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VIA EMAIL TRANSMISSION ONLY

Alan Tabachnick
Historic Preservation Specialist
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Re: Recent Comments on the Section 106 Process, Conrail Harsimus Branch
Abandonment Exemption, STB Docket No. AB 167 (Sub-No. 1189X)

Dear Mr. Tabachnick:

This letter is in response to correspondence from the Rails to Trails Conservancy (“RTC”) addressed to the Advisory Council on Historic Preservation (“ACHP”) and the subsequent communications that ensued.

The Embankment LLCs have recently become aware of these communications from RTC to the ACHP and the subsequent exchange between the Office of Environmental Analysis (“OEA”) and the ACHP pertaining to the STB’s conclusion of the Section 106 consultation and review processes. This topic was most recently addressed in your email to the ACHP dated February 2, 2021 (EO-3312).

The purpose of this letter is to (1) convey the Embankment LLCs’ agreement with OEA’s February 2 responses and approach, and (2) address several glaring misstatements made by RTC to the ACHP that may have influenced ACHP’s recent correspondence with OEA.

First, in its February 2, 2021 response, OEA responds affirmatively to (1) ACHP’s suggestion that the draft Memorandum of Agreement (“MOA”) include a “preliminary determination that Section 110(k) does not apply here based on information we know at this state of the consultation” and (2) that OEA intends to include language that the Section 106 process could be reopened should the full STB find an actual Section 110(k) violation, to help ensure that a final STB decision on the matter is not made moot. The LLCs agree with this balanced approach, which fully comports with the law and protects the Board’s ability to make a final determination.

This approach is especially appropriate given OEA's determination, after review of the evidence, that there has been no violation of the National Historic Preservation Act ("NHPA") Section 110(k) anticipatory demolition prohibition because there was no intent by Conrail to harm historic resources, let alone that Conrail had, "with intent to avoid" Section 106 requirements, "intentionally significantly adversely affected a historic property to which the grant would relate." 54 U.S.C. § 306113, *see* Environmental Assessment (STB served Mar. 23, 2009) at 14 ("Parties . . . 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.") The City directed the removal of the bridges to facilitate access to the waterfront and other redevelopment areas. Conrail complied with these directives.

Second, while the Embankment LLCs have diligently attempted to enter into an omnibus settlement agreement to resolve zoning, redevelopment, and historic preservation issues in a responsible manner and meet all NHPA requirements, it strongly agrees with OEA that an MOA is not predicated on the finalization of a potential settlement agreement, especially one encompassing land use issues not within the jurisdiction of the STB. On the contrary, local land use provisions are customarily not included in an MOA for Section 106 or any other purpose.

It is well-established that the STB has no authority to order mitigation through an MOA or other agreement, including, but not limited to, requiring a carrier to undertake additional mitigation measures, such as donating property for preservation purposes, or imposing a restrictive covenant upon a deed. *Consolidated Rail Corp. – Abandonment Exemption – in Lancaster & Chester Counties, PA*, AB-167 (Sub.-No. 1095X) (STB served Oct. 24, 2002) at 7. In this respect, while the LLCs disagree with RTC that Conrail, and Conrail alone is responsible for the current lack of a final settlement, the fact is that the Board can and should proceed to attempt to finalize an acceptable MOA to address Section 106. An acceptable and customary MOA can be finalized in the absence of a comprehensive settlement agreement that incorporates terms that go beyond STB jurisdiction.

In fact, OEA has clearly communicated to the parties that it will not allow an MOA to be used as a means to effectuate and control potential changes to local land use ordinances or plans, property transfers, or reuse alternatives that are the responsibility of state and local planning agencies. Instead, those items need to be considered and addressed among the local parties and the Jersey City Division of City Planning and other appropriate agencies at the local level, and will not include the STB, the OEA, ACHP, or the New Jersey State Historic Preservation Office.

Again, even if a mutually acceptable final MOA is not achievable, which the LLCs hope is not the case, the LLCs remain committed to engaging cooperatively in good faith in this separate process that will appropriately address land use and redevelopment ordinances, and post-abandonment land acquisition and preservation on the Harsimus Branch. In fact, just last week, the City Council of the City of Jersey City passed Resolution 21-124 authorizing the Planning Board to conduct a preliminary investigation of the area and make recommendations pursuant to *N.J.S.A.* 40A:12A-1 for redevelopment of the entire Harsimus line. The Embankment

LLC's look forward to participating in this process to effectuate the exemplary design of the Albanese project and the appointment of Albanese as the designated redeveloper.

Third, while, again, the LLCs prefer a comprehensive settlement, the LLCs agree with OEA that the Board cannot, as part of its approval and conditioning authority, impose a restrictive covenant or other nonconsensual obligation beyond appropriate documentation, and the Board has no jurisdiction over reuse or conveyance of abandoned railroad property. *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 812, 828-29 (1991). The OEA has already reviewed and addressed multiple comments on this subject, and properly affirmed the STB's limited ability to impose mitigation, most recently in its Cultural Resources Identification Report, its Cultural Resources Identification Report Addendum, and in its Supplemental Environmental Analysis.

The comprehensive studies of potential impact are unchanged by the withdrawal of Conrail from the local settlement agreement. The withdrawal only affects the vacant western parcel owned by Conrail and the proposed dedication of a right-of-way over that vacant land. Since the STB lacks authority to require dedication of a right-of-way, and the right-of-way is not a historic resource, its elimination has no effect on historic resources.

Finally, as explained above, RTC is simply wrong in restating highly charged and unfounded assertions that Conrail engaged in "anticipatory demolition" in violation of the NHPA, and it seriously misleads ACHP when asserting that RTC's "evidence" of violation was "never rebutted." This argument has previously been raised multiple times on the record and has been fully addressed and refuted. While the LLCs will not restate here the many reasons why RTC's NHPA violation assertions are false, to ensure that there is not any misunderstanding and that the record is complete, the LLCs enclose one of several responses by Conrail refuting RTC's erroneous assertions on anticipatory demolition.

Also, when the Board's declaratory order proceedings on the Harsimus Branch began in Docket No. 34818 in January 2006, Conrail and the LLCs committed to the Board that they would not alter any embankment structures during the proceedings. They have not done so over the subsequent fifteen years to date, and they will not do so during the remaining pendency of this proceeding, including the resolution of the Section 106 process. Additionally, since OEA's 2009 initial determination, Conrail, the LLCs, and other participating parties have cooperatively engaged in what is the most comprehensive and thorough Section 106 review ever undertaken by the STB, in full compliance with NHPA and the Board's rules. RTC's assertions are a disservice to OEA's extensive Section 106 review, and the parties' diligent efforts to meaningfully address all of RTC's concerns by creating and maintaining a permanent right-of-way for trail use along the entirety of the railroad corridor. RTC's perplexing request for additional delays in the historic review and MOA consultation process would likely only serve to delay or possibly defeat the creation and availability to the community of a new linear public park and trail that is likely unobtainable outside of an omnibus settlement. Why RTC would raise these issues when the other City Parties have not is unknown.

As previously conveyed, the Embankment LLCs remain committed to working with its developer/purchaser Albanese, the City, the Coalition and other community groups to finalize a settlement so that the comprehensive plan that Albanese has prepared, can be brought to fruition. The Embankment LLCs and Albanese have worked diligently with RTC, the City, the Embankment Coalition and other community groups to develop a plan that preserves all but one Embankment block and that envisages open spaces, preservation, and a linear park of unsurpassed excellence. Continued progress in completing the abandonment will facilitate the future comprehensive development by Albanese and will be ensured by local land use regulations.

The Embankment LLCs greatly appreciate OEA's continuing leadership and efforts to guide the parties, eliminate confusion, reduce delay, and facilitate orderly MOA discussions and final and timely resolution of these proceedings.

Very truly yours,

Michele R. Donato

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Counsel for the Embankment LLCs

Enclosure (Conrail March 18, 2009 response)

cc: Mr. Joshua Wayland
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(ALL ABOVE VIA EMAIL ONLY)