

SERVICE DATE – MARCH 23, 2009

SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

ENVIRONMENTAL ASSESSMENT

STB Docket No. AB-167 (Sub-No. 1189X)
Consolidated Rail Corporation – Abandonment Exemption – in Hudson County, NJ

STB Docket No. AB-55 (Sub-No. 686X)
CSX Transportation, Inc. – Discontinuance Exemption – in Hudson County, NJ

STB Docket No. AB-290 (Sub-No. 306X)
Norfolk Southern Railway Company – Discontinuance Exemption – in Hudson County, NJ

BACKGROUND

In this proceeding, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) (collectively applicants) filed notices of exemption under 49 CFR 1152.50 seeking exemption from the requirements of 49 U.S.C. 10903 for Conrail to abandon and CSXT and NSR to discontinue service over a line of railroad in Hudson County, New Jersey.¹ The rail line proposed for abandonment, known as the Harsimus Branch, extends approximately 1.36 miles from Milepost 0.00 to Milepost 1.36 in the City of Jersey City (City). A map depicting the rail line in relationship to the area served is appended to this Environmental Assessment (EA).

This proposed abandonment and discontinuance has generated many filings and comments, most of which were received before Conrail filed its notice on February 26, 2009. Because of the unique complexities and history of this proceeding and the filings and comments we have received, we have included additional information in this EA beyond that which we would normally include in an EA. First, we explain in more detail the Surface Transportation Board (Board or STB) process for the proposed abandonment and discontinuance. We then provide a summary of prior proceedings related to the Harsimus Branch, discuss the scope of the environmental review in rail abandonment cases, and assess the potential environmental impacts associated with abandonment and discontinuance of the rail line, disclosing information that has been received related to potential reuse of the right-of-way at issue. We then discuss the historic preservation issues involved in the proposed abandonment of the Harsimus Branch and present the next steps in the detailed historic review process that will follow issuance of this EA.

¹ For the sake of simplicity, this document will reference only Conrail's notice of exemption seeking abandonment authority. All references to the Conrail notice incorporate the notices of exemption seeking discontinuance authority filed by CSXT and NSR.

Finally, we discuss the environmental mitigation measures we are recommending to the Board, and provide information on how and when to submit comments on this EA.

THE ABANDONMENT PROCESS

Railroads require prior approval from the Board to permanently close (i.e. abandon or discontinue service over) rail lines that are part of the interstate rail network. 49 U.S.C. 10903; 49 CFR 1152. However, approval is not needed to abandon ancillary spur, industrial, team, switching, or side track (known as “excepted track”). 49 U.S.C. 10906.

Under the regulations of the Board, railroads may file formal applications under 49 U.S.C. 10903 (generally when the rail line continues to serve some shippers). Alternatively, they may file a petition for exemption under 49 U.S.C. 10502, or a notice of exemption under streamlined class exemption procedures. No matter whether a railroad files an application, a petition, or a notice, the Board must meet its responsibilities under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). To meet those responsibilities, the Board may need to impose conditions that limit or postpone the carrier’s ability to exercise its abandonment authorization in whole or in part until the conditions are satisfied and the conditions are removed.

In this proceeding, Conrail has filed notices of exemption under the procedures of the “out-of-service” class exemption at 49 CFR 1152.50.² Railroads may seek abandonment authority under that class exemption when a rail line proposed for abandonment has not originated or terminated any rail traffic in the past two years and carries no overhead rail traffic that cannot be rerouted to other lines.

Abandonment authority is permissive; the railroad can elect not to exercise the authority it has been granted. The Board retains jurisdiction over rail properties until abandonment authority has been consummated.³ Abandonment authority generally expires after one year if the railroad has not submitted a consummation notice within that time indicating the date on which it exercised that authority. See 49 CFR 1152.29(e)(2). Once an abandonment is consummated, the line is no longer part of the national transportation system, and the railroad can retain, sell, or otherwise transfer the property (if it owns the necessary property interest). Eminent domain laws also would apply and quiet title actions can be filed.

In every rail abandonment case, the Board also considers the potential environmental effects of the proposed abandonment under NEPA, 42 U.S.C § 4321, *et seq.* Under NEPA, the STB must take into account the environmental impacts of its actions before issuing a final

² See Exemption of Out of Service Rail Lines, 2 I.C.C.2d 146 (1986), aff’d, Illinois Commerce Commission v. ICC, 848 F.2d 1246 (D.C. Cir. 1988).

³ See Hayfield N.R.R. Co. v. Chi & N.W. Transp. Co., 467 U.S. 622, 633-34 (1984); Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996).

decision either granting or denying the proposed abandonment and discontinuance of service. The Board's environmental regulations implementing NEPA are set forth at 49 CFR 1105. In addition to NEPA, the Board must comply with other environmental laws and statutes, including Section 106 of the NHPA, 16 U.S.C. § 470, *et seq.*, the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, and the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*

The Board's Section of Environmental Analysis (SEA) assists the Board in meeting its responsibilities by conducting an independent environmental review of cases filed with the Board, preparing the necessary environmental documentation associated with that review, and providing recommendations and technical advice to the Board on environmental matters.

Under 49 CFR 1105.7(e) and 1105.8(d), the Board requires railroads seeking abandonment authority to prepare environmental and historic reports setting forth information regarding the proposed abandonment, showing that they have consulted with appropriate agencies, and addressing issues such as whether the proposed abandonment is consistent with existing land use plans, or would result in increases in air emissions and noise. Railroads also must provide good quality photographs of railroad structures on the property that are 50 years old or older and of the immediately surrounding area.

SEA then reviews the environmental and historic reports and prepares an EA based on the reports and upon SEA's independent verification and investigation of the information set forth in the reports. In some proceedings, such as this one, SEA staff also conducts a site visit to the rail line proposed for abandonment. Every EA is issued for public review and comment. SEA then addresses the comments in a Post EA, which also sets forth SEA's final mitigation recommendations to the Board. The Board then issues a decision imposing appropriate conditions, including environmental conditions, on the exemption. Where the historic review process is ongoing, the Board generally imposes a condition prohibiting the railroad from selling the line, altering any sites or structures on the line, or conducting salvage activities on the line until the historic review is complete and the Board removes the condition. This preserves the status quo pending completion of the historic review process, because abandonment may not be consummated, and potentially historic property may not be disturbed until Section 106 is satisfied and the historic review condition has been removed.⁴

Here, for the reasons discussed below, SEA is recommending that the Board impose that type of condition on Conrail. Should the Board accept SEA's recommendation, the condition will act as a "stay" preventing Conrail from consummating the abandonment until the historic review process is complete.

Some parties to this proceeding have suggested that the preparation of a full Environmental Impact Statement (EIS) is warranted, rather than the EA typically prepared for

⁴ See STB Ex Parte No. 678, Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions (STB served April 23, 2008).

rail abandonment proceedings. The parties allege that potentially significant environmental impacts could result that could not be adequately mitigated and that this proposal is controversial.

The Board's environmental rules found at 49 CFR 1105 set forth the criteria that identify those types of actions for which EISs and EAs typically are prepared in proceedings before the Board. Pursuant to 49 CFR 1105.6(b)(2), the Board has classified railroad abandonments as actions normally requiring the preparation of an EA. Based on the information provided by the railroad, a site visit conducted by the Board, and comments provided by interested parties, SEA has preliminarily concluded that the preparation of an EA is appropriate here.

As discussed below, the historic preservation condition that SEA is recommending will ensure that the Board meets its obligations under NHPA. Beyond that, this EA is also recommending a condition to address concerns raised regarding the Coastal Zone Management Act. The other potential environmental concerns that have been raised relate to the potential demolition and reuse of the Harsimus Embankment. But those types of issues are beyond the scope of the Board's environmental review in this abandonment case. Moreover, it is not yet known how the property at issue here would be reused, and all of the potential reuse proposals would be subject to separate permitting processes before they could be implemented. Finally, the EA process—and the comprehensive historic review that will occur here—provide ample opportunity for public participation by all interested parties. Accordingly, SEA sees no reason to prepare an EIS here.

DESCRIPTION OF THE LINE AND SUMMARY OF PRIOR PROCEEDINGS

The rail line proposed for abandonment is located in an urban area of Jersey City. Conrail indicates that the right-of-way varies between 50 and 100 feet wide throughout the length of the proposed abandonment. The topography of the surrounding area is flat. Conrail states that the rail line was originally constructed in the late 1800s by the United New Jersey Railroad and Canal Company (UNJRCC) and leased to the Pennsylvania Railroad Company. The rail line ran from a connection with the UNJRCC main line near Waldo Avenue to the Hudson River waterfront in the Harsimus Cove area. Part of the rail line was elevated.

Between 1901 and 1905, six segments of the rail line along Sixth Street between Brunswick Street and Marin Boulevard were constructed as masonry-enclosed earthen segments, sloping from a height of approximately 35 feet at the western end to 12 feet at the eastern end. Each segment was approximately 400 feet long and 100 feet wide, and ranged from 12 to 35 feet in height. The segments were connected by plate girder bridges.

Conrail indicates that rail traffic on the line began to decline in the 1950s and 1960s. The Pennsylvania Railroad Company merged into the Penn Central Transportation Company (Penn Central) in 1968. After the bankruptcy of the northeastern railroads in the 1970s, the Embankment, along with many other rail properties, was transferred to Conrail pursuant to a

federal program documented in what is known as the Final System Plan. The rail line acquired by Conrail extended from Waldo Avenue and stopped just east of Washington Street.

Conrail states that Jersey City had begun redevelopment efforts in the Harsimus Cove area prior to Conrail beginning operations there. Industrial operations in the area were being replaced with office buildings, real estate complexes, and other commercial developments. The City adopted detailed redevelopment plans for the area, and the Jersey City Development Agency (Agency) condemned some property that was not in active rail use. By the mid-1980s, much of the trackage in the area had been sold to developers or to the Agency. Also, starting in 1984, the City asked Conrail to make available for redevelopment the underutilized railroad property and trackage, and urged Conrail to remove the Embankment.⁵ Conrail agreed to sell the property after it completed a new track connection at Marion, New Jersey, to replace use of the Embankment for turnaround space.

Upon completing the new connection in 1994, Conrail—at the request of the City—permitted the City and National Bulk Carriers, Inc., a private developer, to remove the bridges on the Embankment. Conrail then offered to sell what remained of the Embankment to the City, but no public entity accepted the offer. By the early 1990s, Conrail had sold all of the rail line east of Marin Boulevard. Conrail indicates that no trace of the right-of-way remains on that portion of the right-of-way, which has been completely transformed by development of retail, residential, and hotel properties.

In December 1999, over the objection of the City and Conrail, the six embankment properties were declared eligible for listing on the New Jersey State Historic Register. After that, Conrail indicates, the City and the Agency stopped talking to Conrail about purchasing the embankment properties. No other public entity came forward to purchase those properties. In October 2002, Conrail put the six embankment properties and the two adjacent properties up for bids. Shortly thereafter, the City designated the six embankment properties as an “historic landmark” under municipal law, and Conrail informed prospective bidders that the designation would require a developer to obtain the consent of the Jersey City Historic Preservation Commission to proceed with development of those properties. Conrail states that the only bidder on the eight parcels was SLH Holding Co., LLC (SLH).

In late 2003 and early 2004, the City and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (Embankment Coalition) expressed an interest to Conrail about possibly acquiring the properties, but made no concrete proposals. In July 2005, Conrail closed the sale of the eight parcels to eight limited liability companies formed by SLH for that

⁵ Robert W. Ryan Verified Statement, p. 11-12 and Exh G & H filed April 24, 2006 in STB Finance Docket No. 34818, City of Jersey City, Rails to Trails Conservancy, Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and New Jersey State Assemblyman Louis M. Manzo – Petition for Declaratory Order (Harsimus Declaratory Order Proceeding).

purpose. This left Conrail with ownership of just a 0.18 mile-segment of the old right-of-way east of Waldo Avenue.

In January 2006, the City, the Embankment Coalition, the Rails to Trails Conservancy, and New Jersey Assemblyman Louis M. Manzo (City Parties) petitioned the Board to begin a declaratory order proceeding to determine whether the part of the rail line extending from Waldo Avenue to Marin Boulevard constituted a “line of railroad” requiring abandonment authority from the Board under 49 U.S.C. 10903, or was instead ancillary “spur track” within the meaning of section 10906. The Board initiated the requested Harsimus Declaratory Order Proceeding, and in its August 9, 2007 decision in that proceeding, the Board held that the part of the rail line at issue there constituted a “line of railroad” requiring abandonment authority. In a decision served December 19, 2007, the Board denied a petition for administrative reconsideration. A court challenge of the Harsimus Declaratory Order Proceeding is now pending in the United States Court of Appeals for the District of Columbia Circuit.

Following the Board’s issuance of its decisions in the Harsimus Declaratory Order Proceeding, Conrail began to prepare the required environmental and historic reports needed before it could file for abandonment authority before the Board. Conrail consulted with the requisite agencies and entities set forth in the Board’s environmental regulations at 49 CFR 1105.7(c), and on March 6, 2008, Conrail submitted environmental and historic reports to the Board. In response to Conrail’s submission of the reports, several parties submitted comments raising historic preservation issues and asserting that the reports should address potential reuse of the Harsimus Embankment. Conrail delayed filing its notice of exemption with the Board in order to respond to the comments raised.

Conrail retained Richard Grubb and Associates, Inc. (RGA), a consulting firm that specializes in historic preservation analysis, to provide more information on the Harsimus Embankment and surrounding area. In September 2008, RGA prepared a detailed “Area of Potential Effects Report and Proposed Methodology for Section 106 Consultation.” On October 2008, Conrail invited the New Jersey State Historic Preservation Officer (SHPO) and SEA on a site visit to the Harsimus Embankment to see both the Embankment and surrounding area. In addition to Conrail, SEA, and SHPO, representatives from RGA also attended.

By letter dated December 23, 2008, the SHPO concurred with the definition of the Area of Potential Effect in RGA’s report. At this point, because Conrail had not yet filed for abandonment authority before the Board, the Board’s formal historic review process had not begun.⁶

⁶ The Board encourages rail applicants to consult with relevant parties and agencies as early as possible to provide these agencies and entities with sufficient time to consider issues and respond. This early consultation does not take the place of the Board’s responsibilities under NEPA or NHPA, but supplements the Board’s own analysis and consultations.

On January 6, 2009, Conrail filed a notice of exemption with the Board, seeking abandonment authority under the class exemption for out-of-service lines. Conrail also submitted a supplemental environmental and historic report, which included the RGA report prepared in September 2008. Simultaneously, Conrail filed a motion with the Board asking it to stay the effective date of the notice for 180 days and to waive the pre-filing notification requirements in the Board's environmental rules for the supplemental environmental and historic report. The City Parties and others opposed Conrail's motion. On January 26, 2009, the Board issued a decision rejecting Conrail's motion and dismissed the notice without prejudice to Conrail's refile under the Board's normal procedure. Conrail refiled its notice of exemption on February 26, 2009, thus triggering the start of SEA's environmental and historic review processes on behalf of the Board.

Consistent with its usual procedures, SEA first ensured that Conrail met the requirements of the Board's environmental rules at 49 CFR 1105.7(b), which require applicants to serve environmental and historic reports on appropriate Federal, state, and local agencies. To prepare this EA, SEA then reviewed and investigated the available information about the proposed abandonment to meet the Board's objectives under NEPA. Consistent with Board precedent and NEPA case law, SEA assessed the potential environmental impacts of the proposed abandonment—that is, the impact of diversion of traffic to other rail lines or transportation modes and the disruptive consequences of removing the track and associated structures—and discusses those impacts below.⁷

POTENTIAL ENVIRONMENTAL ISSUES RELATED TO ABANDONMENT (OTHER THAN HISTORIC PRESERVATION)

As noted above, case law and Board precedent both clearly establish that the Board's NEPA review of a proposed abandonment properly is focused on the potential environmental impacts resulting from diversion of traffic from rail to other modes and salvage of the rail line.⁸ As the following discussion shows, no rail traffic has moved over the Harsimus Branch for at least a decade and the track was removed many years ago. Consequently, there are no potential environmental impacts from diversion of traffic and salvage.

⁷ SEA is also taking a thorough look at the potential historic preservation issues, as discussed separately below. Moreover, this EA briefly summarizes the information provided to SEA related to potential reuse alternatives for this property, since both Conrail and commenters have addressed them.

⁸ See Iowa Southern R.R. Co. – Exemption – Abandonment, 5 I.C.C.2d 496 (1989) (Iowa Southern), aff'd Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990).

Diversion of Traffic

Available information from this case and the Harsimus Declaratory Order Proceeding make it clear that no local or overhead rail traffic has moved over the rail line for many years and all of the track and track structures have been removed. Accordingly, the proposed abandonment would not adversely impact the development, use and transportation of energy resources or recyclable commodities; transportation of ozone-depleting materials; or result in the diversion of rail traffic to truck traffic that could result in significant impacts to air quality, noise, or the regional or local transportation network.

Salvage Activities

Impacts from salvage and disposal of a rail line typically include removal of tracks and ties, removal of ballast, dismantling of any bridges or other structures that may be present on the rail right-of-way, and regrading of the right-of-way. Conrail indicates—and SEA has verified—that all of the track, bridges, and other salvageable materials on the rail line were removed over a decade ago. If the proposed abandonment is authorized, Conrail, stating the obvious, avers that it has no plans to conduct any kind of salvage activity. According to Conrail, all of the rail line east of Marin Boulevard was sold long ago for development, and no trace of the line remains there. Conrail still owns the segment of the rail line between Waldo Avenue and a point near Newark Avenue, but Conrail has no present plans for disposition of the property.

The abandonment authority would not lead to any salvage activities by Conrail on the eight parcels between Newark Avenue and Marin Boulevard, which Conrail has sold to SLH. Any alteration of those properties that may occur in the future would result from reuse of those parcels, not from abandonment and salvage by Conrail.

For these reasons, there is no potential for significant environmental effects related to diversion of traffic and salvage activities that would result from the proposed abandonment. Therefore, an EIS is unnecessary here.

Possible Post Abandonment Activities

Ordinarily, the Board does not attempt to identify and address the environmental impacts of reuse alternatives of an abandoned right-of-way. See Implementation of Environmental Laws, 7 I.C.C.2d 807, 811-812 (1991), where the Board's predecessor agency, the Interstate Commerce Commission (ICC), explained, "We are not a planning agency; the identification and development of reuse alternatives is the responsibility of state and local planning agencies, not the ICC."

Here, it is unknown what ultimately will happen to the eight parcels Conrail sold to SLH. Conrail states that the City has indicated that it intends to condemn the properties for park and trail use. Conrail also indicates that SLH has submitted a number of proposals to the City that would permit the eight parcels to be developed and used for park, trail, and transit purposes,

while maintaining the embankment structures largely intact. These alternatives, however, are not based on current zoning requirements and would require the agreement of the City and other agencies in order to be implemented.

At the same time, the available information here shows that before the Board issued its decision in the Harsimus Declaratory Order Proceeding finding that this is a “line of railroad” requiring abandonment authority from the Board, SLH applied for permits that would allow residential development on the Embankment. But because the Embankment parcels have been declared an “historic landmark,” SLH could not proceed with any development that would involve significant demolition of the Embankment without the prior approval of the Jersey City Historic Preservation Commission. Thus, it remains uncertain how this property would be used following its abandonment. All of the possible reuse alternatives would require significant local government approvals prior to their implementation. This process is independent of the abandonment proceeding now pending before the Board.

Environmental Concerns Raised by Parties and Commenters

SEA received several comments and filings that raised environmental concerns, such as noise, dust, hazardous materials, endangered species, and coastal zone concerns. However, these filings have focused almost entirely on the potential environmental impacts that could result from the various reuses that are being pursued by various parties for the Embankment property. As we have discussed above, agency and court precedent establish that environmental impacts relating to uncertain post-abandonment reuse proposals are not part of the Board’s environmental review process in rail abandonment cases. Rather, the purpose of the Board’s environmental review in this and every other abandonment case is to consider the potential impacts of any diversion of traffic and salvage that would take place.⁹ In any event, how the Harsimus Embankment would be used post abandonment is far from certain. When plans solidify, then the permit processes of the appropriate agencies with expertise will move forward, allowing the potential environmental impacts of reuse to be fully considered at that time.

Below, we set forth the environmental resource areas typically discussed in our EAs for rail abandonment cases and summarize and respond to the comments we have received on those issues.

Noise, Dust, and Vibration

As discussed in Conrail’s environmental reports, abandonment of the Harsimus Branch would have no direct impacts on noise, vibration, and dust. The City, according to Conrail, has indicated that its plans for park and trail use would involve the construction of access ramps, connecting bridges, railings and walkways. Even if those plans were part of the environmental review process here, the potential impacts have not been shown to be significant. As Conrail states, the noise, dust, and vibration from such construction activity would be temporary, as

⁹ Iowa Southern

would the impact on local traffic. Local and state traffic ordinance and construction permitting requirements also would apply to the City's construction activities.

The City Parties and others also have commented that the demolition of the embankment by SLH (assuming it could obtain the necessary approvals to construct residential housing) would have adverse environmental effects. The commenters point specifically to noise and vibration that would be caused by trucks moving earth and rock spoil from the demolition site, and to possible harm to public health from fugitive dust emissions resulting from the demolition. But these impacts, assuming that they were to occur, would be subject to the same controls under local ordinances as any other urban construction activity.

Fill Material

Both Conrail and the City Parties have submitted a 1998 report prepared by a consultant for the Jersey City Redevelopment Agency concerning the environmental condition of the embankment properties. The report was prepared after all rail activity had ceased on the line and all track and track structure had been removed. The report concluded that the fill material in the embankments was nonhazardous waste that could be recycled, disposed of at a landfill, or used at other city project sites as subsurface fill material. According to the City Parties, the soil that would have to be removed if the embankment were to be demolished is contaminated; and any removal would result in adverse environmental impacts that should be assessed by the Board in an EIS. As discussed in the 1988 report and below, in the section on Hazardous Materials, however, the commenters have not supported their conclusion that the fill material here is hazardous.

Traffic Disruption

As discussed in Conrail's environmental reports, the abandonment of the unused right-of-way would have no impact on regional and local transportation systems. If the City acquires the Embankment property for a park, the dislocation of local traffic in connection with the construction of stairways, ramps, railings, bridges, and walkways that the City Parties allege would take place would be temporary. The demolition and construction activity associated with SLH's plans for residential housing could temporarily disrupt traffic in the area. According to the City Parties, approximately 14,000 to 20,000 trucks would be diverted to adjacent residential streets. But any such temporary disruption would be subject to local traffic ordinances and construction permitting requirements. The construction of additional housing could marginally increase the amount of automobile traffic in the immediate area. But the local planning and zoning processes would address potential traffic impacts. Moreover, SLH would still need to obtain the approval of the Jersey City Historic Preservation Commission to go forward with its plans with respect to the embankment parcels.

Land Use Concerns Involving the Coastal Zone Management Act

The New Jersey Department of Environmental Protection's Office of Coastal Management (OCM), based on the information provided, has determined that the proposed rail line abandonment may be either in or affect the coastal zone of New Jersey.¹⁰ If so, the proposed abandonment and associated activities may need to be considered in terms of Federal consistency standards. OCM is most concerned with how the proposal would impact the Hudson River Waterfront Walkway and perpendicular access to the Walkway. Conrail has provided additional information to OCM, but no determination has yet been made by OCM regarding the effect of the proposed abandonment on the coastal zone. Accordingly, we will recommend a condition requiring that Conrail complete consultation with OCM to determine whether state coastal management consistency certification is required. If consistency certification is required, Conrail would be prohibited from consummating the abandonment until it obtains consistency certification pursuant to the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.* and notifies SEA.

Threatened and Endangered Species

Based upon Conrail's review of the area, the line is not within any wildlife sanctuaries or refuges, National or State parks or forests. Conrail has reviewed the U.S. Department of the Interior, Fish and Wildlife Service (USFWS) web site to determine whether the proposed abandonment may affect Federally listed species pursuant to the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) (ESA). SEA has verified that the USFWS web site indicates that no Federally listed species under USFWS jurisdiction occur within the impact area of the proposed abandonment. As a result, SEA is not recommending an ESA condition.

Wetlands and Water Quality

The U.S. Environmental Protection Agency, Region 2 (EPA) has evaluated the proposed abandonment and requested additional information from Conrail to aid in its determination regarding whether a Clean Water Act Section 402 permit would be required. Conrail has provided the additional information to EPA as requested. EPA has indicated that a Section 402 permit would be required if there are any point source discharges (via pipes, ditches, storm drainage, construction site runoff) to waters of the U.S. from the site. However, Conrail has indicated to EPA that the proposed abandonment would not involve any activity that would create point source discharges to waters of the U.S. EPA also indicated that a Section 404 permit would be required for placement of dredged or fill materials into wetlands and other waters of the U.S. Because the proposed abandonment would not involve excavation or other activity that would create dredged or fill materials, there would be no degradation to water

¹⁰ No other land use concerns have been raised regarding the proposed abandonment. As Conrail states, the Harsimus Branch is in an urban area and there would be no effect on any prime agricultural land.

quality. Conrail is not aware of any designated wetlands or 100-year flood plains within the proposed project area. Accordingly, SEA is not recommending a condition to address wetlands or water quality.

Hazardous Materials

Conrail states that it is not aware of any hazardous waste sites or hazardous materials spills on the right-of-way. EPA expressed concerns about the presence of hazardous materials in soils. Conrail indicates that soil sampling and analysis was conducted in 2005 in connection with a proposed redevelopment by a third party of the property surrounding and including the Embankment. A report prepared in connection with that sampling states that no volatile organic compounds, pesticides, or PCBs were detected in the soil and that the semi-volatile organic compounds that were detected are classified as nonhazardous waste. The report further concluded that the fill material could be recycled or disposed of at a landfill and that any detected contamination can be designated as “Historic Fill.” According to Conrail, the fill at issue here is the same type of historic fill present in many properties in Jersey City and elsewhere in Hudson County, and handling the material has become a routine component of Hudson County real estate development. Therefore, SEA sees no need to recommend a mitigation measure to address this issue.

Geodetic Station Markers

The National Geodetic Survey (NGS) has advised SEA that no geodetic station markers have been identified that may be affected by the proposed abandonment.

Air Quality

There would be no air emissions associated with abandonment activities because salvage has already occurred. While the City has suggested that construction of residential housing could have a temporary effect on air quality, any such effects would be temporary.

Energy

As discussed in Conrail’s environmental reports, abandonment of the right-of-way would have no energy impacts because the Harsimus Branch has long been out of service. Some additional fuel use could occur due to increased use of trucks during construction activities if, for example, the City were to construct a park or the proposed residential housing is implemented, but any such activities would be temporary.

Safety

As discussed in Conrail's environmental reports, no public health or safety impacts would result from the proposed abandonment. Any impacts on safety related to the potential reuse of the property would be beyond the scope of this EA and temporary. In addition, Conrail states that the permitting process that would take place prior to the implementation of those proposals would address any potential concerns related to safety.

Indian Tribes

Pursuant to 36 CFR 800.2, SEA conducted a search of the Native American Consultation Database at <http://home.nps.gov/nacd/> to identify Federally-recognized tribes which may have ancestral connections to the project area. The database did not identify any tribes that may have an interest in the proposed abandonment.

SEA's Conclusion Regarding the Abandonment's Potential to Cause Significant Environmental Impacts

In sum, based on all information available to date, SEA does not believe that abandonment activities would cause significant environmental impacts if the environmental mitigation recommended in the EA are imposed and implemented. The potential reuse proposals that are being considered for this property are not part of the Board's consideration in the environmental review for this abandonment case. Moreover any potential environmental impacts related to those proposals would be temporary and would be addressed in the permitting process for those activities that would take place.

HISTORIC REVIEW

Long before Conrail filed its notice of exemption seeking abandonment authority in this proceeding, SEA knew that important issues regarding the Embankment would require careful consideration by the Board under Section 106 of the NHPA. The historic review process here is ongoing. As discussed above, Conrail has retained a consultant with knowledge and expertise in the consideration of historic resources that has prepared a detailed report on the Area of Potential Effect and proposed methodology for Section 106 consultation. And SEA has traveled to Jersey City to examine the Embankment. Recently the SHPO concurred with the definition of the Area of Potential Effect in the Conrail consultant's report. In the forthcoming weeks, SEA will be assembling a list of consulting parties who we hope will be assisting us as we move through the steps in the Section 106 historic review process: identification, determination of adverse effect, and mitigation. Both the comments submitted by numerous groups and Conrail's own historic report provide some information regarding possible consulting parties.

In short, the historic review process is just beginning. And with the imposition by the Board of SEA's recommended historic preservation condition, the status quo will be retained

until the conclusion of the Section 106 process because Conrail will be unable to consummate this proposed abandonment until that process is complete.

The SHPO and others, including the City, argue that the historic review process should not proceed because Conrail has engaged in “anticipatory demolition” in violation of Section 110(k) of NHPA. Section 110(k) permits an agency to suspend processing of an application when “an applicant who, with intent to avoid the requirements of [Section 106], has intentionally significantly adversely affected a historic property.” 16 U.S.C. 470h-2(k). In support of their anticipatory demolition argument, these parties assert that Conrail should have known that the Harsimus Branch was a “line of railroad” requiring abandonment authority from the Board and that by removing bridges and track structure, Conrail demonstrated intent to harm the Embankment.

This 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. In 1994, after completing a new rail connection at Marion, New Jersey, Conrail permitted the City (as well as National Bulk Carriers, Inc.) to remove a bridge on the Embankment at Marin Boulevard. At the urging of the City, Conrail removed the remaining bridges. And when the Board issued its decision in the declaratory order proceeding finding the Harsimus Branch to be a line of railroad, Conrail acted appropriately and in good faith—hiring a historic resource contracting firm, preparing the Area of Potential Effect Report, consulting with the SHPO and others, and developing the historic report and supplement to the report in compliance with the Board’s environmental regulations. To accuse Conrail of intent to harm the Embankment ignores these facts.

Below, we set forth a brief summary of the submissions received that raise concerns associated with historic sites and structures:

Conrail submitted its historic report to meet the requirements of the Board’s environmental rules [49 CFR 1105.8(a)] and served the reports on the SHPO pursuant to 49 CFR 1105.8(c). The Area of Potential Effect Report prepared by Conrail’s consultant, RGA, indicates that the six embankment parcels have been determined eligible for listing on the National Register of Historic Places (National Register). Other structures and historic districts within the Area of Potential Effect are also listed or eligible for listing on the National Register.

SEA received numerous comments on the proposed abandonment and discontinuance raising issues and concerns which primarily focused on the Board’s responsibilities under Section 106 of the NHPA and alternative reuse of the right-of-way. Comments were received from the City Parties¹¹ (the City, the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition and Rails to Trails Conservancy); the New Jersey State Historic

¹¹ The City Parties filed comments on March 13, 2009, restating the same arguments made in prior submissions.

Preservation Office, the New Jersey General Assembly; County of Hudson Department of Public Resources, Division of Planning; Preservation New Jersey; Jersey City Economic Development Corporation; Civic JC, Harsimus Cove Association; The Friends of Liberty State Park; Jersey City Landmarks; and NY/NJ Baykeeper.

In a letter of January 26, 2009, the SHPO expressed concern about the short time frames established in the class exemption for out-of-service rail lines, stating that the time frames would prevent the full completion of the NHPA process.¹² The SHPO also raised concerns that if Conrail continues to pursue sale and demolition, the project will result in an adverse effect on the historic embankment.

However, as explained above, the Section 106 process is ongoing. Our recommended condition would require that Conrail retain its interest in and take no steps to alter the historic integrity of all sites, buildings, and structures within the project right-of-way that are eligible for listing or listed in the National Register until the Section 106 process of NHPA is completed. Moreover, our recommended condition specifically provides that Conrail may not consummate this abandonment until the Section 106 process is completed, and the Board has removed the Section 106 condition. Therefore, Conrail's decision to seek abandonment authority under the streamlined class exemption procedures does not mean that the Section 106 process will not be completed. Rather, SEA's recommended condition assures that the status quo will be maintained until Section 106 is satisfied and the historic review condition is removed.

RECOMMENDED CONDITIONS

We recommend that the following environmental conditions be imposed on any decision granting abandonment authority.

1. Consolidated Rail Corporation (Conrail) shall consult with the New Jersey Department of Environmental Protection's Office of Coastal Management (OCM) to determine whether state coastal management consistency certification is required. If consistency certification is required, Conrail shall be prohibited from consummating the abandonment until it obtains consistency certification pursuant to the Coastal Zone Management Act, 16 U.S.C. 1451 et seq and notifies the Board's Section of Environmental Analysis.
2. Consolidated Rail Corporation (Conrail) shall retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f, has been completed. Conrail shall report back to the Board's Section of Environmental Analysis regarding any consultations with the State Historic Preservation Office, any other Section 106 consulting parties that have been identified, and the public. Conrail may not file its

¹² Similar concerns have been raised by commenters.

consummation notice until the Section 106 process has been completed and the Board has removed this condition.

CONCLUSIONS

Based on the information provided from all sources to date, SEA concludes that, as currently proposed, abandonment of the line would not significantly affect the quality of the human environment if the mitigation recommended in the EA are imposed and implemented. Therefore, the EIS process is unnecessary.

Alternatives to the proposed abandonment typically include denial (and therefore no change in operations), discontinuance of service without abandonment, and operation by another operator under the offer of financial assistance provisions at 49 U.S.C. 10904. Here, however, there does not appear to be any realistic alternative to abandonment. As described in Conrail's environmental reports, the APE report, and in the Board's decisions in the Harsimus Declaratory Order Proceeding, the right-of-way has not been used for rail service for many years, all of the track and track structures have long been removed and there is nothing to suggest that there are shippers currently or potentially interested in rail service.

PUBLIC USE

Following abandonment of the rail line, some portions of the right-of-way may be suitable for other public use under 49 U.S.C. 10905. A request containing the requisite four-part showing for imposition of a public use condition (49 CFR 1152.28) must be filed with the Board and served on the railroad within the time specified in the Board's Federal Register notice.

TRAILS USE

A request for a notice of interim trail use (NITU) to provide time to negotiate an arrangement for rail banking/interim trail use under 16 U.S.C. 1247(d) for this right-of-way is due to the Board, with a copy to the railroad, within 10 days of publication of the notice of exemption in the Federal Register. Nevertheless, the Board will accept late-filed requests as long as it retains jurisdiction to do so in a particular case. This request must comply with the Board's rules for use of rights-of-way as trails (49 CFR 1152.29).

PUBLIC ASSISTANCE

The Board's Office of Public Assistance, Governmental Affairs, and Compliance responds to questions regarding interim trail use or public use. You may contact this office directly at (202) 245-0238, or mail inquiries to Surface Transportation Board, Office of Public Assistance, Governmental Affairs, and Compliance, Washington, DC 20423.

COMMENTS

If you wish to file comments regarding this Environmental Assessment, send an **original and two copies** to Surface Transportation Board, Case Control Unit, Washington, DC 20423, to the attention of Kenneth Blodgett. Environmental comments may also be filed electronically on the Board's website, www.stb.dot.gov, by clicking on the "E-FILING" link. **Please refer to Docket No. AB-167 (Sub-No. 1189X) in all correspondence, including e-filings, addressed to the Board.** If you have any questions regarding this Environmental Assessment, please contact Kenneth Blodgett, the environmental contact for this case, by phone at (202) 245-0305, fax at (202) 245-0454, or e-mail at blodgettk@stb.dot.gov.

Date made available to the public: **March 23, 2009.**

Comment due date: **April 7, 2009.**

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Anne K. Quinlan
Acting Secretary

Attachment