236484
236485
236486

ENTERED
Office of Proceedings
August 21, 2014
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 COUNTRY, NJ

SUPPLEMENTAL ENVIRONMENTAL AND HISTORIC REPORT

Consolidated Rail Corporation ("Conrail") submits this Supplemental Environmental and Historic Report in response to the Board's decision served August 8, 2014, in the above-captioned proceedings. This is the third Environmental and Historic Report submitted by Conrail in this proceeding. The first, submitted March 6, 2008, focused on the direct effects of the abandonment itself. There are none, because the line at issue ("Harsimus Branch") has been out of service for many years and all of the track and track structure have been removed.

As required by 49 C.F.R. § 1105.7(c), Conrail consulted with all appropriate agencies in preparing the 2008 Report. All of the correspondence that Conrail received from those agencies, along with pertinent Conrail responses, were attached either to the 2008 Report or to the next Report submitted by Conrail, on February 26, 2009.

The 2009 Report responded to allegations by some parties that the 2008 Report was deficient because it failed to address possible reuses of the properties underlying the Harsimus Branch right of way (the "Sixth Street Embankment") that Conrail sold to third parties (the "LLCs") in 2005. Conrail observed in the 2009 Report that there was serious doubt about how the properties might be reused. At the time, the two most salient possibilities were (1) that the Embankment would be acquired by the City of Jersey City and converted to an elevated public park or (2) that the LLCs would be permitted to develop the properties for residential housing.[1] Conrail did not believe or concede that either of those reuse possibilities was reasonably foreseeable within the meaning of either the National Environmental Policy Act ("NEPA") or the National Historic Preservation Act ("NHPA"). Moreover, in light of the need for the current owners to obtain approval from the Jersey City Historic Preservation Commission for any demolition of the Embankments necessary for the construction of residential housing, and the need for the city to authorize condemnation, condemn the properties, and appropriate the necessary funds for the development of the park, Conrail did not believe or concede that its abandonment of the right of way could properly be held the proximate cause, within the meaning of NEPA or the NHPA, of any impacts resulting from the City's park proposal or the LLCs' residential housing proposal. 2009 Report at 2-3.

Conrail nevertheless determined to address the City's and the LLCs' proposals both in the 2009 Report and in the Area of Potential Effects ("APE") Report attached to the 2009

[1] From time to time the LLCs have submitted proposals to the City that would permit the Embankment properties to be developed and used for park, trail, and transit purposes, as well as commercial purposes, which 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. No one has ever argued that these possibilities must or should be reviewed for their environmental or historic preservation effects by the Board.

Report. Because the LLCs' proposal would involve demolition of the existing Sixth Street Embankment and construction of new apartment buildings and townhouses, that proposal received the most attention, both from an environmental standpoint in the 2009 Report and from an historical preservation standpoint in the APE Report.[2]

Having reviewed the 2009 Report, the APE Report, and various other pre-filing and post-filings pleadings related to environmental and historic preservation issues, and having conducted a site visit, the then-Section of Environmental Analysis (now and hereafter Office of Environmental Analysis or "OEA") issued its Environmental Assessment ("EA") on March 23, 2009. With respect to environmental review, OEA concluded that there would be no significant environmental impacts. EA at 13. OEA observed that environmental concerns regarding the potential demolition and reuse of the Embankment were beyond the scope of the Board's environmental review. *Id.* at 4, 7, 13. Moreover, OEA found that it was speculative how the properties would be reused, and that all of the potential reuse proposals would be subject to separate permitting processes before they could be implemented. *Id.* at 4, 7-9. In particular, OEA noted that the LLCs "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." *Id.* at 9. Finally, even if the proposals for reuse of the Embankment by third parties were properly part of the environmental process, OEA found that the effects of the demolition and construction proposals would be temporary and would be addressed in the local permitting process for whatever activities took place. *Id.* at 9-10, 13.[3]

---

[2] Conrail also addressed a number of legal issues related to the Board's NEPA and NHPA review in "Comments of Consolidated Rail Corporation on Issues Raised by Pre-Filing Correspondence," filed January 6, 2009.

[3] OEA rejected claims that it should prepare an EIS. EA at 3-4, 16. The only environmental condition OEA recommended was that Conrail complete consultation with the New Jersey

With respect to historic preservation review, OEA concluded that that process was just beginning and recommended that the Board impose its standard condition that the railroad retain its interest in and take no steps to alter historic properties until the Section 106 process is complete and the Board removes the condition. *Id.* at 13, 15. OEA rejected arguments that the historic review process should not proceed because Conrail had engaged in "anticipatory demolition" in violation of Section 110(k) of NHPA. *Id.* at 14. OEA also rejected concerns about the application of the Section 106 process in class exemption proceedings. *Id.* at 15.

In June 2009, the United States Court of Appeals for the District of Columbia Circuit held that United States District Court for the District of Columbia, sitting as the Special Court, had exclusive jurisdiction to determine whether the Harsimus Branch was a line of railroad over which the STB had jurisdiction. *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (2009). Proceedings were begun thereafter in the Special Court, and the STB, by decision issued April 20, 2010, formally held the abandonment exemption proceedings in abeyance, including the environmental and historic preservations review. The Special Court subsequently determined that the Harsimus Branch was a line of railroad, and the STB reinstituted the abandonment exemption proceedings in its decision issued August 8, 2014.

In its August 8, 2014 decision, the Board observed that portions of the original EA issued in March 2009 might not be up to date or relevant. Accordingly, the Board held that OEA would issue a Supplemental EA for public review and comment, followed by a Final EA assessing any comments received. The first step the Board ordered was for Conrail to file and serve updated environmental and historic reports. August 8, 2014 Decision at 6.

Department of Environmental Protection regarding whether a state coastal management consistency certification was required. EA at 11.

A significant change in circumstances has taken place since OEA issued its original March 2009 EA. At that time all concerned recognized that the LLCs could not carry out their demolition and residential development proposal without a waiver of the Municipal Landmark restrictions that the City had placed on the Embankment properties. Conrail took the position in its 2009 Report that no review of the impact of the LLCs' proposal was required or appropriate because the implementation of that proposal was not "reasonably foreseeable" within the meaning of NEPA or NHPA.[4] Nevertheless, at that point the Jersey City Historic Preservation Commission had not ruled on the LLCs' requests for waivers, and out of an abundance of caution Conrail submitted a Report that covered both the environmental and the historic preservation impacts of the LLCs' proposal.

In April and May 2009, however, after lengthy hearings, the Jersey City Historic Preservation Commission *denied* the LLCs' requests for waivers that would permit the LLCs to develop the Embankment properties. The LLCs subsequently appealed the decisions of the Historic Preservation Commission to the Jersey City Zoning Board of Adjustment, which conducted its own lengthy and independent hearings. In October 2011, the Zoning Board also

---

[4] Some parties have argued that demolition and development of the Embankment properties by the LLCs could be an "indirect effect" of Conrail's abandonment of the right of way. But "indirect effects" must still be reasonably foreseeable. *See* 40 C.F.R. § 1508.8 (Council on Environmental Quality regulation defining "indirect effects" under NEPA as effects that "are caused by the action and are later in time or farther removed in distance, *but are still reasonably foreseeable*") (emphasis added); *see also, e.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) ("NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause. [In a prior case,] [t]he Court analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). In a guidance document, the Advisory Council on Historic Preservation has stated that "[t]o the extent that Section 106 and NEPA share common concepts, the terminology, such as 'reasonably foreseeable,' will have the same meaning, and the established NEPA definition will be followed." ACHP, Section 106 Regulations: Section-by-Section Questions and Answers (discussing Section 800.5) (available at http://www.achp.gov/106q&a.html) (last visited August 20, 2014).

denied the LLCs' requests for waivers. Thus, while the LLCs have also appealed the Zoning Board's decision, it is now clear that demolition of the Embankments and construction of residential housing is not reasonably foreseeable within the meaning of either NEPA or NHPA. Conrail's abandonment could not be held to be the proximate cause, within the meaning of NEPA or the NHPA, of any impacts resulting from the LLCs' twice-rejected housing proposal, since it is not reasonably foreseeable that the LLCs' proposal will ever be carried out and since the proposal could be carried only as a result of the intervening actions of state or local authorities.

That leaves only the City's condemnation and park proposal as a possible candidate for review under Section 106 of the NHPA.[5] But Conrail does not believe that the City Parties now have either the funding or the desire to both acquire the Embankment properties and make significant changes to them, particularly since they are protected as a Municipal Landmark. Thus, even assuming the City's condemnation the Embankment after abandonment of the right of way were reasonably foreseeable within the meaning of the NHPA, no adverse impact on historic properties would result.[6]

In sum, no environmental or historic preservation review is required or appropriate in this proceeding. Conrail's abandonment will have no direct effects on the environment or historic properties, because there is no rail infrastructure to salvage. Post-abandonment reuse by third

---

[5] From a NEPA standpoint, aside from the fact that "uncertain post-abandonment reuse proposals are not part of the Board's environmental review process in rail abandonment cases" (2009 EA at 9), OEA correctly determined that the potential impacts of the City's plans had not been shown to be significant. *Id.*

[6] In any event, if the City wishes to have its proposal evaluated under NHPA, the City can retain the necessary consultants and enter into the necessary undertakings to carry out such an evaluation.

parties is uncertain. There is no reasonably foreseeable indirect effect that merits or justifies review by OEA or the Board.

Respectfully submitted,

Robert M. Jenkins III /AS

Jonathan M. Broder
CONSOLIDATED RAIL CORPORATION
1717 Arch Street, Suite 1310
Philadelphia, PA 19103
(215) 209-5020

Robert M. Jenkins III
Adam C. Sloane
MAYER BROWN LLP
1999 K Street NW
Washington DC 20006
(202) 263-3261

Attorneys for Consolidated Rail Corporation

August 21, 2014

CERTIFICATE OF SERVICE

I, Adam C. Sloane, hereby certify that, on this 21st day of August, 2014, I caused a copy of the foregoing to be served by First Class Mail, postage prepaid, upon the following:

Charles H. Montange
426 NW 162nd Street
Seattle, Washington 98177

Daniel Horgan
Waters, McPherson, McNeill PC
300 Lighting Way
Secaucus, NJ 07096

Aaraon Morrill
Civic JC
64 Wayne Street
Jersey City, NJ 07302

Eric Fleming
President
Harsimus Cove Association
344 Grove Street
P.O. Box 101
Jersey City, NJ 07302

President
Historic Paulus Hook Ass'n
192 Washington Street
Jersey City, NJ 07302

Jill Edelman
President
Powerhouse Arts District Neighborhood Ass'n
140 Bay Street, Unit 6J
Jersey City, NJ 07302

Robert Crowell
Monroe County Planning Department
Room 306 Courthouse
Bloomington, IN 47404

Andrea Ferster
General Counsel, Rails to Trails Conservancy
2121 Ward Court NW, 5th Floor
Washington, DC 20037

Fritz R. Kahn, P.C.
1919 M Street NW
7th Floor
Washington, DC 20036

President
Van Vorst Park Association
91 Bright Street
Jersey City, NJ 07302

Jennifer Greely
President
Hamilton Park Neighborhood Association
22 West Hamilton Place
Jersey City, NJ 07302

East Coast Greenway Alliance
5315 Highgate Drive
Suite 105
Durham, NC 27713

Robert Crow
President
The Village Neighborhood Association
365 Second Street
Jersey City, NJ 07302

Michael D. Selender
Vice President
Jersey City Landmarks Conservancy
P.O. Box 68
Jersey City, NJ 07303-0068

Preservation New Jersey Incorporated
310 W. State Street
Trenton, NJ 08618

Gregory A. Remaud
Conservation Director
NY/NJ Baykeeper
52 West Front Street
Keyport, NJ 07735

Sam Pesin
President
Friends of Liberty State Park
75 Liberty Ave., Box 135
Jersey City, NJ 07306

Justin Frohwirth, President
Jersey City Economic Development Corp.
30 Montgomery Street, Suite 820
Jersey City, NJ 07302

Olu M. Howard
President
Hamilton Park Neighborhood Association
308 Eighth Street
Jersey City, NJ 07302

Daniel D. Saunders
Deputy State Historic Preservation Officer
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

Eric S. Strohmeyer
Vice President COO
CNJ Rail Corporation
81 Century Lane
Watchung, NJ 07069

Maureen Crowley, Coordinator
Embankment Preservation Coalition
263 Fifth St
Jersey City, NJ 07302

I further certify that, in accordance with 49 C.F.R. §§ 1105.7(b) and 1105.11, on this 21st day of August, 2014, I provided a copy of the foregoing to each the agencies designated below by First Class Mail, postage prepaid :

AGENCY SERVICE LIST

Mayor Steven M. Fulop
City Hall – 280 Grove Street
Jersey City, NJ 07302

New Jersey State Clearinghouse
State Review Process
Office of the Governor
P.O. Box 001
Trenton, NJ 08625-001

Thomas A. DeGise
County Executive
Justice Brennan Court House
538 Newark Avenue
Jersey City, NJ 07306

Massiel Ferrara, PP, AICP
Planning Director
Hudson County Division of Planning
Meadowview Complex
595 County Avenue
Bldg. 1, Second Floor
Secaucus, NJ 07094

NJ Department of Environmental Protection
Historic Preservation Office
Attn: Patty Christman, NJ Transit & Rail Infrastructure
Mail Code 501-04B
P.O. Box 420
Trenton, NJ 08625-0420

Bradley M. Campbell, Commissioner
Mail Code 501-04B
Department of Environmental Protection
Historic Preservation Office
P.O. Box 420
Trenton, NJ 08625-0420

Ruth W. Foster, PhD.
NJ Department of Environmental Protection
Office of Permit Coordination and Environmental Review
401 East State Street
P.O. Box 420
Trenton, NJ 08625-0420

David Sumba, Pr. Env. Specialist
NJ Department of Environmental Protection
Bureau of Coastal Land Use Compliance & Enforcement
100 North Road
Chester, NJ 07930

Richard Reilly, Bureau Chief
NJ Department of Environmental Protection
Bureau of Inland Regulation
501 East State Street
Mail Code 501-02A
P.O. Box 420
Trenton, NJ 08625-0420

NJ Department of Environmental Protection
Division of Land Use Regulation
Attention: David Franz, Acting Director
Mail Code 501-02A
501 East State Street
P.O. Box 420
Trenton, NJ 08625-0420

Grace Musumeci, Chief
Environmental Review Section
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

U.S. Fish and Wildlife Service
927 N. Main Street, Building D
Pleasantville, New Jersey 08232

The District Engineer
U.S. Army Engineer District, New York
Jacob J. Javits Federal Building
26 Federal Plaza, Room 2109
New York, NY 10278-0090

Director's Office
National Park Service
U.S. Department of the Interior
1849 C Street, NW
Room 2216
Washington, DC 20240

Mike Caldwell, Regional Director
National Park Service
U.S. Custom House
200 Chestnut Street, Fifth Floor
Philadelphia, PA 19106

Dr. Dan Roman, Acting Chief
Spatial Reference System Division
National Geodetic Survey
1315 East-West Highway
Silver Spring, MD 2090-3282

Carrie Mosley
State Conservationist
Natural Resources Conservation Services
220 Davidson Avenue, 4th Floor
Somerset, NJ 08873-4115

Adam C. Sloane