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January 21, 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  
Jersey City, Hudson County, New Jersey  
ACHP Connect Case #001682*

Dear Mr. Nelson:

On behalf of Rails-to-Trails Conservancy ("RTC"), I am writing to update you on recent important developments in connection with the above-referenced undertaking regarding the Harsimus Branch and Embankment in Jersey City, New Jersey, and the implication of these recent events on the ongoing issues relating to compliance by the Surface Transportation Board ("STB") with Section 106 of the National Historic Preservation Act ("NHPA") and its implementing regulations, 36 C.F.R. Part 800. Specifically, Consolidated Rail Corporation ("Conrail"), the applicant before the STB, has withdrawn, without any explanation, from the settlement term sheet that it previously executed with RTC and its preservation partners, which would have preserved the Harsimus line for future trail and rail use. The settlement was the predicate assumption for moving forward with developing a draft Memorandum of Agreement ("MOA") to resolve the adverse effects of the abandonment on historic properties under Section 106, notwithstanding the unresolved question before the STB of Conrail's unlawful sale and anticipatory demolition of the historic rail line. Conrail's unexplained action now precludes the STB from resolving its Section 106 responsibilities through the vehicle of the draft MOA.

### **Interests of Rails-to-Trails Conservancy**

Rails-to-Trails Conservancy ("RTC") is a national nonprofit conservation organization dedicated to enriching America's communities and countryside by creating a nationwide network of trails from former rail lines and connecting corridors. Today, RTC has more than 99,000 members and supporters nationwide, including 4,129 members in New Jersey. 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.

## **Background**

For more than 15 years, RTC along with the City of Jersey City and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (“Coalition”) has been engaged in extensive litigation and advocacy to remedy and correct blatant violations of federal rail law by Conrail, who illegally sold a portion of the historic Harsimus Branch to private developers in 2005 without first securing the required regulatory authorization from the STB. Conrail and the developers sought demolition permits for, began, and fully intended to complete demolition of the historic stone embankment without any compliance with Section 106 of the NHPA. This unlawful action deprived RTC and its partners of numerous statutory remedies that would have facilitated the acquisition of the historic rail line for preservation purposes. While the courts have now definitively established the STB’s jurisdiction over the line, the STB has yet to address the consequences of Conrail’s unlawful sale to private developers and the resulting problems that this creates for the STB’s ability to comply with both the letter and spirit of Section 106.

Despite these serious consequences flowing from Conrail’s unlawful sale, RTC and its partners opted to engage in settlement negotiations with Conrail and its chosen developers, in an effort to avoid further adversarial proceedings and arrive at a negotiated resolution of this long-running controversy. Accordingly, in September 2018, Conrail formally notified the STB that productive settlement discussions were underway and that the parties were optimistic that an “omnibus settlement” of this matter was in sight that would “not only settle the parties’ disputes but also result in a Section 106 MOA that would be acceptable to the STB, the NJ SHPO and the ACHP.”

Consistent with that representation, in June 2019, all relevant parties including Conrail executed a term sheet setting forth an agreed set of terms and conditions that would have preserved this extraordinary historic right of way by transferring it to Jersey City for a compatible preservation use as a trail and future transportation corridor. A copy of this term sheet will be made available upon request. Although the negotiations of a final settlement were delayed due to the pandemic and a labor dispute, the parties remained committed throughout 2020 to hammering out the details of a final settlement agreement.

On the basis of Conrail’s representations about the likely settlement and at the urging of the private developers to expedite the Section 106 process, in October 2020, the STB circulated a draft MOA for review by the consulting parties. As the NJ SHPO acknowledged in its Section 106 comments to the STB, this MOA presumed that the settlement terms formalized in the term sheet executed by the parties, including Conrail, satisfactorily resolved the adverse effects of the STB’s abandonment.

However, on Monday, December 14, 2020, counsel for Conrail informed the City of Jersey City and counsel for RTC that Conrail was withdrawing from all settlement negotiations, notwithstanding the execution of the settlement term sheet by all parties, including Conrail. Conrail gave no reasons for its withdrawal. Conrail’s action effectively precludes the execution of the settlement contemplated by the term sheet, since the mechanism for ensuring that the preservation commitments were carried out was Conrail’s commitment to defer consummation of STB abandonment authorization until the historic property was protected through its transfer to Jersey City. The remaining parties have been unable thus far to resolve their significant

differences about how to ensure that the corridor is protected prior to the effectiveness of any abandonment authorization without Conrail's key role in ensuring that the preservation commitments are enforceable. As a result, it is now necessary to address the following legal issues regarding the STB's NHPA compliance before the Section 106 process can move forward.

### **Conrail Engaged in Anticipatory Demolition.**

As the NJ SHPO acknowledged in its comments on the draft MOA circulated on December 3, 2020, the settlement agreement under negotiation by RTC and its partners is "highly germane to understanding the reasonable and foreseeable effects of abandonment." More specifically, the commitments embodied in the settlement term sheet executed by the parties in 2019 would have allowed the STB to proceed with the Section 106 process without the need to resolve the issue of Conrail's unlawful sale of the historic embankment property to private developers and the resulting anticipatory demolition activities. However, without a binding and enforceable commitment to the agreed-upon preservation measures, which is now the case, the Section 106 process cannot be concluded until the issue of Conrail's unlawful sale and the developers' subsequent anticipatory demolition of the historic embankment are resolved.

As you know, Section 110(k) of the NHPA (the "anticipatory demolition" provision) establishes a penalty designed to discourage damage or destruction of historic properties, which might otherwise be used as a means to avoid Section 106 review. In order to deter such actions, the penalty requires the presumptive denial of federal approval or assistance, unless and until the federal agency goes through a special consultation process to determine whether circumstances could justify the approval or assistance at all, in light of the earlier intentional harm inflicted on the property:

Each Federal agency shall ensure that the agency *will not grant* a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section [106], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the [ACHP], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

54 U.S.C. § 306113 (emphasis added); *see also* 36 C.F.R. § 800.9(c). In short, "Section 110(k) 'works to punish those who would seek to manipulate the § 106 process by denying them access to post-demolition permits.'" *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 793 (N.D. Ohio 2001).

In this case, Conrail violated Section 110(k) by its unlawful sale of the historic 6<sup>th</sup> Street

Embankment to developers without first securing STB abandonment authorization, thereby intentionally evading the STB's jurisdiction over Conrail's abandonment of the line and preventing compliance with Section 106. As the ACHP itself noted in its 2016 letter to STB's Office of Environmental Analysis ("OEA"), Conrail's unlawful sale of the property to a private developer "complicates STB's review of effects on historic properties and may compromise STB's ability to comply with the requirements of Section 106." While a settlement consistent with the term sheet previously executed by the parties would have avoided the necessity of addressing this issue, that is no longer the case as a result of Conrail's decision to withdraw from the settlement. Without the parties' binding and enforceable agreement to a negotiated preservation solution, there can be no abandonment and no compliance with Section 106 until Conrail's unlawful sale and the resulting anticipatory demolition of the historic embankment are resolved under the regulatory procedures governing anticipatory demolition.

**Unless the STB Voids the Unlawful Sale, the STB Cannot Meaningfully Resolve the Adverse Effects of the Abandonment Under Section 106**

As RTC and its preservation partners have previously stated, the draft MOA fails to consider any alternatives that would avoid or reduce the many recognized and identified adverse effects of the STB's proposed abandonment authorization. Instead, the STB asserts in one of the "whereas clauses" to the draft MOA, that "the Board's ability to impose involuntary mitigation to resolve adverse effects to historic properties in railroad abandonment cases is generally limited to the documentation of historic properties because railroad rights-of-way are private property and the Board's jurisdiction over those rights-of-way ends with the consummation of abandonment authority." The only measure proposed by the MOA is historic signage and documentation, which does *not* constitute mitigation that resolves adverse effects. See *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809 (9th Cir. 1999)

There is no support for the STB's limited view of its obligation to consider alternatives. In this case, the only reason why the STB even arguably lacks the ability to mitigate the adverse effects of the abandonment of the Harsimus Branch is because Conrail unlawfully conveyed the regulated historic rail line to private developers prior to receiving abandonment authorization from the STB, and the private developers are not subject to STB's regulatory control. However, STB unquestionably has the legal authority to remedy this obstacle by voiding the deeds unlawfully conveyed by Conrail to the private developers.<sup>1</sup> Unless the STB exercises this legal authority, the STB's ability to carry out its responsibility to consider alternatives to resolve adverse effects – and the ACHP's ability to provide meaningful comments on the undertaking –

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<sup>1</sup> See, e.g., *Pyco Industries – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, F.D. 34890, served August 3, 2006, slip op. at 6; *SF&L Railway, Inc. – Acquisition & Operation Exemption – Toledo, Peoria & Western Railway between La Harpe & Peoria*, F.D. 33995, served Oct. 17, 2002, slip op. at 19 ("persons who engage in such abuses [should not] be allowed to profit from them"); *Railroad Ventures, Inc. – Acquisition & Operation Exemption -- Youngstown & Southern Railroad Co.*, F.D. 33385, served Oct. 4, 2000, *aff'd*, *Railroad Ventures v. STB*, 299 F.3d 523 (6th Cir. 2001); *Land Conservancy of Seattle & King County – Acquisition & Operation Exemption -- BNSF*, F.D. 33389, served Sept. 26, 1997, slip op. at 3.

will be foreclosed. This further underscores the need to address the underlying predicate question of anticipatory demolition under Section 110(k).

In sum, the STB and the state and federal preservation agencies can no longer rely on the possibility of the parties arriving at a negotiated solution that preserves the historic Harsimus branch to avoid addressing the consequences of Conrail's unlawful sale and anticipatory demolition of the Harsimus Branch. In light of the foregoing, Rails-to-Trails Conservancy requests that the ACHP advise the STB that the draft MOA can no longer serve as a vehicle for the STB's compliance with Section 106 in connection with this undertaking, and that the STB must instead address and resolve the question of Conrail's anticipatory demolition under its regulations, 36 C.F.R. § 800.9(c). The RTC remains committed to participating actively as a consulting party in the process to resolve these adverse effects.

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

cc: Jaime Loichinger, Assistant Director, Federal Permitting, Licensing, and Assistance Section, ACHP  
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