

**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 EFFECTS ASSESSMENT REPORT**

Consolidated Rail Corporation (“Conrail”) files these comments on the Cultural Resources Effects Assessment Report (“Report”) issued by the Board’s Office of Environmental Analysis (“OEA”) on March 29, 2019. In its Report, OEA seeks comments on the effects on historic properties of three scenarios it has identified as “reasonably foreseeable”: **Scenario 1** involves the complete preservation of the Harsimus Branch right-of-way as a public park and trail; **Scenario 2** involves the complete demolition of the Embankment portion of the Harsimus Branch and redevelopment of the Embankment properties for residential use; **Scenario 3** involves a settlement among the parties that would result in preservation of most of the Harsimus

Branch right-of-way and demolition and redevelopment of a single Embankment block. Report at 3-1-7.¹

Conrail has raised concerns from the beginning of these proceedings about whether, as a matter of law, any historical preservation proceedings were justified. As OEA acknowledges in its Report, usually the Board's review under Section 106 of the National Historic Preservation Act in abandonment proceedings is confined to the abandoning railroad's salvage plans for the track infrastructure and the potential for traffic diversion to other modes. Report at 1-6, 3-1. The potential for third party reuse of abandoned properties is not normally considered or reviewed. Nevertheless, OEA has taken the position that this case presents "unique circumstances," including the fact that the LLCs provided "preliminary development plans for the Embankment properties early in the Section 106 process." Id. at 1-7. Accordingly, OEA built its "worst-case" scenario, Scenario 2, on the assumption that it was "reasonably foreseeable" that the LLCs' preliminary development plans would be approved, the Embankments would be completely destroyed, and residential housing would be built in their place.

As Conrail has explained before,² there is a serious problem with OEA's determination that complete destruction of the Embankment properties is "reasonably foreseeable" within the meaning of Section 106. OEA's determination ignores, first, that the City long ago designated the Embankment properties a Municipal Landmark, which cannot be destroyed or redeveloped absent a waiver from the City. Second, when the LLCs sought such a waiver for their

¹ For "comparison" purposes, OEA also analyzes a **No Action Alternative**, which would occur if abandonment were not consummated in this proceeding. Report at 3-7-8.

² See "Supplemental Environmental and Historic Report," filed Aug. 21, 2014, at 5-6; Letter from R. Jenkins to V. Rutson, filed Feb. 29, 2016, at 1; "Comments of Consolidated Rail Corporation on Cultural Resources Identification Report," filed June 19, 2017, at 3.

preliminary demolition and redevelopment plans, both the City’s Historic Preservation Commission and its Zoning Board of Adjustment conducted lengthy and independent hearings, and both denied the LLCs’ requests for a waiver. While the LLCs have appealed those decisions in proceedings that have been stayed, it is entirely speculative whether the LLCs may ultimately prevail. Thus, as a matter of law, it cannot be deemed “reasonably foreseeable” within the meaning of Section 106 that post-abandonment the LLCs will demolish the Embankments in their entirety and build residential housing in their place.³

Also highly speculative is Scenario 1, which assumes that the City acquires all of the relevant Harsimus Branch right-of-way and all of it is preserved in the form of a trail and park. We need not belabor the point, however, since Conrail agrees with OEA that, even if it were reasonably foreseeable, Scenario 1 results in no adverse effects on historic properties. Report at vii, 3-3.

Scenario 3 may be the least speculative of the three scenarios identified by OEA in its Report. The parties have devoted considerable time and effort to attempting to reach agreement on an omnibus settlement agreement that would preserve most of the Harsimus Branch right-of-way for park and trail and possible light rail use, while permitting development of the easternmost block of the Embankments, and Conrail is hopeful that such an agreement will come to fruition. Conrail agrees with OEA that the limited development permitted by such an agreement would have minimal adverse effects on historic properties, and the provisions for park and trail use would complement historic preservation. Report at viii, 3-6-7.

³ The Report appropriately does not identify any adverse effects, or effects of any kind, in Scenario 2 arising from the abandonment of that portion of the Harsimus Branch right of way still owned by Conrail between CP Waldo and the LLCs’ properties. Since Conrail has no current plans for development of that portion of the old Harsimus Branch right-of-way, no post-abandonment effects are “reasonably foreseeable” within the meaning of Section 106.

No settlement agreement, however, has yet been reached. Conrail agrees with OEA that the Board cannot impose the terms of a settlement on the parties, because “the Board has no authority to determine the post-abandonment use of an abandoned rail line.” Report at 3-7. “The Board cannot force a railroad to sell or donate its property or to impose restrictions on a deed of sale for the purposes of historic preservation.” Id. at 5-3. Further, the Board has “no jurisdiction over or role in city planning, local zoning, or post-abandonment development of former rail rights-of-way.” Id. The Board “cannot force . . . parties to execute an agreement or dictate the terms of any such agreement.” Id. Nor may the Board “use delay or threat of delay in the Section 106 process to force a railroad or other entity to commit to mitigation actions involuntarily.” Id. at 5-3.

If an omnibus settlement agreement is reached by the parties, Conrail agrees with OEA that the terms of that agreement may be outlined in a Memorandum of Agreement (“MOA”) and the Board’s Section 106 decision may incorporate and reflect the parties’ commitment to those terms. Report at 5-2-3. However, as OEA properly emphasized in its Report, the MOA may “not commit the Board to oversee or undertake actions beyond what is permitted by the Board’s regulatory authority.” Id. at 5-3. The Board is not a court. It has neither the authority, resources, nor expertise to administer compliance with a complex settlement agreement among private, public, railroad, and non-railroad parties concerning land use, city planning, zoning, easements, deeds of sale, environmental conditions, permitting, construction requirements, and other pertinent matters. A judicially enforceable settlement agreement may form the basis for an agreed MOA in this proceeding, but the MOA must be derivative of, and subordinate to, the settlement agreement.

Failing a voluntary agreement among the parties, Conrail agrees with OEA that the only mitigation requirement that the Board is authorized to impose in a Section 106 proceeding as a condition of abandonment is historic “documentation” of the line, such as photographs and a narrative description. Report at 1-2, 1-6, 5-2. Conrail has repeatedly made clear its readiness to provide such documentation.⁴

OEA says that it has included a No Action Alternative in its analysis to provide a “comparison” to Scenarios 1-3. Report at viii, 1-12, 3-2. It does indeed provide a comparison, since it results in more adverse effects on historic properties than either Scenario 1, 2, or 3. Id. at 4-2. But it is not a reasonable alternative, as OEA recognizes, because the Harsimus Branch has been out of service for many years and there are no shippers on the line. Id. at 3-7. The Board would have no lawful basis to deny Conrail abandonment authority, so long as Conrail complies with the conditions, including documentation of the line, that the Board is authorized to impose on an abandonment. As OEA properly observes, “the Board could not deny abandonment authority solely for the purposes of historic preservation.” Id. at 3-2.

Conrail has fully cooperated in OEA’s Section 106 proceedings, including funding the work of the consultant, RGA, Inc., hired by OEA to assist in the review process. Conrail has also fully cooperated in efforts by all parties voluntarily to settle their historical preservation differences. As OEA emphasizes in its Report, however, “the Section 106 process in this case has already lasted more than four years, including one year for Step 1 of the four-step process and three years for Step 2, far longer than in any previous railroad abandonment case.” Report at 5-3. Conrail agrees with OEA that “expeditious completion of the process, consistent with the

⁴ Conrail has experience with documenting historic railroad structures and facilities. For a recent example, see “Swinging Over The Schuylkill: The History Of The PW&B And Bridge No. 31,” available at <http://www.conrail.com/wp-content/uploads/2014/01/Swing-Bridge-Website-December-21-2018.pdf>.

Board's Section 106 responsibilities, is necessary and appropriate." Id. Accordingly, Conrail urges OEA to move forward with the Section 106 process as expeditiously as possible. Absent a voluntary agreement on mitigation, Conrail can and will provide reasonable documentation to meet the only mitigation requirement the Board is authorized to impose.

Respectfully submitted,

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Robert M. Jenkins III

Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street NW
Washington DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation

April 29, 2019

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that on this 29th day of April, 2019, 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:

Advisory Council on Historic Preservation
Charlene Dwin Vaughn
Office of Federal Agency Programs
401 F Street NW, Suite 308
Washington DC 20001-2637

Historic Paulus Hook Association
Diane Kaese, President
121 Grand Street
Jersey City, NJ 07302

Thomas A. DeGise, Hudson County Executive
Justice Brennan Court House
583 Newark Avenue
Jersey City, NJ 07306

City of Jersey City
Mayor Steven M. Fulop
City Hall
280 Grove Street
Jersey City, NJ 07302

Jersey City Economic Development Corporation
298 Academy Street
Jersey City, NJ 07306

Hudson County Office of Cultural &
Heritage Affairs
Bill LaRosa, Division Director
585 Newark Avenue
Jersey City, NJ 07306

Civic Jersey City
Ester Wintner
64 Wayne Street
Jersey City, NJ 07302

Hudson County Division of Planning
Massiel Ferrara, Director
Building 1, Floor 2
Meadowview Complex
595 County Avenue
Secaucus, NJ 07094

Friends of Liberty State Park
Sam Pesin, President
P.O. Box 3407
Jersey City, NJ 07303-3407

Jersey City Landmarks Conservancy
Norrice Raymaker, President
P.O. Box 68
Jersey City, NJ 07303-0068

Hamilton Park Neighborhood Association
Mark Isikoff, President
PMB 166
344 Grove Street
Jersey City, NJ 07302

Marin Blvd, LLC et al.
Michele R. Donato, Esq.
106 Grand Central Avenue
Lavallette, NJ 08735

Harsimus Cove Association
Rebecca Symes, President
PMB #101
344 Grove Street
Jersey City, NJ 07302

New Jersey Committee for the East Coast
Greenway
Andy Hamilton
Mid-Atlantic Coordinator
1099 Pebble Hill Road
Doylestown, PA 18901

New York/New Jersey Baykeeper
Gregory A. Remaud, Conservation Director
52 West Front Street
Keyport, NJ 07735

New Jersey Historic Preservation Office
Katherine Marcopul
Historic Preservation Office
NJ Department of Environmental Protection
P.O. Box 404
Trenton, NJ 08625-0404

Newport Neighborhood Association
Robert Vivien, President
40 Newport Parkway, #604
Jersey City, NJ 07310

The Village Neighborhood Association
Jose Vazquez, President
365 Second Street
Jersey City, NJ 07302

Pennsylvania Railroad Harsimus Stem
Embankment Coalition
Stephen Gucciardo, President
495 Monmouth Street
Jersey City, NJ 07302

Camden & Amboy Railroad Historical Group
Mr. John J. Killbride
W-11 Avon Drive
East Windsor, NJ 08520-5647

Pennsylvania Railroad Technical & Historical
Society
Jerry Britton, President
North Central Chapter
25 Maplewood Drive
Etters, PA 17319

City of Jersey City Historic Preservation
Commission
Annisia Cialone, Planning Director
30 Montgomery Street, 14th Floor
Jersey City, NJ 07302

Powerhouse Arts District Neighborhood
Association
Jill Edelman, President
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Friends of the Jersey City and Harsimus
Cemetery
Eileen Markenstein, President
435 Newark Avenue
P.O. Box 8026, Five Corners Station
Jersey City, NJ 07038

Preservation New Jersey
Scot D. Panneacker, President
P.O. Box 7815
West Trenton, NJ 08628

National Park Service
Joshua Laird, Acting Regional Director
NPS – Northeast Regional Office
US Custom House
200 Chestnut Street, 5th Floor
Philadelphia, PA 19106

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

Dominick Critelli
Bureau of Rail Services
NJ Department of Transportation
1035 Parkway Avenue
Trenton, NJ 08625-0600

Victoria J. Rutson
Office of Environmental Analysis
Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20423-0001

Paula Scelsi
NJ Department of Transportation
1035 Parkway Avenue
Trenton, NJ 08625-0600

The Van Vorst Park Association
Oona Jackson Moore, President
83 Wayne Street
Jersey City, NJ 07302

Dara Callender, P.E.
Supervising Compliance Specialist
Environmental
Services Unit
NJ TRANSIT
One Penn Plaza East
Newark, NJ 07105

Society for Industrial Archeology
Sandy Needham, President
Roebling Chapter
235 West End Avenue
Apartment 14C
New York, NY 10023-3648

Brian P. Stack
411 Palisade Avenue
Jersey City, NJ 07307

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:

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

Eric S. Strohmeyer
c/o CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Adam C. Sloane
Adam C. Sloane
Mayer Brown LLP