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February 2, 2021

Reid Nelson, Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street, N.W. Suite 308
Washington, DC 20001

Re: *Proposed Abandonment of Consolidated Rail Corporation's Harsimus Branch Embankment, Jersey City, Hudson County, New Jersey*
ACHP Connect Case #001682

Dear Mr. Nelson:

On behalf of Rails-to-Trails Conservancy ("RTC"), I am following up on the email sent by Jaime Loichinger to the Surface Transportation Board ("STB") on January 22, 2021, regarding RTC's letter of the same date concerning the need for STB to address the violation of Section 110(k) of the National Historic Preservation Act ("NHPA") by Consolidated Rail Corporation ("Conrail"), the applicant before the STB. A copy of that email is attached.

Ms. Loichinger's email requires prompt clarification for several reasons. First, her email appears to suggest that the STB, in consultation with the ACHP, has already made "a preliminary determination that Section 110(k) does not apply." This is incorrect. The only time that the STB staff even attempted to respond to the charge of anticipatory demolition was in the agency's March 23, 2009 Draft Environmental Assessment ("EA"), which asserted, without any evidence, that the Section 110(k) "argument fails because the parties making this argument have not demonstrated any intent on Conrail's part to harm historic sites or structures. It was the City itself, starting in 1984, that asked Conrail to make available for redevelopment underutilized railroad property and trackage, and specifically urged Conrail to remove the Embankment." STB OEA Draft EA, at 14 (March 23, 2009) (available <https://prod.stb.gov/search-stb-records/>)

RTC and its partners responded promptly, and forcefully presented sworn testimony and extensive evidence that Conrail knew or reasonably should have known that the Embankment was a "railroad line" within the meaning of that term in 49 U.S.C. 10903(d). See *Jersey City et al. Summary Statement Concerning Section 110(k)* (Jan. 21, 2009) (attached). Conrail has never rebutted this evidence, and indeed, ultimately stipulated in Court that the Embankment was subject to the STB's abandonment jurisdiction. Neither the STB nor its staff have ever addressed this evidence of Conrail's intentional adverse effects.

Regarding the EA's wholly unsupported claim that Conrail should be excused for its illegal sale because the City had explored opportunities to buy the Embankment prior to 2005,

this argument has been rejected by the U.S. Court of Appeals for the D.C. Circuit in *Jersey City v. Consolidated Rail Corp.*, 668 F.3d 741, 745-46 (D.C. Cir. 2012), in which the Court expressly acknowledged that Jersey City did not and could not attempt to purchase the property or secure its removal due to the STB's jurisdiction. Indeed, the EA's assertion that the City attempted to acquire the corridor in 1984 is not credible, since the Branch was still in active freight rail service in that year.

Based on this evidence thoroughly discrediting and rebutting the EA's assertion, and in response to language in the draft EA, the New Jersey State Preservation Officer ("SHPO") in 2009 specifically advised:

The situation in the current case is extraordinary. The STB has not yet approved the proposed abandonment, yet Conrail has already sold the historic property to a developer. The developer is actively pursuing demolition of the historic property. This all occurred before the initiation of the Section 106 review process, let alone any discussion of ways to avoid, reduce or mitigate the clearly foreseeable adverse effects. STB now seeks to redress that lack of timely Section 106 consultation by establishing a Section 106-like review process whose certain outcome is an adverse effect including the probable demolition of the historic property. . . The EA asks to accept as a Section 106 equivalent, a process in which any sale of the property with an easement has been foreclosed. The process proposed by STB does not lead to a full consideration of alternatives; instead, it leads to loss of the historic property at the consummation of abandonment.

Letter from Daniel D. Saunders, Deputy NJ SHPO to STB, dated May 7, 2009 (attached).

As the foregoing makes clear, Conrail intentionally sold a historic railroad corridor that it knew or should have known was subject to STB jurisdiction prior to applying for STB abandonment authorization. The Section 106 regulations expressly recognize that the transfer or sale of a historic property that is subject to federal control without preservation restrictions is an adverse effect. 36 C.F.R. § 800.5(a)(2)(vii). Not only did Conrail knowingly transfer the Harsimus Embankment, Conrail signed a permit application to demolish the Embankment, resulting in the actual commencement of demolition by its chosen developers. This evidence demonstrates that Conrail's actions intentionally and significantly adversely affected the historic Embankment without compliance with Section 106.

Also extremely troubling is the suggestion in Ms. Loichinger's email that the ACHP concurs in the EA's cursory and discredited assertion that Section 110(k) is inapplicable. Any such concurrence is entirely premature, as the STB itself has made no formal determination, and the EA's assertion that Section 110(k) is inapplicable, made more than a decade ago, did not take into account the voluminous and undisputed evidence submitted by the RTC and its partners to the STB. It is also not appropriate for ACHP staff to prejudge the ACHP's eventual formal role in commenting on any determination that the STB might make concerning the existence of a Section 110(k) violation under 36 C.F.R. § 800.9(c)(2)(i).

Likewise, the ACHP should immediately correct any suggestion or implication in Ms. Loichinger's email that the STB can simultaneously deny the existence of a Section 110(k) violation and approve a Section 106 MOA. In fact, as Ms. Loichinger has acknowledged, the

STB must resolve the Section 110(k) issue *before* proceeding with the MOA. Resolution of Section 110(k) requires providing the ACHP with 30 days to comment on the agency's determination, and the agency must respond to the ACHP's comments and must notify the SHPO and other interested parties "prior to" approving the undertaking. 36 C.F.R. § 800.9(c)(2)(ii).

In short, Ms. Loichinger's suggestion that the STB can make a determination that Conrail's actions do not violate Section 110(k)—while simultaneously approving an MOA that fails to protect the Harsimus Branch Embankment—invites the STB to deny without justification the existence of a Section 110(k) violation, and implies that the ACHP would rubberstamp that determination. The ACHP's email therefore seriously undermines the likelihood that the STB will meaningfully comply with Section 110(k) and deprives the SHPO and interested parties of any assurances that the ACHP's review will be made independently based on a review of the STB's rationale and the evidence in the record, rather than any prejudgment made by staff without the benefit of this necessary information.

Accordingly, we request that the ACHP immediately clarify that the STB must make a formal determination regarding whether Conrail's actions have violated Section 110(k), and must do so prior to, not simultaneously with, the STB's review of any MOA, and that any effort to advance the Section 106 process must await the STB's receipt of and response to ACHP's comments per 36 C.F.R. § 800.9(c)(2)(ii). The STB should provide opportunities for public input and comment on Section 110(k) issues, and further indicate how the agency intends to address those issues.

If you have any questions, please do not hesitate to contact me at (202) 974-5142.

Very truly yours,

A handwritten signature in black ink, appearing to read 'A. Ferster', with a stylized flourish at the end.

Andrea C. Ferster, General Counsel
Rails-to-Trails Conservancy

Enclosures:

- Email from Jaime Loichinger, ACHP, to Alan Tabachnik, STB (Jan. 22, 2021)
- Jersey City *et al.* Summary Statement Concerning Section 110(k) (Jan. 21, 2009)
- Letter from Daniel D. Saunders, Deputy NJ SHPO, to STB (May 7, 2009)

cc: Javier Marquez, General Counsel, ACHP

Kelly Fanizzo, Associate General Counsel, ACHP

Jaime Loichinger, Assistant Director, Federal Permitting, Licensing, & Assistance
Section, ACHP

Sarah Stokely, Program Analyst, Federal Permitting, Licensing, & Assistance
Section, ACHP

Alan Tabachnik, Historic Preservation Specialist, Office of Environmental Analysis, STB

Kate Marcopul, Administrator and Deputy NJ SHPO

Charles Montange, Counsel for Jersey City, NJ and Coalition

Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation