historic Preservation Commission (*id.* at 1-5), there is no mention of the fact that both the Historic Preservation Commission and the Jersey City Zoning Board of Adjustment have denied the LLCs' requests for waivers that would permit the LLCs to develop the Embankment properties. As Conrail explained in its Supplemental Environmental and Historic Report ("Conrail Supp. Report"), filed with the Board on August 21, 2014, both the Historic Preservation Commission and the Zoning Board conducted lengthy, independent hearings regarding the LLCs' development proposals and rejected all of them. Conrail Supp. Report at 5-6. Accordingly, there is no basis at this point for OEA or the Board to find that the residential development contemplated by the LLCs is "reasonably foreseeable" within the meaning of the NHPA. *Id.* at 5-7.

Conrail has been willing, and continues to be willing, to fund the work of the consultant, RGA, Inc., hired by OEA to assist in the Section 106 review process, because Conrail has assumed, and continues to assume, that that process can be completed reasonably expeditiously. The Statement of Work ("SOW") signed by Conrail, RGA, and OEA in July 2015 originally provided for the Cultural Resources Report, including an analysis of potential effects on the identified historic properties, to be produced by March 2016 for comments by all consulting parties. Conrail subsequently agreed to an amendment to the SOW providing for the report to be circulated to all consulting parties by July 2016, with the final report due September 30, 2016. The draft report, however, was not circulated until May 5, 2017, and it did not include any analysis of potential effects. According to a letter to the consulting parties from the OEA

Director dated May 4, 2017, OEA now intends to treat the analysis of potential effects as a separate step in the Section 106 process. May 4 OEA Letter at 3. That would be followed, if necessary, by another step: the resolution of adverse effects. *Id.*

Conrail is fully aware of the amount of work that has gone into identifying and documenting historic properties in the Cultural Resources Identification Report. We have nothing to add to the impressive compendium RGA and OEA have prepared. We expect that the obvious thoroughness of their work will militate against further delay or additional steps in moving on to the analysis of potential effects and, if necessary, the mitigation of adverse effects. Conrail continues to believe, however, that no potential effects can be ascribed to the LLCs' residential development plans, which have been repeatedly rejected by the City. Should the Section 106 review process continue to drag on, Conrail reserves all legal options to seek to accelerate the process or bring it to a close.

Respectfully submitted,

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June 19, 2017

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that on this 19th day of June, 2017, I caused the foregoing to be served by First Class U.S. Mail, postage prepaid, on the following, who are listed as Consulting and Interested Parties in Appendix D to the May 5, 2017 Cultural Resources Identification Report issued by the Surface Transportation Board's Office of Environmental Analysis:

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And in addition, I caused the foregoing to be served by First Class U.S. Mail, postage prepaid, on the following individuals not listed in Appendix D to the May 5, 2017 Cultural Resources Identification Report issued by the Surface Transportation Board's Office of Environmental Analysis:

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