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29 October 2020

Victoria Rutson
Alan Tabachnick
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

Re: Conrail – Ab. Ex. – in Hudson County, NJ,
AB 167 (Sub-no. 1189X)

Follow up to October 27 Virtual Hearing
On STB OEA's proposed Section 106 MOA

Dear Ms. Rutson and Mr. Tabachnick:

This comment is on behalf of City of Jersey City ("City"), Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition ("Coalition"), and Rails to Trails Conservancy ("RTC") (collectively, "City, et al"). City et al thank the agency for the opportunity to highlight some of our concerns with the agency's approach to this case, especially in respect to the agency's obligations under the National Historic Preservation Act, during the virtual hearing on the evening of October 27.

I.

Reserving the right to file further written comments, for the convenience of the agency we are supplying this letter, and attaching to this letter the written versions of the oral remarks delivered by Mr. Baker for the City, Ms. Crowley and Mr. Gucciardo for the Coalition, and Ms. Ferster for RTC.

II.

At the virtual hearing, the developer interests argued that future use of the Harsimus Branch was purely a local land use matter for Jersey City and that this agency had no role to play. The developer interests misunderstand and mischaracterize the issue. City et al are not looking to STB to engage in local land use planning. City et al are merely seeking to enjoy the rights and remedies to acquire and to protect the property otherwise available under federal law, and federally-mediated state law, but for Conrail's unlawful de facto abandonment. These federal rights and remedies, if made available, would foster historic preservation. The United States Court of Appeals for the D.C. Circuit has validated City, et al's position. In particular, in City of Jersey City v. Consolidated Rail Corp., 668 F.3d 741, 745-46 (D.C.Cir. 2012), the Court explained that the City was suing for relief

“under a federal statute that offers it an array of rights and benefits, [and] it seeks to void an allegedly unlawful sale of railroad line that threatens its interests in the historic and environmental value of the property. In that context, the City's refusal to invade federal jurisdiction and engage in unlawful self-help can hardly deprive it of standing.”

The Court also noted that in any event “Conrail's refusal to [timely] invoke STB proceedings injures the City by depriving it of the benefits of those proceedings – namely, the opportunity to acquire and to protect the property” under the various remedies available in or as a result of the federal proceedings. 668 F.3d at 744.

The developer interests also referenced a settlement, which they claimed would attain the objectives of City, et al. Unfortunately, there is as yet no settlement. For fifteen years (or more), City, et al have endeavored to reach a settlement with SLH Properties and Conrail. While we are hopeful one still can be reached, this depends on circumstances (e.g., the economy) and the actions of third parties beyond our control. City, et al accordingly properly and prudently seek the benefit of federal rights and remedies of which City, et al to date have wrongfully been deprived due to Conrail's unlawful de facto abandonment of the Harsimus Branch. In any event, all should recognize that any “settlement” so far discussed will still embody adverse impacts on historic resources, although City, et al are diligently laboring to mitigate these to the extent possible in the circumstances.

As the attached Oct. 27 comments indicate, and in accordance with the D.C. Circuit decision referenced above, City, et al call for a section 106 MOA that

places City, et al in the same position to preserve the historic assets in this case that they would have enjoyed but for Conrail's unlawful 2005 sale of portions of the historic Harsimus Branch to the developer interests. Two conditions will do this: (1) STB should void the deeds by Conrail to SLH Properties upon the effectiveness of any abandonment authorization, and (2) STB should impose a public use condition as authorized by 49 U.S.C. 10905 barring Conrail from selling that property for other than public use for 180 days. Unless STB's MOA incorporates these conditions, it is premature, because the agency so far has avoided any meaningful consideration of the requirements of section 110(k) of the National Historic Preservation Act. Conrail engaged in anticipatory demolition, for which section 110(k) provides remedies. These remedies include denial of the abandonment license and presumably measures to restore City, et al to the position they would have enjoyed in terms of preserving historic assets but for the unlawful de facto abandonment actions of Conrail. These remedies are superior to, and would supplant, the mere documentation requirements embodied in STB's current draft MOA.

Respectfully submitted,

/s/

Charles H. Montange
Attorney for City of Jersey City,
PRR Harsimus Stem Embankment
Preservation Coalition, and
Rails to Trails Conservancy

Attachments: statements by Mr. Baker (City),
Ms. Crowley (Coalition), Ms. Ferster (RTC),
and Mr. Gucciardo (Coalition)

Presentation for October 27 STB Virtual Hearing on
STB Proposed Section 106 MOA

Good evening. My name is Peter Baker. I am Corporation Counsel for the City of Jersey City. On behalf of the City of Jersey City, I wish to express appreciation for this opportunity briefly to express our views on the agency's proposed Section 106 MOA. We reserve the right to elaborate in written comments to be filed later.

The agency's proposed MOA calls for Conrail to prepare a plaque -- in essence a tombstone -- for each block of the Embankment. This fails to mitigate the adverse impacts on historic assets that flow from an otherwise unconditioned abandonment authorization not just for the Embankment but also for the whole Harsimus Branch. Under an unconditioned abandonment, the entire Branch from Marin Boulevard to the Waldo and Chestnut Avenue areas will be dismembered and lost. There will also be adverse impacts on adjoining historic assets and districts.

In contrast, the City advocates preserving the Harsimus Branch for multiple public purposes, including historic preservation, trail, park, green space and rail purposes. This will mitigate adverse impacts.

Since 2005, years before Conrail finally applied for abandonment authority, the City sought to acquire the Harsimus Branch, going so far as to authorize eminent domain proceedings.

But under the New Jersey Title Practice Manual, the City cannot acquire the property until there is proof of STB abandonment authorization or proof that none is required. When we asked Conrail for such proof, the railroad did not respond, except promptly to sell the eight blocks containing the Harsimus Embankment to developer SLH Properties. According to STB and federal statutes, this sale was and is unlawful.

The City has been litigating before this agency and in federal courts to obtain Conrail compliance with the law since the time of the unlawful sale. In addition,

the developer (sometimes joined by Conrail) has sued the City many times in state court. During the past 15 years of litigation, the City has supplied the agency with evidence, including an expert opinion, that Conrail either knew, or should have known and was willfully blind, that it was violating the law. The agency should not rubberstamp willful unlawful conduct by a railroad with an unconditioned abandonment authorization, which the current MOA in our view does.

Conrail's unlawful action was prejudicial to the City and to the public interest. By purporting to sell the property to a developer, the railroad at the very least deprived City of the benefits of post-abandonment public use conditioning under 49 U.S.C. 10905. It also deprived the City of meaningful comment under section 106 and NEPA. And it amounted to a willful anticipatory demolition for purposes of section 110(k) of the National Historic Preservation Act.

As indicated in the Comments filed on behalf of City on October 19 in connection with STB's Draft Supplemental Environmental Assessment, STB should restore the City to the position and rights the City would have had but for Conrail's unlawful de facto abandonment and sale to SLH Properties.

The agency can do this by imposing two conditions on abandonment: first, the agency would condition the abandonment effectiveness on voiding ab initio all deeds out by Conrail to SLH Properties, and second, the agency would grant a 180-day public use condition barring Conrail from disposing of the property for other than public use. During that 180 period, the City could then invoke eminent domain remedies, or use a special statute found at NJSA 48:12-125.1 to acquire the property at the same price paid by SLH Properties. This approach would permit preservation of the property for public purposes and truly mitigate adverse impacts on historic assets otherwise flowing from an abandonment authorization.

We oppose an MOA which does not incorporate at least these two conditions.

The parties have been discussing a settlement. The City feels that the conditions we have recommended are compatible with that settlement. What STB proposes is not.

The Harsimus Branch presents a unique opportunity not just to the City of Jersey City but to the entire region. Very few urban areas on the eastern seaboard feature contiguous, undeveloped stretches of property that represent opportunities for not just shared green space development, but the re-creation and repurposing of historic corridors of travel for foot, bike, and light rail travel between

neighborhoods and nearby communities. The destruction of the Branch would extinguish this opportunity forever. We only get one shot at this, and the City is ready to take it.

Thank you for this opportunity to present our views.

Comments for STB OEA October 27 Meeting of Consulting Parties (AB 167 Sub-no. 1189X)

My name is Maureen Crowley. Thank you for this opportunity to speak for the Embankment Coalition.

If I were to summarize the Coalition's view of the draft Memorandum of Agreement as well as the agency's earlier Draft Supplemental Environmental Assessment, it would be that the agency appears to be proceeding without meaningfully protecting historic assets or the environment, and without accommodating settlement negotiations that are well underway, as we were led to understand the agency would do.

As you know from our interactions, we see the role of the STB, especially in the circumstances here, not as narrowly limited to facilitating the rail company's interests but as meaningfully addressing the broader aims of NEPA and NHPA to enhance the environment and preserve historic assets. In light of the unlawful sale of the historic corridor without a required prior STB license, STB should use its ample power to adopt conditions that would be consistent with preserving the Harsimus Branch and would also discourage railroads from ignoring abandonment licensing requirements.

Instead, STB's apparent intention, as indicated so far in your draft EAs and this draft MOA, is to endorse Conrail's unauthorized abandonment. Given the anticipatory demolition that occurred here, in violation of NHPA, we do not understand how the agency can press forward with an unconditioned abandonment that anticipates loss of historic resources.

At the very least, STB should restore the situation to what it would have been had Conrail acted in accordance with law. Two essential conditions should be reflected in the MOA:

1. Condition the effectiveness of any abandonment on voiding the deeds from Conrail to SLH Properties
2. Grant a public use condition barring Conrail from disposing of the property for other than public use for 180 days following the effectiveness of the abandonment.

We believe that these two simple conditions are consistent with the settlement under discussion between the parties.

If the agency does not wish to impose these conditions, we then request that, instead of pursuing an MOA that serves no purpose, the agency cooperate with the litigation parties to reach a settlement that will preserve the actual resource and avoid adverse effects to a host of other districts and sites integral to our historic Downtown.

It has taken Jersey City decades to recover from the collapse of the region's rail system. The Coalition wants to see the old freight way to New York Harbor serve the public. Like Liberty State Park, which rose from the ashes of the NJ Central Railroad, the Harsimus Branch can be a source of tremendous civic pride if preserved and sensitively reused.

All parties have been working on a settlement that fosters preservation, and we recommend redoubled efforts to get remaining issues resolved. With a mutually acceptable settlement, the history of the Pennsylvania Railroad would be memorialized not by plaques but by the continued presence of its structures. The transportation corridor would be put to 21st-century uses, connecting states from Maine to Florida in a carbon-reducing walking and biking trail and preserving opportunity for future light rail. It would reverse harms to the community flowing from an unlawful sale and demolition. It would give Jersey City residents - eager for open space - a linear park, one that Nature has already forested for us. It would demonstrate that

corporations, advocacy groups, and governments at every level can resolve differences and end disputes.

Whether via conditioning or settlement, preservation is in the best interest not simply of Jersey City and its citizens, and of Conrail, but also of this agency. It would encourage compliance with this agency's licensing requirements. It would foster the goals of NEPA and NHPA in a meaningful, not purely ministerial, way. It would end 15 years of litigation involving the agency. We ask the agency to help us get this done.

Testimony of the Rails to Trails Conservancy
STB Section 106 Consulting Parties Virtual Meeting
October 27, 2020

Good evening. My name is Andrea Ferster. I am general counsel for the Rails to Trails Conservancy ("RTC"). RTC is a national nonprofit conservation organization whose mission is to create a nationwide network of trails from former rail lines and connecting corridors. Headquartered in Washington, D.C., with four regional field offices. RTC has more than 100,000 members and supporters nationwide.

RTC has a strong and longstanding interest in the fulfillment of the vision of the East Coast Greenway, a 3,000-mile biking and walking route linking the major cities of the Atlantic coast from Maine to Florida. The Harsimus Branch in Jersey City would provide a key link for the east coast greenway, connecting Jersey City neighborhoods, historic sites, and open space from the Hudson to the Hackensack Rivers.

For more than 15 years, RTC along with Jersey City and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition has been engaged in extensive litigation and advocacy to enforce blatant violations of federal rail law by Conrail, who illegally sold the historic Harsimus embankment to private developers. These developers promptly commenced and fully intended to complete demolition of the historic stone embankment without first securing regulatory authority from this agency, and without any compliance with Section 106 of the National Historic Preservation Act. While the courts have now definitely established this agency's jurisdiction over the line, the STB has yet to address the consequences of Conrail's unlawful actions and the resulting problems that this creates for the STB's ability to comply with both the letter and spirit of Section 106.

There are three distinct areas in which this agency's compliance with the NHPA and its implementing regulations have come up short: First, inadequate engagement of the general public, second, failure to consider measures to resolve adverse effects, and finally, the ongoing issue of Conrail's anticipatory demolition

of the historic rail line. I will discuss these three issues and provide some preliminary comments on the draft Memorandum of Agreement recently circulated to consulting parties, with more specific written comments to follow.

First, there have been inadequate opportunities provided to the general public to participate in the Section 106 process. As the Section 106 plainly provide, “The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official **shall** seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, [and] the likely interest of the public in the effects on historic properties. 36 C.F.R § 800.2(d)(1).

There can be little doubt that this is an exceedingly complex undertaking of substantial public concern, affecting an exceptional historic and public resource. As befitting such a complex and important undertaking, early in the Section 106 process, this agency promised that a public hearing would be held in the project area to hear from members of the public. To the best of our knowledge, no such public hearing has yet occurred, and this virtual meeting, solely for consulting parties, does not discharge this regulatory responsibility.

Further, the draft Memorandum of Agreement was circulated only to consulting parties, and this virtual public meeting is limited to consulting parties. Members of the public must be provided with a meaningful opportunity to comment on the undertaking, and in particular, to comment on the draft MOA.

Second, the Section 106 regulations require the STB to confer with 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). As the OEA acknowledges, abandonment of the historic Harsimus branch will have an adverse effect on a large number of historic resources, based on a variety of foreseeable scenarios that could occur if abandonment authority were granted. And yet the draft MOA fails to consider any alternatives that would avoid or reduce these identified adverse effects, but instead simply concludes that the only alternative that the Board can consider is the “no action” alternative, based on the proposition that this Board “has no regulatory authority over post-abandonment uses of the Harsimus Branch.”

As RTC along with its Coalition partners have pointed out in their most recent comments to the Supplement Draft Environmental Assessment (SDEA), the STB plainly has the legal authority and obligation to consider alternatives beyond

simply taking “no action” to resolve adverse effects. An obvious alternative is a conditioned abandonment that protects this agency’s jurisdiction and mitigates adverse environmental impacts, per the comments of Jersey City.

Finally, and most remarkably, is the absence of any acknowledgement by the agency that this post hoc effort to comply with Section 106 occurs in a context in of Conrail’s unlawful sale of the property to a private developer, which, in the words of the Advisory Council on Historic Preservation in its 2016 letter to OEA, “complicates STB’s review of effects on historic properties and may compromise STB’s ability to comply with the requirements of Section 106.” The limited terms of the draft MOA confirms that this action has intended had precisely this consequence. Further, the Advisory Council directed STB to address the issue of Conrail’s anticipatory demolition under Section 110(k) of the NHPA raised by the consulting parties.

The OEA responded by stating that the Section 110(k) violation would be addressed by the Board after the OEA completes its environmental and historic preservation review and all information is presented to the Board as it is making its abandonment decision. Further, OEA indicated that the parties would be given an opportunity to present arguments to the Board as to whether a Section 110(k) violation has taken place. To date, there has been no opportunity to present this issue to the Board.

It is RTC’s position that this agency is required by both Section 110(k) and its own policy on consummation of abandonment to deny the abandonment unless and until steps are taken by Conrail to return the property to its status quo ante or adopt, in consultation with the consulting and concurring parties a preservation solution through the Section 106 process that avoids adverse effects to historic properties.

Thank you for this opportunity to present our views.

My name is Stephen Gucciardo. I am President of The Embankment Preservation Coalition.

Thank you for the opportunity to speak.

1. The loss of federal jurisdiction over The Harsimus Branch and the 6th St Embankment is a clear adverse impact on this historic site, which exposes it to demolition. STB claims that adverse effects cannot be foreseen (even though Conrail and SLH Properties have sought demolition permits). In these circumstances, why did the STB choose to prepare an MOA rather than a Programmatic or a Project Agreement, which are used when effects are supposedly not foreseeable?

2. If the agency is now separating NHPA analysis from NEPA analysis, it should not make comments due on both at the same time, as has essentially happened here. In addition, the agency is not providing sufficient time for comment. Because many of the consulting parties, and particularly the public interest parties, are all-volunteer organizations whose boards meet once a month, and because their representatives may need their boards' approval, a 30-day interval between steps in your review process does not allow meaningful consultation to occur. Sixty days would accommodate these organizations.

3. As we understand section 106, the agency needs to consult on mitigation with the public and not just the consulting parties. When will the agency consult with the public? How will the public know to comment? Will the STB then consult again with the consulting parties? How otherwise will the public or consulting parties be assured meaningful comment? How would we know?

4. We understand that SHPO and ACHP take into account public concerns. To do this, they have to see the comments filed by the public with the STB, consider those comments, and react. Therefore, the comment periods for both SHPO and ACHP need to be extended beyond the public comment period to allow ample time for review and incorporation.

We need a clear process description from the STB if consulting parties and the public are to make meaningful and timely contributions to the outcome. We ask STB OEA to issue a document that outlines in detail and explains the steps being taken by the STB.

STB OEA has indicated it has privacy concerns about sharing Consulting Parties contact information, we ask that it do the following:

Ask consulting parties represented here tonight if they will share their contact information.

- a. Send the same request to parties not represented here tonight.
- b. Let us know what consulting parties do not respond to your email so we can help you update their contact information or inform you of changes in the organization or contacts for this purpose. (For example, we do not believe the Newport Neighborhood Association is any longer in existence or at least is not the same organization that requested consulting status. We also do not think adequate outreach to Lenape tribes that may be interested in this case has been done.)
- c. Reconsider your practice not to share consulting parties' contact information, which we do not believe is private when used in a public proceeding.

We ask for this information and improved procedures because the implementation process has never been clear, and we continue to be caught off guard by developments. We did not expect to receive a draft MOA (or EA, for that matter) at this time, because based on prior meetings with OEA, we understood that STB OEA was supporting our efforts to reach a settlement. That settlement is expected to mitigate adverse effects in ways that secure the physical historic assets in perpetuity rather than merely providing another round of documentation for what is

about to be lost, and signage to mark its passage. That is not mitigation but defeat of the goals of NHPA, and a defeat completely unnecessary in the circumstances of this case.