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July 14, 2023

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

Re: Environmental Comment in AB 167-1189X
(Conrail/Harsimus Branch) and related proceedings

Dear Ms. Gosselin and Mr. Tabachnick:

Rails to Trails Conservancy (“RTC”) hereby provides comments on the draft Memorandum of Agreement (“MOA”) to carry out the responsibilities of the Surface Transportation Board (“STB”) with result to the above-captioned abandonment proceeding under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 206108.

RTC is a national nonprofit conservation organization whose mission is to create a nationwide network of trails from former rail lines and connecting corridors. We are headquartered in Washington, D.C., with four regional field offices. RTC has more than 100,000 members and supporters nationwide.

RTC has a strong and longstanding interest in the preservation of the Embankment through use as a trail, a use that would preserve the historic embankment, be compatible with adjacent historic sites, and would also preserve the line for future transportation uses. The Harismus Branch has long been considered a key link for the East Coast Greenway, a 3,000-mile biking and walking route linking the major cities of the Atlantic coast from Maine to Florida.

For nearly 20 years, RTC along with Jersey City and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition has been engaged in extensive litigation and advocacy stemming from Conrail’s unlawful sale of the historic Harsimus embankment to private developers. Through our efforts, the courts have now definitely established this agency’s jurisdiction over the line. The difficulty we face now is that the STB has yet to address the consequences of Conrail’s unlawful actions and the resulting problems that this creates for the STB’s ability to comply with both the letter and spirit of Section 106.

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We have reviewed the draft MOA, and do not believe that it should be signed by any of the concurring parties, due to the core deficiencies in the agency's compliance with Section 106.

There are two key areas in which this agency's compliance with Section 106 have come up short: inadequate engagement of the general public, and failure to consider measures to resolve adverse effects.

First, to date, there have not been adequate opportunities provided to the general public to participate in the Section 106 process. A public hearing should be held to "seek and consider the views of the public" as required by the Section 106 regulations. 36 C.F.R. § 800.2(d)(1).

Second, disregarding numerous objections voiced by the consulting parties, the draft MOA continues to reflect the legally erroneous presumption that the STB has no regulatory authority over post-abandonment uses of the Harsimus Branch due to Conrail's unlawful sale of the corridor to developers. As a result, the draft MOA focuses solely on creating documentation of the Harsimus Branch to preserve a written record of this unique historic resource, in recognition that once the abandonment is authorized, the line and its nearby historic resources will be unprotected from destruction and harm.

This presumption violates the most basic procedural requirement of Section 106, which directs the agency to consider ways to avoid or mitigate adverse effects. 36 C.F.R. § 800.6(a) ("The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties.") The proposed documentation of historic properties after they are destroyed and interpretative signage (to be simply stored at some unidentified location offsite) is not mitigation. *See 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.")

As many of the consulting parties have previously pointed out, the STB has broad authority to void that unlawful sale and certainly to deny the abandonment requested by Conrail. The OEA's denial of this clear authority over the abandonment has effectively given Conrail and its surrogate, the LLCs, permission to treat the Section 106 process as a meaningless exercise. Not only does this position reward Conrail for its unlawful sale, it encourages other railroads to evade Section 106 in the same manner.

And if the STB's disavowal of its authority is correct, it amounts to admission that the ability of the Advisory Council on Historic Preservation to comment on the undertaking has been foreclosed. The appropriate next step under these circumstances is seek the Council's comments, not enter into a meaningless memorandum of agreement that fails to provide for any real mitigation. At that point, the parties' only recourse will be to initiate another round of costly and time consuming litigation and appeals.

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But it doesn't have to be this way. Since the current owners of the Harsimus Embankment – the LLCs – have repeatedly and publicly stated their willingness to preserve key portions of the Embankment for preservation and trail purposes, an obvious alternative is incorporating this mitigation plan as binding commitment in a Memorandum of Agreement signed by all consulting and concurring parties. A conditioned abandonment that is subject to the provision of an enforceable MOA requiring the preservation of the Embankment will resolve this seeming unending controversy and would serve as a model for future Section 106 consultations.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Ferster', with a stylized flourish at the end.

Andrea Ferster, General Counsel
Rails to Trails Conservancy

cc: Reid Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation
Kate Marcopul, Administrator and Deputy New Jersey State Historic Preservation Officer
Elizabeth S. Merritt, Deputy General Counsel, National Trust for Historic Preservation