



July 14, 2023

Danielle Gosselin, Director
Office of Environmental Analysis
Alan Tabachnick, Preservation Officer
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

via email to: eservice@stb.gov
alan.tabachnick@stb.gov

Re: Environmental Comment in AB 167-1189X
Comments on Draft Memorandum of Agreement (MOA)
(Conrail/Harsimus Branch) and related proceedings

Dear Ms. Gosselin and Mr. Tabachnick,

As you know, the National Trust for Historic Preservation has been participating for several years in the consultation process under Section 106 of the National Historic Preservation Act regarding the Harsimus Brank Embankment in Jersey City, including, for example, a consultation meeting convened on October 27, 2020. However, we learned recently that the Surface Transportation Board (STB) does not have a formal record on file from the National Trust requesting official status as a consulting party. We therefore initiate this letter with a request to participate as a consulting party pursuant to 36 C.F.R. §§ 800.2(c)(5) and 800.3(f)(3).

Interests of the National Trust

The National Trust for Historic Preservation in the United States is a private nonprofit organization chartered by Congress in 1949 to “facilitate public participation” in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. *See* 54 U.S.C. § 312102(a). With more than one million members and supporters around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition, the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, which is responsible for working with federal agencies to implement compliance with Section 106 of the National Historic Preservation Act. *Id.* §§ 304101(8), 304108(a). With respect to the Harsimus Branch Embankment, the National Trust participated as an *amicus curiae* in support of the Rails-to-Trails Conservancy and the City of Jersey City in the litigation challenging the effort by Conrail to evade the STB’s jurisdiction over its abandonment of the rail line. *City of Jersey City v. Consolidated Rail Corp.*, 668 F.3d 741 (D.C. Cir. 2012).

Comments on the Draft MOA

We agree with the comments submitted by the Rails to Trails Conservancy. The STB has failed to engage in the fundamental purpose of the Section 106 process, which is “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). Instead, the proposed MOA is limited to “document-and-destroy” mitigation.¹

We disagree with the STB’s assumption that it has no regulatory authority over the post-abandonment use of the Harsimus Branch. And we support the resolution advocated by the Rails to Trails Conservancy – an abandonment explicitly conditioned upon a binding and enforceable MOA that includes a substantive commitment to preserving key portions of the historic Harsimus Branch Embankment for pedestrian trail use.

Thank you for considering the comments of the National Trust for Historic Preservation.

Sincerely,

A handwritten signature in black ink, reading "Elizabeth Merritt". The signature is written in a cursive, flowing style.

Elizabeth S. Merritt
Deputy General Counsel

cc: Rachel Mangum and Jaime Loichinger, ACHP
Kate Marcopul, NJ Deputy SHPO
Andrea Ferster, General Counsel, Rails to Trails Conservancy

¹ Indeed, as the Rails to Trails Conservancy pointed out, this should not even be deemed to qualify as mitigation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999) (“measures that offer historic documentation of pristine resources before they are damaged or destroyed are not “mitigation”).