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OEA

SERVICE DATE — SEPTEMBER 23, 2021

SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

FINAL ENVIRONMENTAL ASSESSMENT

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

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

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

OVERVIEW

In this proceeding, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) jointly filed a verified Notice of Exemption with the Surface Transportation Board (Board or STB) under 49 C.F.R. § 1152.50 seeking Board authorization for Conrail to abandon and CSXT and NSR to discontinue service over an approximately 1.36-mile portion of a line of railroad known as the Harsimus Branch.¹ The rail line extends from milepost 0.00, CP Waldo, to milepost 1.36, a point east of Washington Street, in Jersey City, Hudson County, New Jersey (the Line).² Maps depicting the Harsimus Branch are set forth in Appendix A. Additional background on the history of the Harsimus Branch rail line and this proceeding can be found in several of the documents referenced below.

The Board's Office of Environmental Analysis (OEA) is issuing this Final Environmental Assessment (Final EA) as part of OEA's environmental review of the proposed abandonment under the National Environmental Policy Act³ (NEPA). On March 23, 2009, OEA issued an EA (2009 Draft EA) examining the potential effects on environmental and historic resources if the

¹ The streamlined abandonment exemption process at 49 C.F.R. § 1152.50 applies to rail lines where no rail traffic has originated or terminated in the past two years and there is no overhead traffic that cannot be rerouted. These abandonments typically are decided within 60 days. No rail traffic has moved over the Harsimus Branch for decades.

² For simplicity, this document will reference only Conrail's Notice of Exemption seeking abandonment authority. All references to Conrail's notice incorporate the Notices of Exemption seeking discontinuance authority filed by CSXT and NSR.

³ 42 U.S.C. §§ 4321-4370m-12.

Board were to authorize Conrail to abandon the Harsimus Branch.⁴ During the public review and comment period on the 2009 Draft EA, OEA received approximately 2,000 comments, many of which raised historic preservation concerns.

Before OEA was able to prepare a Final EA summarizing and responding to the comments on the 2009 Draft EA, the abandonment proceeding (along with the environmental review process) halted when the Board issued a stay to allow litigation to proceed in the courts on matters unrelated to environmental or historic review. The Board lifted the stay in a decision issued on August 11, 2014 and directed that the environmental review under NEPA and the historic review under Section 106 of the National Historic Preservation Act⁵ (NHPA) proceed. OEA resumed its review and decided to continue the environmental review under NEPA and the Section 106 review separately because the issues and concerns raised by the commenters predominantly focused on the historic importance of the Pennsylvania Railroad Harsimus Branch Embankment (the Embankment) and its effect on surrounding neighborhoods and historic districts.

OEA issued a Draft Supplemental EA for public review and comment on September 10, 2020 (2020 DSEA) updating the environmental analysis, addressing the environmentally related comments on the 2009 Draft EA, and providing an opportunity for further public comment. OEA received 13 comments on the 2020 DSEA, which are summarized and addressed below.

SUMMARY OF THE SEPARATE SECTION 106 HISTORIC REVIEW PROCESS

Prior to addressing the environmentally related issues that have been raised in the comments on the 2020 DSEA—which is the focus of this Final EA—OEA, for clarity, sets forth below a summary of its separate Section 106 process in this proceeding to date because many of the comments OEA has received on the 2020 DSEA raise historic preservation concerns.

Section 106 requires a four-step historic review process. This summary sets forth the steps completed and briefly outlines the remaining work. Step 1 (Initiation) was completed in 2009, when OEA initiated the Section 106 process and defined the undertaking and the Area of Potential Effects (APE) in consultation with the New Jersey Historic Preservation Office (the State Historic Preservation Officer or SHPO) and other Section 106 consulting parties.

During Step 2 of the Section 106 process (Identifying Historic Properties), OEA held in-person consulting party meetings in May and June of 2016, issued a Cultural Resources Identification Report (Identification Report) on May 5, 2017, and issued an addendum to the Identification Report (Identification Report Addendum) on October 16, 2018.

For Step 3 (Assessing Effects), OEA conducted a thorough assessment and issued a Cultural Resources Effects Assessment Report (Effects Report) on March 29, 2019 that documented the potential impacts of the proposed abandonment on historic properties and an

⁴ Under the Board's environmental rules, EAs are typically required in railroad abandonment cases. 49 C.F.R. § 1105.6(b)(2).

⁵ 54 U.S.C. § 306108.

addendum to the Effects Report (Effects Report Addendum) on November 12, 2019.

As part of Step 4 of the Section 106 process (Achieving a Resolution), OEA prepared a Draft Memorandum of Agreement (MOA) that set forth measures the Board could impose on Conrail to avoid, minimize, or mitigate adverse effects to historic properties listed in or eligible for listing in the National Register of Historic Places (National Register). OEA provided the Draft MOA to the consulting parties for review and comment on October 14, 2020 and held a virtual consulting parties meeting on October 27, 2020 to provide an additional opportunity for the parties to provide comments. The execution of the MOA by the Advisory Council on Historic Preservation (ACHP), the SHPO, Conrail, and OEA would conclude Step 4 and end the Section 106 process.

On March 8, 2021, ACHP wrote a letter to the Board⁶ requesting that, before the Section 106 process concludes, the Board determine whether Conrail violated Section 110(k) of NHPA, as had been alleged by some parties to the abandonment proceeding.⁷ The Board responded by issuing a decision permitting arguments and evidence to be submitted on claims relating to Section 110(k). Opening submissions were due by June 18, 2021 and replies were due by July 19, 2021. In accordance with ACHP's request, OEA suspended completion of the Section 106 historic review pending the Board's determination on Section 110(k).

The next step will involve Board review of the submissions regarding whether a Section 110(k) violation did or did not occur. After considering the submissions, the Board will determine if a violation of Section 110(k) occurred. Should the Board find a violation, the Board may decide to deny abandonment authority, or it may (in consultation with ACHP) determine that the circumstances at issue here justify possibly proceeding with granting such authority. Should the Board conclude that no violation of Section 110(k) occurred, or that the abandonment should proceed even though a violation of Section 110(k) occurred, then OEA will complete the Section 106 process. After the conclusion of the Section 106 process in this case, the Board will consider the recommendations from OEA concerning the effects of the proposed abandonment on environmental and historic resources, will balance that information with the transportation merits of the proceeding, and will issue a final decision approving, denying, or approving with the imposition of conditions a grant of abandonment authority to Conrail.

⁶ ACHP's request may be found on the Board's website, environmental comments, (EI-30367). The SHPO submitted a letter to the Board on April 23, 2021 supporting ACHP's request (EI-30695).

⁷ Section 110(k) of NHPA prohibits a federal agency from granting a loan, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of Section 106, intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, prior to Section 106 review. 54 U.S.C. § 306113. See www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit.

ISSUANCE OF THE 2020 DSEA IN THE NEPA PROCESS

OEA served the 2020 DSEA for public review and comment on September 10, 2020. In the 2020 DSEA, OEA addressed the environmental comments on the 2009 Draft EA. OEA also concluded that the Board's granting Conrail authority to abandon the Harsimus Branch would not significantly affect the quality of the human environment and that, accordingly, the Environmental Impact Statement (EIS) process is unnecessary. OEA further concluded that the Coastal Zone Management Act condition recommended in the 2009 Draft EA is no longer necessary,⁸ and that the historic mitigation condition recommended in the 2009 Draft EA will remain in place pending the conclusion of the Section 106 process. OEA determined that there was no need for OEA to recommend any additional environmental conditions in the 2020 DSEA based on changed circumstances or the comments received in response to the 2009 Draft EA. The 2020 DSEA's comment period ended on October 19, 2020, and OEA received 13 comments,⁹ which are summarized and discussed below.

Notwithstanding the pending Section 110(k) and Section 106 issues, OEA believes that it is appropriate to issue this Final EA now and to conclude the NEPA process because the NEPA process here is separate and independent. In this Final EA, OEA responds to the 13 environmental comments submitted on the 2020 DSEA and sets forth the following final environmental conclusions and recommendations for the Board to consider: 1) the environmental effects of the proposed abandonment are not significant and, therefore, preparation of an EIS is not warranted; and 2) the Board should impose the Section 106 historic preservation condition recommended in the 2009 Draft EA and again in the 2020 DSEA in any decision that would grant Conrail abandonment authority in the event that the MOA has not been executed prior to the issuance of a Board decision authorizing abandonment.¹⁰ Issuance of this Final EA concludes the NEPA process. Because ample opportunity to comment has been afforded in this proceeding, OEA is not requesting additional environmental comments on the Final EA.

COMMENTS ON THE 2020 DSEA

This section summarizes and responds to the environmental comments received on the 2020 DSEA. While many of the comments address historic resource issues that have been and continue to be examined as part of the Section 106 and Section 110(k) processes, OEA is

⁸ The New Jersey Department of Environmental Protection's Office of Coastal Zone Management determined that the areas proposed for abandonment in the Harsimus Branch proceeding were located outside of the coastal zone and therefore, would have no reasonably foreseeable effect on the coastal zone of New Jersey. See 2020 DSEA at 11-12.

⁹ The Jersey City Parks Coalition submitted a request to be a Section 106 Consulting Party (EI-26994), which OEA did not treat as an environmental comment and granted as part of the Section 106 process. The request is not counted as an environmental comment.

¹⁰ As discussed above, OEA has suspended the Section 106 process pending the Board's determination on the applicability of Section 110(k) in this proceeding. Depending on the Board's decision, OEA may move forward and complete the final step in Section 106 review (execution of an MOA by ACHP, the SHPO, Conrail, and OEA).

including some discussion of them here where appropriate. The comments listed below are available on the Board's website and may be located using the EI number included parenthetically.¹¹

List of Comments Received

Groups and Organizations

- City Parties (EI-26992)
 - City of Jersey City
 - Embankment Coalition
 - Rails to Trails
- Hamilton Park Neighborhood Association (EI-26993)
- Hudson County Office of Cultural & Heritage Affairs/Tourism Development (EI-26992)
- Jersey City Landmarks Conservancy (EI-26982)
- Civic JC (EI-26983)
- Village Neighborhood Association (EI-26984)
- Friends of Liberty State Park, Inc. (EI-26985)
- NY/NJ Baykeeper (EI-26987)
- Harsimus Cove Association (EI-26989)
- East Coast Greenway Alliance (EI-26988)
- Conrail (301191)¹²

Individuals

- Frank Gallagher, Ph.D. (EI-26991)
- Moirah Kinberg (EI-26986)

Summary of Issues Raised in the Comments

The City Parties:

- The 2020 DSEA was incorrect on three points: 1) that the City had the opportunity to acquire the Embankment, 2) that the STB cannot void the deed of sale from Conrail to the LLCs, and 3) that the agency has no regulatory authority to do anything other than grant abandonment authority and, therefore, no environmental analysis is necessary.
- Conrail violated Section 110(k) and unlawfully sold the property without first obtaining abandonment authority and should be required to restore the property to the status quo prior to that sale.
- OEA should recommend as conditions that the Board: 1) void all deeds issued by Conrail relating to the Harsimus Branch upon the effective date of abandonment authorization, and 2) require that Conrail take no action to sell or alienate its property interests in the

¹¹ <https://prod.stb.gov/proceedings-actions/environmental-comments>.

¹² Conrail submitted its comments as a formal filing, which generates a different unique identifier.

Harsimus Branch, other than for public use purposes, for 180 days following the effective date of abandonment. Alternatively, the Board should require that, before consummation of any abandonment can occur, Conrail reacquire the portions of the Harsimus Branch at issue here and offer the property for sale for a period of at least 180 days.

- The 2020 DSEA errs in not analyzing environmental impacts of demolition and removal of the Embankment and imposing conditions related to that demolition.
- The 2020 DSEA fails to consider impacts on historical resources.
- The 2020 DSEA should consider as alternatives the impacts of use of the Embankment for park, trail, historic preservation and/or rail purposes and the exercise of eminent domain over the Embankment.
- The 2020 DSEA comes to incorrect conclusions regarding the Board's authority to impose mitigation measures.
- The 2020 DSEA should have considered what remedies and mitigation would have been available in an abandonment proceeding for the Harsimus Branch if Conrail had not sold portions of the line prior to seeking abandonment authority.
- Many of the other commenters (Hamilton Park Neighborhood Association, Jersey City Landmarks Conservancy, Village Neighborhood Association, Friends of Liberty State Park, Inc., NY/NJ Baykeeper, Harsimus Cove Association, and East Coast Greenway Alliance) indicated their support for the comments submitted by the City Parties. Hudson County Office of Cultural & Heritage Affairs/Tourism Development submitted the comments of the City Parties.

Hamilton Park Neighborhood Association (HPNA):

- There is a need for open spaces and public facilities before enabling the continued explosion of residential high-rise development that is ongoing in Jersey City.
- Neighbors of the Embankment have contributed to its maintenance and have created a type of land art.
- Conrail acted unlawfully by selling the Embankment to the LLCs, which will demolish the structure, resulting in huge impacts to the environment, including:
 - damage to historic sites and structures,
 - loss of habitat in a densely populated area,
 - harm to flora and fauna,
 - overdevelopment, and
 - loss of the Embankment as a means of stormwater control.

Jersey City Landmarks Conservancy:

- The 2020 DSEA is inadequate because of its limited scope, misleading narrative, and baseless conclusions.

CivicJC:

- Conrail acted unlawfully by selling the Embankment to the LLCs, which, in its view, will ensure that the structure will be demolished, resulting in huge impacts to the environment, including:
 - damage to historic sites and structures,

- loss of habitat in a densely populated area,
- harm to flora and fauna,
- overdevelopment, and
- loss of the Embankment as a means of stormwater control.

The Board of Directors of the Village Neighborhood Association:

- The loss of the Embankment through demolition and redevelopment would displace many other National Register-eligible historic sites and structures.
- Should the STB approve this abandonment without mitigating conditions, there will be adverse environmental effects, such as flooding and habitat loss.
- The STB should have supported the negotiated settlement agreement, which would have allowed for a nature-oriented open space and trail.

Friends of Liberty State Park:

- Demolition of the Embankment would result in overwhelming adverse environmental effects, including loss of open space and habitat.
- Liberty State Park is an oasis for migratory birds, monarch butterflies, foxes, and deer. If the Embankment were to be demolished and redeveloped, then there would be additional pressure on the open space and habitat afforded by Liberty State Park.

NY/NJ Baykeeper:

- The Embankment provides needed open space, habitat for wildlife, a valuable source for rainwater capture, and floodwater reduction.
- It has the potential to provide future light rail and other low impact transportation.

Harsimus Cove Association (HCA):

- The 2020 DSEA should have examined salvage implications of demolition (HCA provides example of the LLCs, who soon after purchasing the Harsimus Branch from Conrail, allegedly destroyed a stanchion at Brunswick Street and attempted to sell the stone to the City of Hoboken).
- The record contains evidence that the LLCs and Conrail jointly signed an application for a permit to demolish the Embankment.
- OEA must examine alternatives, including demolition of the Embankment.
- Demolition of the Embankment would result in adverse impacts to:
 - Historic sites and structures,
 - Foreclosure of long-standing plans to site the East Coast Greenway to be located along transportation corridors, including the Harsimus Branch,
 - Stormwater management,
 - Open spaces,
 - Loss of potential for the Harsimus Cove neighborhood to have a park, and
 - Foreclosure of the potential for light rail from Journal Square to the Waterfront.
- Peace, enjoyment, and property values will be adversely affected by demolition.

- Inadequate Tribal outreach to identify Indian Tribes with an interest in this abandonment (including reference to Lenape fishing tools recently discovered in the Harsimus Cemetery).

East Coast Greenway Alliance (ECGA):

- ECGA has been planning for several decades to implement a safe, off-road route.
- The 2020 DSEA does not discuss negative effects from unconditional abandonment and includes no mitigation for that.

Frank Gallagher, Rutgers Associate Professor of Professional Practice, Director of the Environmental Planning and Design Program in the Department of Landscape Architecture

- Continued existence of the Embankment as an open space provides many environmental benefits, including:
 - Carbon sequestration,
 - Hydrologic cycling,
 - Nutrient cycling,
 - Wildlife refuge, and
 - Stormwater catchment.
- A study was done on Liberty State Park demonstrating that the benefits of open spaces were worth approximately \$2 million per year.

Moirah Kinberg, Resident of Jersey City Heights:

- Cities must adopt plans to address stormwater and CSO that contaminate waterways.
- Demolition and development of the Embankment will result in rainwater flowing directly into the City's overburdened CSO.
- Taxpayers will have to bear the cost of addressing impacts to the CSO.

Conrail:

- Agrees with OEA's decision to not recommend imposition of a CZMA condition here.
- Refers to Conrail's extensive comments submitted on the 2009 Draft EA. According to Conrail, nothing has happened in this proceeding to change Conrail's position as stated in those comments.
- Any post-abandonment uses proposed for the Embankment, including demolition and construction of residential housing, would not be reasonably foreseeable or proximately caused by the Board's licensing decision here.

RESPONSE TO ENVIRONMENTAL ISSUES IN COMMENTS ON THE 2020 DSEA

As discussed above and because OEA decided to conduct its NHPA and NEPA review processes separately, comments on the 2020 DSEA that raise potential impacts to historic sites and structures from abandonment of the Harsimus Branch are being fully addressed as part of the Section 106 process for this proceeding and are only addressed here as appropriate.

In addition, other non-environmental issues raised in the comments will be addressed, as appropriate, by the Board and not OEA. These comments include those regarding voiding Conrail's sale of the Embankment to the LLCs, imposing a 180-day non-sale condition on a

grant of abandonment authority, and allegations pertaining to Section 110(k) and any other allegedly unlawful conduct by Conrail. As discussed above, the issue of whether a Section 110(k) violation occurred is not related to the environmental review under NEPA that is the subject of this Final EA and is also an issue that will be decided by the Board, not OEA. In addition, remedies such as voiding a property sale, imposing sale conditions, and requiring a property transfer are outside the scope of the NEPA and NHPA processes conducted by OEA. Any such requirements would not be related to the mitigation of impacts on environmental resources and, thus, are not appropriate for consideration in this Final EA.

Because OEA prepared this Final EA as part of the NEPA process, the responses below are focused on the environmental issues raised in the comments on the 2020 DSEA.¹³ Although many issues in the comments have been raised and responded to before in prior phases of this proceeding, OEA will respond to the environmental comments on the 2020 DSEA, even if OEA may have previously responded to the same issues. To avoid repetition, OEA has organized its responses by issue rather than by commenter.

OEA's NEPA Process is Insufficient Because it Failed to Consider Demolition, Redevelopment, and Other Possible Reuse of the Embankment After Abandonment

Commenters state that the environmental review process that OEA has undertaken is inadequate. They continue to assert that OEA should have examined the environmental impacts of post-abandonment reuse, including three reuse scenarios: demolition and redevelopment of the Embankment; exercise of eminent domain powers by the City of Jersey City; and use of the Embankment for park, trail, historic preservation and/or rail purposes. Commenters voice concern that if the Embankment were to be demolished, many adverse environmental impacts would result. These impacts include the loss of open space in the increasingly developed Jersey City, which, the commenters state, would result in reduced habitat and harm to flora and fauna and reduced capacity for nutrient cycling, diminished stormwater control, additional rainwater flowing directly into Jersey City's overburdened Combined Sewer Outflows, and additional pressure on the open space provided by Liberty State Park. Finally, commenters note, abandonment would foreclose the potential for development of light rail or similar future transportation.

The potential adverse environmental impacts mentioned by commenters, however, would not result from the proposed abandonment. Rather, they would result from post-abandonment demolition, redevelopment, and/or reuse that could remove the open space currently afforded by the Embankment. The Board has no control or jurisdiction over any changes to, or development of, property that was formerly used for rail transportation after abandonment occurs. In the event the Board authorizes an abandonment here, the Board's jurisdiction will end once the abandonment authority is consummated by Conrail.¹⁴ The whole point of a railroad seeking

¹³ As appropriate, this Final EA also discusses NHPA issues raised by the commenters.

¹⁴ See, e.g., *Consol. Rail Corp. v. STB*, 93 F.3d 793, 797 (D.C. Cir. 1996); *Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996); 49 C.F.R. § 1152.29(e) (regulation adopted in 1996 establishing notice of consummation process for railroads to consummate abandonment authority and thereby remove the property from the Board's jurisdiction).

abandonment authority from the Board is to remove the line from the interstate rail system and, thus, from the Board's jurisdiction. The Board does not and cannot control what a railroad does with property after the abandonment process has been completed and the property is no longer part of the interstate rail system and no longer being used for rail transportation purposes. Thus, as OEA has consistently explained, post-abandonment reuse of rail property is beyond the scope of environmental review under NEPA in rail line abandonment proceedings.

The 2009 Draft EA discussed the limited scope of OEA's analysis under NEPA and the 2020 DSEA discussed the only two major considerations OEA examines in rail line abandonments: (1) potential environmental impacts of salvage of materials such as track, ties, and other rail appurtenances present on the rail line that typically can occur during the process of abandoning the line, and (2) potential environmental impacts of any rail traffic being diverted to trucking or other rail lines as a result of the proposed abandonment.¹⁵ As stated at page 11 of the 2020 DSEA,

With respect to issue No. 1, the first consideration is whether any salvageable materials such as track, ties, and other rail appurtenances are still present on the rail line. If a railroad intends to salvage those materials following authorization of abandonment, salvage operations could potentially cause environmental impacts, such as temporary increases in noise, dust, vibration, or traffic; disturbance of local wildlife, soils, water bodies, drainage patterns, or fill materials; or adverse impacts to air or water quality. As established in the 2009 Draft EA and in other case-related documentation, Conrail does not propose to conduct any salvage as part of the proposed abandonment.

Post-abandonment demolition, redevelopment, and reuse of the Embankment do not fall within these two areas of environmental impacts analyzed in an abandonment proceeding, as they are outside the scope of the Board's jurisdiction, and, thus, OEA properly did not consider those impacts in its environmental review under NEPA.

In asserting that OEA should consider impacts of demolition of the Embankment, commenters point to the presence in the record of a 2007 application to the Jersey City Zoning Board and the Jersey City Historic Preservation Commission for permits to demolish the Embankment jointly signed by Conrail and the LLCs. However, regardless of whether Conrail and the LLCs may have once applied for demolition permits for the Embankment, the Embankment has not been demolished and cannot currently be demolished or salvaged because, during the pendency of this abandonment proceeding, Conrail is subject to Section 106, and it cannot demolish the Embankment or engage in salvage on the Line unless and until the Board authorizes Conrail's proposed abandonment and the abandonment is consummated.¹⁶ And, as

¹⁵ The record indicates that no trains have operated over the Harsimus Branch in decades.

¹⁶ The Harsimus Cove Association alleges that the LLCs "soon after the transfer of deeds from Conrail to the developer LLCs" removed a stanchion from the Harsimus Branch extending beyond the Embankment. EI-26989 at 2. However, the removal of the stanchion allegedly occurred in January 2006 before the Board determined that the Harsimus Branch was a railroad line subject to Board abandonment regulation and the environmental review required for

explained above, if the Board should decide to grant abandonment authority to Conrail, post-abandonment demolition and other post-abandonment activities are neither within the jurisdiction nor the control of the Board and, thus, are not actions appropriately considered in the environmental analysis under NEPA here.¹⁷

Loss of Federal Jurisdiction is a Significant Environmental Impact Requiring an EIS

The issue of loss of federal jurisdiction has been raised in the Section 106 historic process, where OEA noted that 36 C.F.R. § 800.5(a)(2)(vii) specifies that the loss of “federal ownership or control” over historic properties can be considered an adverse effect under Section 106. Following consultation with ACHP, however, OEA and ACHP have agreed that the Board’s limited jurisdiction over the rail line proposed for abandonment in this case does not constitute “federal ownership or control” under 36 C.F.R. § 800.5(a)(2)(vii).¹⁸ Because there was no federal ownership or control, OEA reasonably concluded that the loss of federal control over the Harsimus Branch would not be a direct adverse effect under Section 106.

Commenters, however, have also suggested that significant environmental effects warranting an EIS would result because of the loss of federal jurisdiction if the Board were to grant abandonment authority. But the kind of environmental impacts that can result from rail line abandonment—salvage of the tracks, ties, and appurtenances and diversion of rail traffic to other modes—would not occur in this case. Conrail has stated that it has no plans to conduct salvage activities as part of the proposed abandonment, and rail traffic ceased on the Harsimus Branch many years ago.¹⁹ Moreover, loss of federal jurisdiction by itself does not proximately cause any significant environmental impacts requiring preparation of an EIS under NEPA. And here, neither the commenters nor the record offer evidence of anything more than the potential removal of Board jurisdiction. As already discussed, the Board’s jurisdiction over the Line is limited and the loss of jurisdiction if abandonment is granted does not constitute a significant effect for the purposes of NEPA. Therefore, significant environmental effects would not occur from this proposed abandonment, and preparation of an EIS is not warranted.

proposed abandonments. City of Jersey City—Pet. for Dec. Order, FD 34818, Petitioners’ Opposition to Intervenor Petition for Extension of Time (filed January 23, 2006).

¹⁷ The 2020 DSEA discussed three reuse scenarios on a conceptual level, based on “broad and aspirational descriptions of potential preservation or potential demolition and redevelopment of the Embankment based on the level of detail available.” OEA concluded that, even if such reuse scenarios were within the scope of its environmental review, the information was “insufficient for conducting a meaningful environmental review under NEPA.” 2020 DSEA at 10.

¹⁸ EI-27088 at 1.

¹⁹ Conrail submitted a combined Environmental & Historic Report (2008 E&H Report) on March 6, 2008 stating that “As the subject lines have been out of service for more than two years, no commodities are transported on the lines and no changes in current operations or maintenance-practices will result from the proposed action. Applicants have no plans to dispose of the structures on the line; track, track material, and crossties have previously been removed.” 2008 E&H Report at 2.

OEA Erred Deciding to Separate the Section 106 Process from the NEPA Process

OEA reasonably determined that the most effective way in which to meet its obligations under both NHPA and NEPA here was to conduct those review processes separately. While OEA often combines the Section 106 process with the NEPA process because that is typically more efficient, there is no requirement to do so. Federal agencies' statutory obligations under NEPA and NHPA are separate and independent. Here, OEA appropriately decided that it would be best to separate the NEPA and Section 106 processes because the overwhelming majority of comments received on the 2009 Draft EA raised concerns about the historic importance of the Embankment and its relationship to the surrounding area, which include several historic sites and structures, such as historic districts, churches, parks, and neighborhoods. Because the concerns voiced by stakeholders focused mainly on historic preservation issues, OEA determined that here the Section 106 process merited its own detailed process, as evidenced by the numerous reports and addenda (totaling over 1100 pages of analysis) issued during the Identification and Effects steps of the historic review.

In making any final decision on the merits of the Harsimus Branch abandonment, the Board will have before it all of the EA documentation and the NEPA comments, as well as the separate documentation and historic preservation comments prepared under Section 106. This will allow the Board to fully consider the effects of the proposed abandonment on both the environment and historic resources before deciding whether to approve, deny, or approve with mitigating conditions Conrail's abandonment of the Harsimus Branch.

OEA Failed to Identify and Involve Tribes

As discussed in the 2009 Draft EA, OEA conducted a search of the National Park Service's Native American Consultation Database, which was the appropriate database at that time, to identify federally recognized tribes that may have ancestral connections to the project area. Using that database, OEA found no tribal entities with connections to the project area. In the subsequent years, despite issuing multiple reports for public review and comment, OEA has received no comments or calls from Tribes, and no tribal entities have requested to participate in either the NEPA or the Section 106 processes. Therefore, no changes to the 2020 DSEA are necessary to address concerns about OEA's Tribal outreach in this proceeding.

OEA Failed to Support the Potential Settlement Agreement

Neither OEA nor the Board has a role in ongoing negotiations between various stakeholders regarding potential future post-abandonment uses of the Harsimus Branch right-of-way. As a federal agency tasked by Congress with economic regulation of various modes of surface transportation, primarily freight rail, the Board does not license, design, fund, or approve local development plans on property that is no longer part of the interstate rail system and is outside its jurisdiction over rail transportation. Although OEA supports the efforts of various stakeholders involved in the Harsimus Branch abandonment case to work together to find a solution that would create a shared vision for the future of the Embankment, the Board does not have a role in any post-abandonment development of the rail right-of-way in this or any abandonment proceeding.

Mitigating Conditions Should be Recommended by OEA and Imposed by the Board

Commenters requested that OEA recommend and that the Board impose conditions to mitigate what they perceive as environmental impacts of the proposed abandonment. OEA notes that OEA can only recommend, and the Board can only impose, environmental conditions that are consistent with the Board's statutory authority over rail transportation by rail carriers under the Interstate Commerce Act, as amended by the ICC Termination Act. Accordingly, any environmental conditions that OEA recommends must relate directly to the proposed action before it, must be reasonable, and must be supported by the record. In this proceeding, the proposed action before the Board is Conrail's proposal to abandon a line of railroad. Therefore, any environmental mitigation measures that OEA recommends must be related to the potential impacts of the proposed abandonment. As discussed above, the impacts from an abandonment of a rail line are limited to impacts from abandonment-related salvage and impacts from the diversion of rail traffic. Accordingly, OEA can only recommend environmental conditions that are related to salvage or to the diversion of rail traffic. The fact that, in this case, Conrail sold portions of the Harsimus Branch prior to receiving abandonment authority from the Board does not change the potential impacts of the proposed abandonment or the type of mitigation measures that OEA can recommend.

Consistent with OEA's standard practice, OEA continues to recommend that the Board impose a Section 106 condition (set forth below) in any decision granting Conrail the right to abandon the Harsimus Branch if the MOA has not been executed prior to the issuance of the decision. The condition would prevent Conrail from consummating abandonment of the Harsimus Branch until the Board removes the condition. Because the proposed abandonment would not result in any environmental impacts from the diversion of rail traffic to other transportation modes or any environmental impacts from abandonment-related salvage activities, no other mitigation conditions are warranted.

CONCLUSIONS

The 2020 DSEA comment period has ended. Because there has been ample opportunity for public comment in this proceeding, OEA is neither requesting nor providing time to submit environmental comments on this Final EA. OEA recommends that the following condition, previously recommended in the 2009 Draft EA, should be imposed upon any decision granting abandonment authority in the event that the MOA has not been executed prior to the issuance of a Board decision authorizing abandonment:²⁰

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, 54 U.S.C. §

²⁰ If an interim trail use agreement under 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29 is reached for the Harsimus Branch (or a portion thereof), compliance with this condition is not required with respect to any portion of the rail line covered by the interim trail use agreement for the duration of the agreement.

306108, has been completed. Conrail shall report back to the Office of Environmental Analysis (OEA) regarding any consultations with the New Jersey Historic Preservation Office and other Section 106 consulting parties identified in the concurrent historic review process and the public. Conrail may not file its consummation notice or initiate any salvage activities related to abandonment (including removal of tracks and ties) until the Section 106 process has been completed and the Board has removed this condition.

If the above condition is imposed, OEA concludes that the proposed action would not significantly affect the quality of the human environment.

By the Board, Danielle Gosselin, Acting Director, Office of Environmental Analysis.