

## **Embankment Preservation Coalition Comments on STB Section 106 Process and Draft MOA in Docket AB 167 (Sub-No. 1189X)**

The Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition submits the following comments to the Surface Transportation Board Office of Environmental Analysis (STB OEA) on the Section 106 review in AB 167 (Sub-no. 1189X). We give our view of what the National Historic Preservation Act (NHPA) and Advisory Council on Historic Preservation (ACHP) regulations require, as they relate to the current draft Memorandum of Agreement (MOA) that STB OEA has crafted.

Our comments below should not be interpreted as acceptance of the process or the direction this MOA is taking to date. We oppose execution of the current MOA because it is inadequate to avoid or mitigate the adverse impacts on historic assets, even though ample means to avoid or mitigate are within STB's power.

The Embankment Coalition reserves the right to amend these comments. These comments are additive to previous comments, and are without any waiver of rights or legal positions available to the Embankment Coalition.

### **Summary of Major Concerns**

The Memorandum of Agreement draft is premature and should not be executed.

STB has yet to address the consequences of Conrail's unlawful sale of property under the jurisdiction of this agency.

STB's Section 106 process and the current MOA do not comply with both the letter and spirit of NHPA and Section 106 regulations.

STB has yet to engage the general public in the Section 106 process. It should do so.

STB has not invited organizations known to have strong interests in the outcome of the STB undertaking to be consulting parties. It can still do so.

STB has failed to consider measures, both within its power to take or voluntary by others, to resolve adverse effects of the undertaking, as required by NHPA and ACHP regulations. These measures exist and should be considered.

STB has not fully engaged the consulting parties that are already identified in ways to avoid, minimize, or mitigate adverse effects of the STB undertaking, should STB authorize rail abandonment without historic protection conditions.

STB should expand consultation so that all interested parties can consider potential mitigation - those listed in these comments and those suggested by others. This action is necessary to comply with NHPA and Section 106 regulations.

**NHPA and Section 106 as these relate to AB 167-1189 X and the MOA**

1. STB OEA should be guided in its administration of the Section 106 process by the policy set out in the National Historic Preservation Act, particularly the passages below:

“It is the policy of the Federal Government, ... in partnership with States, local governments, Indian tribes, ... and private organizations and individuals, to—;

- (3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;
- (4) contribute to the preservation of non-federally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;
- (6) assist State and local governments, Indian tribes, and the National Trust to expand and accelerate their historic preservation programs and activities.”<sup>1</sup>

STB OEA should maximally encourage preservation by exploring options for mitigation in the current Section 106 process. Section 106 applies to agencies that own, control, or have jurisdiction over historic properties, including agencies that have licensing power. STB has jurisdiction over the Harsimus Branch abandonment undertaking. Railroads may not abandon and sell off their regulated property lawfully unless first authorized by the agency. As long as STB retains jurisdiction over the Harsimus Branch, the historic assets encompassed by the Branch are protected. It is obvious, therefore, that prevention and certainly mitigation of adverse effects encompass delay in granting, or refusal to grant, abandonment authority until other means of mitigation of equal or greater effectiveness are agreed upon. To the extent it has power to protect the Harsimus Branch, STB should decline to grant abandonment authority in the circumstances here. At the very least, the agency must consider only granting discontinuance authority, relieving the railroad of common carrier obligations but keeping the Harsimus Branch intact. OEA’s process and its MOA to date fail to recognize this.

2. Instead of exploring options for mitigation, STB is giving short shrift to the steps in the Section 106 process in which consulting parties consider ways to avoid and minimize and mitigate adverse effects and agree on resolving them. OEA is instead assuming abandonment and is addressing “mitigation” on that basis, arbitrarily limiting itself to calling for documentation and signage as “mitigation,” and aiming to restrict the consulting parties to that consideration as well.

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<sup>1</sup>54 U.S.C. § 300101. Policy

Documentation and signage are not mitigation of adverse effects; instead, they amount to conceding that destruction of the historic resources is preordained and that documentation and signage is memorialization for former resources. Yet, the apparent assigns (Albanese parties) of Conrail's chosen developer (the Hyman Limited Liability Companies) that unlawfully purchased part of the regulated line from Conrail have notified STB OEA that options exist. These options presumably will not harm Conrail in any way and will preserve most of the Embankment. OEA should be encouraging public and private preservation options, not ignoring them.

3. NHPA was established to address exactly the situation in AB-167 (Sub-No. 1189X): the "ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments" that threaten our historical and cultural heritage because of "inadequacies of governmental and nongovernmental historic preservation programs and activities."<sup>2</sup>

Yet OEA, an administrator of this law, is both exemplifying the inadequacies of its own agency's historic preservation activities and making the burden of historic preservation even more difficult for local authorities trying to balance rapid development with the need to preserve historic and cultural heritage and provide open space and sustainable transportation options to a growing population.

4. OEA's narrow construction of STB powers and its failure to acknowledge wider public interest responsibilities conflict with its responsibilities under NHPA and NEPA.
5. OEA's positions in the NHPA Section 106 process are confusing and contradictory. Rather than administer a robust process that encourages preservation and supports government and private and individual efforts to preserve historic resources, OEA describes STB as powerless to do so. Defying common sense, OEA pretends that outcomes of abandonment authorization are unpredictable even though Conrail and the LLCs applied for demolition permits for the entire Embankment and instituted litigation against the City of Jersey City to obtain these. This litigation is stayed only because of this STB proceeding. OEA thus must assume that upon STB authorized abandonment, the historic resource that is the subject of the undertaking will be destroyed post-abandonment per the demolition permits sought by Conrail and its chosen developer. Although OEA has said STB can consider voluntary mitigation, it has refused to make that consideration part of the Section 106 process, even when notified by the assign of Conrail's chosen developer that they have a voluntary mitigation plan. The agency is thus not only ignoring the demolition intent but seemingly

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<sup>2</sup> <https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act> Retrieved July 4, 2023

discouraging efforts to assuage it. In short, OEA is currently administering a “check-off-the-box” process, in order to facilitate abandonment authorization without any meaningful mitigation and without consideration of any meaningful mitigation. This is evidenced by the draft MOA as well as directions to consulting parties to focus their comments on the MOA to “updates.” Such constraint forecloses actual prevention and mitigation of adverse effects. At this point, the whole process, including this admonition by the agency, amounts to a denial of reasonable comments. STB may claim the Embankment Coalition and others are being consulted, but the Coalition and others are not being consulted when STB is effectively closing its eyes and ears to facilitate Conrail’s unlawful de facto abandonment.

6. Unless corrected, the Section 106 process as administered by OEA does not comply with the spirit, purposes, or requirements of NHPA, as well as with the spirit of other federal laws and Executive Orders designed to promote and protect our nation’s historic resources.
7. The purposes of NHPA Section 106 are described as follows: “(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties... The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”<sup>3</sup>

OEA and consultants have identified such properties and examined (though not thoroughly) effects of the undertaking. OEA concedes that the undertaking (abandonment authorization) has adverse effects. Its MOA, however, acknowledges “visual” effects of the undertaking and does not list other effects of the undertaking. These effects are not the unpredictable, abstract outcomes that the MOA would have us believe but include, among other adverse effects, complete destruction of the historic property considered for abandonment and the resulting physical damage to adjacent properties. The MOA does not convey the enormity of these potential outcomes. OEA defines its responsibility for such effects as terminating when abandonment is consummated. This position is untenable, as the undertaking’s adverse effects begin at consummation.

8. NHPA says, in Program Responsibilities and Authorities,<sup>4</sup> that “Each Federal agency shall establish...a preservation program for the identification, evaluation, and nomination to the National Register, and protection, of historic property.” Further, the requirements for such program [words in bold our emphasis] “shall ensure that—  
(1) historic property under the **jurisdiction** or control of the agency is identified, evaluated,

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<sup>3</sup> [https://www.ecfr.gov/current/title-36/chapter-VIII/part-800/subpart-A/section-800.1#p-800.1\(a\)](https://www.ecfr.gov/current/title-36/chapter-VIII/part-800/subpart-A/section-800.1#p-800.1(a))

<sup>4</sup> § 306102

and nominated to the National Register;

(2) historic property under the **jurisdiction** or control of the agency is managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values in compliance with section 306108 of this title and gives special consideration to the preservation of those values in the case of property designated as having national significance;

(3) the preservation of property **not under the jurisdiction or control** of the agency **but potentially affected by agency actions is given full consideration in planning**;

(4) the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, ... and the private sector; and

(5) the agency's **procedures for compliance with section 306108** of this title—

**(A) are consistent with regulations promulgated by the Council pursuant to section 304108(a) and (b) of this title;**

**(B) provide a process for the identification and evaluation of historic property for listing on the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, ... and the interested public, as appropriate, regarding the means by which adverse effects on historic property will be considered; ...**<sup>5</sup>

STB's "program" and "process," to the extent we can discern these, are inconsistent with the spirit and aims of NHPA, at least in cases where a railroad engaged in an unlawful de facto abandonment, as it has here. Simply put, STB and its OEA to date are treating this unlawful de facto abandonment as a *fait accompli*, divorcing the historic assets involved from any meaningful control by the agency. STB, however, could void the deeds to Conrail's chosen developer. It has power to do this. Doing so would be consistent with a program supportive of NHPA and timely application of the Section 106 process. Failure to assert control by voiding the deeds not only unlawfully undercuts NHPA and Section 106 in this proceeding but also encourages the regulated industry – at least those lines with historic assets – to engage in unlawful abandonments before applying for abandonment authority, in order to evade Section 106. Note that NHPA includes "jurisdiction" as well as "control." OEA cannot deny (as it has) that STB has control of historic property at issue in AB\_167\_1189 X, while conceding (as it has) that it has jurisdiction. The agency in any case is even obligated by NHPA to give "full consideration" in planning to property not under the jurisdiction or control of the agency but potentially affected by its action.

9. Re Section 106 § 306108. Effect of undertaking on historic property. "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally

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<sup>5</sup> NHPA Section 5. § 306102.

assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.”<sup>6</sup>

This provision requires the Board members (and their Office of Proceedings and Office of General Counsel) to take into account the adverse effects flowing from an abandonment authorization. OEA’s process to date is not equipping STB’s decision-makers to do so; it instead is papering over the consequences of abandonment licensing. The unlawful *de facto* abandonment in this case has severely prejudiced preservation options that would avoid or minimize the consequences of loss of federal jurisdiction as sought by Conrail. The OEA process and draft MOA evade or deny any responsibility for adverse effects despite Conrail’s unlawful *de facto* abandonment. Instead, the agency and its OEA should focus on holding Conrail accountable for the adverse effects and on actions that are consistent with doing so. The draft MOA, a document that is intended to inform the head of the agency, does not convey information needed for the head to take into account the effects of the undertaking. The MOA so far conveys no sense of the many downstream adverse effects the board’s decision will have on historic assets. It does not explain that authorizing abandonment with no conditions for preservation of historic resources means that the agency will actually be assisting, without any public necessity to do so, in their destruction. The MOA does not note that some adverse effects even took place before the agency and consulting parties and the public, much less the head of the agency, had a chance to take into account the effect of the undertaking. The MOA assumes that the agency will not void the deeds or take meaningful equivalent action to enforce its statutory responsibility, to require railroads to obtain abandonment authority *before* abandoning their lines.

10. Re: “§ 306111. Environmental impact statement. Nothing in this division shall be construed to—  
... provide any exemption from any requirement respecting the preparation of an environmental impact statement under that Act.”<sup>7</sup>

The Coalition notes that an Environmental Impact Statement (EIS) under NEPA, which would have been more comprehensive than the Environmental Assessment and Section 106 review here, was not prepared. An EIS was requested to be done by hundreds of members of the public, but STB declined despite the unlawful sale by Conrail.

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<sup>6</sup> NHPA. § 306108. Effect of undertaking on historic property

<sup>7</sup> NHPA § 306111

11. Re § 306113. Anticipatory demolition. “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 306108 of this title, 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 Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.”<sup>8</sup>

STB denies that anticipatory demolition has taken place in AB 167-1189 X despite the overwhelming evidence City et al. provided that an intentional anticipatory demolition occurred. Under what is referred to as the “final order doctrine,” City et al. cannot challenge STB’s arbitrary and capricious handling of anticipatory demolition until, and if, STB issues a final order authorizing abandonment. City et al., however, have reserved the right to challenge the agency’s failure to enforce the law as to anticipatory abandonment, which occurred despite the fact that the Harsimus Branch was clearly a “line” of railroad, that Conrail sold it in the face of the City’s inquiry for proof of abandonment authority or that none was required, and in the context of the City’s effort to preserve the line in 2005 through lawful use of eminent domain. The MOA is misleading when it fails to specify this reservation.

12. Re: § 306114. Documentation of decisions respecting undertakings. “With respect to any undertaking subject to section 306108 of this title that adversely affects any historic property for which a Federal agency has not entered into an agreement pursuant to regulations issued by the Council, the head of the agency shall document any decision made pursuant to section 306108 of this title. The head of the agency may not delegate the responsibility to document a decision pursuant to this section. Where an agreement pursuant to regulations issued by the Council has been executed with respect to an undertaking, the agreement shall govern the undertaking and all of its parts.”<sup>9</sup>

The draft “Memorandum of Agreement” cannot be viewed as an “agreement” among any of the consulting parties with an interest in historic preservation.

13. The Coalition urges the agency not to enter into the draft MOA, or any similar MOA, because it currently fails to avoid, minimize, or meaningfully mitigate adverse effects of the proposed abandonment. Instead, the draft MOA appears to be designed solely for the purpose of facilitating an unlawful de facto abandonment by rubberstamping an unlawful sale of the key historic properties by Conrail to its chosen developer, despite overwhelming public opposition and the City’s efforts to institute lawful eminent domain proceedings prior

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<sup>8</sup> NHPA, § 306113

<sup>9</sup> § 306114. Documentation of decisions respecting undertakings.

to the unlawful sale.

**Code of Federal Regulations as it relates to this proceeding and the MOA<sup>10</sup>**

14. 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.

In AB-167 (Sub-no.1186 X) loss of federal control or jurisdiction must be deemed an adverse effect, because continued STB jurisdiction is clearly protecting the Harsimus Branch and other historic assets, and loss of that jurisdiction will expose them to demolition permits and loss. See, for example, City of Jersey City, et al. Pet. For Dec. Order, FD 34818, served Feb 8, 2006, slip at p. 2 (Conrail and its chosen developer agree not to remove structures pending resolution). STB seems to admit this by maintaining it has no control post abandonment consummation. The MOA itself assumes destruction of the resource because it proposes documentation and signage to memorialize the loss of the resource.

15. The regulations say a plan for consultation should be implemented early in the Section 106 process and that “The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to **avoid, minimize or mitigate [our emphasis]** any adverse effects on historic properties.”.<sup>11</sup>

OEA has not engaged consultants in considering ways to “avoid” and “minimize” adverse effects and instead presented a draft MOA to consultants that defines “mitigate” as documentation and signage. Documentation and signage are not mitigation of adverse effects; they instead memorialize a resource that STB OEA is assuming will be destroyed as an outcome of STB’s own decision in an undertaking.

If STB authorizes abandonment with no conditions, the agency entrusted to administer a process designed to avoid adverse effects will thus be complicit in their destruction or damage. This cannot be the aim of NHPA or the ACHP regulations.

STB previously responded to a comment in the Environmental Assessment process by saying, “OEA will seek ways to resolve adverse effects to historic properties, if any adverse effects are identified, during the appropriate stage of the Section 106 process.”<sup>12</sup> The time is now to seek those ways.

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<sup>10</sup> “Code of Federal Regulations: 36 CFR PART 800 -- PROTECTION OF HISTORIC PROPERTIES (incorporating amendments effective August 5, 2004)

<sup>11</sup> § 800.1 Purposes

<sup>12</sup> STB, 46660\_CRIDADDENDUM.pdf

16. 800.1 says the regulations have as a purpose “that a broad range of alternatives may be considered during the planning process for the undertaking.”

A broad range of alternatives has not been considered, and those that have been suggested by consulting parties have been rejected with declarations that they are not within the STB’s powers to consider. Examples of measures clearly within STB’s powers are (a) not granting the abandonment and (b) granting discontinuance only. Both these alternatives would not impose any burden on Conrail (which has already sold some of its assets on the corridor). STB could also void the deeds that manifest the unlawful de facto abandonment and impose a 180-day public use condition allowing Jersey City space to acquire the properties under local law. This latter alternative would simply restore a lawful status quo.

Notwithstanding the options above, OEA denies it can consider ways STB itself has to avoid, minimize, or mitigate adverse effects, and it has also declined to consider options that could be taken by other parties, including ones already agreed to in principle by litigants in this matter.

17. 800.2 says, in regard to consultation, “The agency official should plan consultations appropriate to the scale of the undertaking...”<sup>13</sup>

OEA appears to envision the undertaking in the abstract, as a decision to authorize abandonment or not, and this conception serves to limit the “scale of the undertaking” to a board-room bureaucratic decision. The real-world consequences of this decision for Jersey City and the region, however, are great: these involve the intersection of public needs for historic preservation, transportation corridor preservation, flood control, urban environmental sustainability, the health of its citizens, among others, in a city whose population grew by 40,000 new residents between 2010 and 2020. The undertaking also goes to the heart of whether the agency can hold companies it regulates to account for flouting rail law and agency jurisdiction, thus depriving the public of certain protections and undermining federal regulation in general. Indeed, the manner in which STB is treating the unlawful de facto abandonment here will encourage railroads to similarly destroy or sell off historic assets before seeking abandonment authorization. Encouragement of such a practice would be a great injustice. The agency should continue and expand a consultation appropriate to the true scale of the issues involved.

18. The regulations say, in (ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations, “Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe... that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies

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<sup>13</sup>Subpart A-Purposes and Participants 800.2 (4)

regardless of the location of the historic property. Such Indian tribe ... shall be a consulting party.<sup>14</sup>

We point out the potential significance of the land on which the Harsimus Branch is located to indigenous peoples historically displaced and later removed from areas by federal policy. Our society is grappling with historical injustices, and this project should be a part of that effort, and it is required by NHPA regulations. The eastern part of the Branch is on the filled-in Harsimus Cove where Henry Hudson's crew first encountered Munsee people in 1609. The western part of the Branch still lies amid open space and remnants of a largely filled-in tidal creek that was an oystering source for Lenape peoples and a major contributor to their subsistence pre-Dutch and English colonization. This federal undertaking, if abandonment is authorized, has the potential to further adversely affect this still largely undeveloped land by finishing off almost two centuries of railroads radically changing the landscape by digging through Palisades cliffs, lopping off a promontory, and filling in creeks and marshes and a cove. In contrast, the Embankment Coalition and other preservationists are seeking to protect and restore the natural ecology in this open area, which provides rare urban habitat and is needed to balance continuing development around it.

The Coalition does not know whether any Lenape tribes were invited to be consulting parties, but we are aware of recent interest in New Jersey ancestral homelands of Lenapes both in this state and in distant states. Inquiries should be made of them.

The ACHP has more information regarding consultation in Section 106 with Indian tribes and on the displacement and removal of Indians from ancestral lands.<sup>15</sup> <sup>16</sup> The Natural Resources Conservation Service (NRCS) has also developed guidance addressing this situation.<sup>17</sup> Additional information is at <https://www.bia.gov/frequently-asked-questions> and <https://www.ncai.org/about-tribes>

19. Relevant regulations say, regarding additional consulting parties, "Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties."<sup>18</sup>

While public-interest-oriented consulting parties are currently acknowledged in the Section 106 process, many additional potential consulting parties may be completely unaware that

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<sup>14</sup> Subpart A-Purposes and Participants 800.2 (2) (ii)

<sup>15</sup> The Indian Removal Era and Section 106 Tribal Consultation: Information Paper

<sup>16</sup> CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: THE HANDBOOK June 2021

<sup>17</sup> Tribal Ancestral Lands Consultation Under the National Historic Preservation Act – Guidance for Natural Resources Conservation Service Employees – Title 190 Part 315

<sup>18</sup> Subpart A-Purposes and Participants 800.2 (5)

their interests are implicated in this proceeding. The MOA somewhat misleadingly implies that the agency actively sought out consulting parties. It is our recollection that STB OEA did not identify and “invite” many of them, as the current draft MOA claims, but rather acceded to their requests to participate after the Embankment Coalition alerted these organizations to the process. (The STB OEA itself documents an instance: “On January 26, 2009, the Jersey City Landmarks Conservancy, Preservation New Jersey, the Village Neighborhood Association, and the East Coast Greenway Alliance (Interested Parties) each filed a reply and request for consulting party status in an NHPA section 106 review.”<sup>19</sup>)

20. Additional Parties to Section 106 review should be identified and invited. ACHP notes that “...the Agency Official should ... be sensitive to the need to involve additional consulting parties at later stages in the process, as potential project impacts become better understood and the interests of other parties become clearer.”<sup>20</sup>

It is the responsibility of STB OEA to identify interested parties. Here are a few, however, that have obvious interests affected by the undertaking:

- a. St. Anthony of Padua Roman Catholic Church and Holy Rosary Church on 6<sup>th</sup> Street. These two churches together make up, in SHPO Opinions, the Immigrant Roman Catholic Church Historic District of St. Anthony’s (on the National Register in its own right) and Holy Rosary. St. Anthony’s is the first Polish parish in the state. Holy Rosary is the first Italian parish. They share a rich history of serving large immigrant populations, many of them employed on the railroads, at the turn of the 19<sup>th</sup>-20<sup>th</sup> centuries. To our knowledge, the leaders and parishioners of these churches have no idea that the STB undertaking may affect their properties and their cultural practices. Both parishes use the Embankment backdrop and adjacent street for their historic cultural festivals and religious processions. St. Anthony’s and Holy Rosary should be invited to consult.
- b. The Italian Educational and Cultural Center at Casa Colombo, which is the secular heart of what, in the SHPO Opinion, is Italian Village Historic District. The IECC by its very name has an interest in this proceeding. The IECC should be invited to consult.
- c. The Historic Jersey City and Harsimus Cemetery, which borders the Branch at its western end, and according to reports sold some of its land to be used for the

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<sup>19</sup> DECISION 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 OF SERVICE EXEMPTION—IN HUDSON COUNTY, NJ STB Docket No. AB-290 (Sub-No. 306X) NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN HUDSON COUNTY, NJ Decided: January 26, 2009

<sup>20</sup> Subpart A-Purposes and Participants 802.2

Branch. The Cemetery is engaged in preparing a *Nomination* to the State and National Registers of Historic Places. The Cemetery should be invited to consult.

- d. Lenape groups, both here in New Jersey and elsewhere in Oklahoma and Wisconsin. These groups originated in what became New Jersey; they were historically first displaced and then removed farther west by federal removal policy. NHPA gives such groups special consideration, and some might be interested in participating if they knew about this process. As mentioned elsewhere, the lands on which the Harsimus Branch was constructed were Lenape hunting and fishing grounds; Henry Hudson recorded their presence in Harsimus Cove when he anchored in the Cove, later filled in by the railroad. Lenape hunting and fishing tools were recently found in the Harsimus Cemetery. OEA should reach out to these groups.
  - e. New Jersey Future, which has conducted extensive outreach in the Jersey City area and other urban centers into stormwater and its effects on antiquated combined sewage systems. The massive Embankment structure contributes to stormwater control in a flood plain; its removal and redevelopment would contribute to local stormwater problems. NJF should be invited to consult.
  - f. New Jersey Conservation Foundation. Since 1960 NJCF has preserved 160,000 acres of land in New Jersey, working with landowners “to design land preservation transactions that are a win-win for all.” NJCF should be invited to consult.
  - g. Open Space Institute, which was influential in the State purchase of the old Boonton line. Plans and studies linking it to the Harsimus Branch for greenway purposes exist or are underway. OSI should be invited to consult.
  - h. NJ Bike and Walk Coalition, also instrumental in the State’s acquisition of the Boonton Line for a Greenway proposed for connection with the Harsimus Branch. NJB&WC should be invited to consult.
  - i. BikeJC, a local organization very active in ensuring safe routes for bicyclists to get through the City and beyond. BikeJC should be invited to consult.
21. Regulations say: “The views of the public are essential to informed Federal decision making in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.”<sup>21</sup>

So far, the public has had no meaningful outreach from STB or role in the Section 106 process. The OEA has been conflating nonprofit organization participation with that of the

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<sup>21</sup> Subpart A-Purposes and Participants, 800.2

public. The in-person and virtual meetings it has held have been with consulting parties, not the public.

The Coalition has repeatedly but unsuccessfully advocated that the agency hold an in-person public meeting in Jersey City to explain this process. Such a meeting should be widely publicized in local articles, advertisements, and social media, and the agency should give continuing opportunities for the public to be heard.

22. Some members of the public have special interests pertinent to the STB undertaking. These include property owners who will be especially affected by outcomes of the Undertaking. There has been no notice in the Federal Register or news media advising such parties on how they may express their views in the Section 106 process.

The Embankment Coalition estimates that 600 property owners and an unknown additional number of residents live immediately to the north and south of the massive Embankment. Their own historic buildings would be directly affected by Embankment demolition. It is quite likely that many are completely unaware that serious damage to their properties may result from STB's decision on abandonment – not just visual adverse effects but material damage to their properties and property values. Some adjacent properties have sheds or other structures supported by the Embankment wall. Many property owners south of the wall share an alleyway, half part of the Embankment property, half theirs, that is used to access garages on their properties.

We ask the federal agency to be at least as responsible as the local government is in regard to private property owners affected by governmental decisions: When demolition permits are sought locally, the applicant is required to notify property owners within 200 feet. The STB or the applicant for abandonment authorization should notify such property owners of the potential demolition of the Embankment and give them a voice in this process. A list of these property owners, with addresses, can be obtained from the Jersey City's tax office.

23. Relevant regulations re public information say that "The agency official must...provide the public with information about an undertaking and its effects on historic properties and seek public comment and input."<sup>22</sup>

No meaningful outreach to the public has been done by the agency during this Section 106 process. The MOA is misleading in this regard, as no public meetings have been arranged or held. (OEA appears to wrongly assume that nonprofit organizations are the public.) Any information that has found its way to members of the public is through local organizations,

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<sup>22</sup> 800.2

not the agency.

It is not sufficient to claim that the public is involved because a document is lodged on an obscure-to-the-public STB web site to which the public has not been alerted and that members of the public not familiar with the system or the internet would find difficult to find out about. The agency should not rely on fictitious notice.

24. In retrospect, the earlier OEA review of the Environmental Assessment appears to have laid the groundwork for STB OEA to discount public voices. The STB received 2000 comments in that process; many of these were inspired by the Embankment Coalition's outreach, not that of the agency. At that time, hundreds of individuals and organizations called for a more expansive Environmental Impact Statement (EIS) rather than a narrowly focused Environmental Assessment (EA). STB declined these requests. The public called for an EIS because people on the ground understand what a devastating impact demolition of the Harsimus Embankment and breakup of the longer transportation corridor will have on Jersey City and the region. Once again, in this Section 106 process, STB OEA keeps its distance from these quite foreseeable effects, which the agency will only make more likely if it authorizes abandonment without conditions compatible with preserving the historic assets in question.

25. Section 800.3 of the Regulations say the agency must have a plan to involve the public: "In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with §800.2(d)."<sup>23</sup>

If such a plan exists, the Coalition is not aware of it. As we have indicated, the agency has failed to ensure public participation, basically conflating some nonprofit participation with the public, and even then, instructing these organizations to comment on revisions STB OEA proposes to a draft MOA it created without their consultation. The draft MOA is crafted to lead to a preordained result (that is, abandonment authorization, resource destruction, and an obituary as represented by documentation and signage wrongly presented as mitigation.

26. Relevant regulations call for the agency official to identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The official is encouraged "to invite others to participate as consulting parties as the section 106 process moves forward."<sup>24</sup>

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<sup>23</sup> 800.3 (e)

<sup>24</sup> 800.3 (f)

We gave examples of parties above that are entitled to consult but for whom no outreach was provided and were thus disabled from consulting.

27. Relevant regulations call for the agency to “make a reasonable and good faith effort to identify any Indian tribes...that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.”<sup>25</sup>

We are aware of no effort by OEA responsive to this requirement. We believe there would be interested tribes if outreach were made, and, as indicated above, believe it is important for the agency to do so.

28. 805.1 says criteria of adverse effects must be applied to properties within the Area of Potential Effects. It gives examples of adverse effects that we comment on below.

- a) The following effects should be more extensively evaluated and ways to avoid, minimize or mitigate them explored. Of the items quoted below, i, ii, iii, iv, v, vi, and vii are all implicated in this undertaking but are not acknowledged in the MOA. Examples i and vii have already happened, undermining the Section 106 process.

“(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties ([36 CFR part 68](#)) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

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<sup>25</sup> 800.3 (f) (2)

- vii. Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.”<sup>26</sup>
- b) STB OEA, consulting parties, and the public have had no opportunity to analyze adverse effects on specific buildings, including contributors to National Historic Districts or buildings that are listed or eligible in their own right, and that are likely to occur should this undertaking proceed to abandonment without conditions. If the Embankment is demolished, structural damage is quite likely to occur on properties bordering it.
- c) Regarding the example (i) in (a) above, a stanchion has already been removed from the corridor, and demolition of at least one block of a National-Register-eligible site is highly probable given local Redevelopment Plans contingent on settlement of legal issues. Demolition permits have been sought for the entire Embankment by Conrail and its chosen developer in the absence of settlement. Demolition of the entire Embankment would have drastic effects on multiple adjacent but historic properties (these remain unexamined in the current process) as well as to the National Historic Districts within which they are located.
- d) STB OEA acknowledges item vii in the example in (a) above as an adverse effect but this is not mentioned in the MOA nor ways to avoid, minimize, or mitigate its effect given. (The Coalition reiterates that documentation and signage are not mitigation.)

29. Definitions<sup>27</sup> in the Regulations that should be reviewed by STB OEA follow:

- a) “(f) Consultation means the process of **seeking, discussing, and considering** the **views** of other participants, and, where feasible, **seeking agreement** with them regarding matters arising in the section 106 process. The Secretary's “Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act” provide further guidance on consultation.” **[emphasis ours]**

The MOA was drafted without seeking contributions from most consulting parties, who have served instead as recipients of drafts and given minimal time to comment on complicated matters. We have certainly not discussed or considered the views of other participants in the context of the Section 106 review. The MOA appears to have been drafted entirely by OEA with a view not to avoid or minimize adverse

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<sup>26</sup> 800.5 (2)

<sup>27</sup> 800.16

effects to historic resources but to minimize the Section 106 consultation effort. More particularly, the MOA appears to have been drafted to secure Conrail's agreement, not to eliminate adverse effects of Conrail's unlawful de facto abandonment or of a subsequent post-hoc abandonment authorization so Conrail is not burdened by its unlawful actions. Ultimately, however, the issue is not punishing Conrail but returning the property to its regulatory status and ownership before the unlawful de facto abandonment so preservation options can be meaningfully considered, pursued, and implemented.

- b) "(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register."

The Coalition questions whether contributing buildings within the Historic Districts identified in the APE in this process should have been analyzed for specific effects, especially those adjacent to the Embankment that would be most drastically affected by its demolition, a potential outcome of an abandonment authorization without historic preservation conditions.

- c) "(j) Foreclosure means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking."

Foreclosure is taking place in AB-167 (Sub.-No. 1189X). The agency is failing to consider and implement available means to eliminate or mitigate adverse effects on section 106 assets. The agency is failing by short-circuiting Steps 3 and 4 of the process. The Coalition also maintains that the agency's failure to restore the Harsimus Branch to status ante the unlawful sale forecloses meaningful comment and participation in the 106 process.

- d) "(l)(1) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior."

The MOA does not mention adverse effects to buildings within the Historic Districts. This conveys the sense that adverse effects are an abstraction, a blow to significance of a Historic District designation on paper rather than to the significance and actual physical damage to the buildings within the Districts.

- e) "(o) Memorandum of agreement means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties."

The Coalition notes: The proposed MOA does not “resolve” any adverse effects of abandonment. It invites them. Thus it does not comply with the definition of a MOA and DTB OEA should stop using the term “MOA” to describe the document on which it is now soliciting limited comment.

- f) d) “(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”

By statute, rail lines may not be torn out and sold off without prior STB authorization. An STB abandonment authorization is therefore an undertaking subject to Section 106 and NEPA. Despite OEA protestations to the contrary, this definition does not serve to limit the obligations of the STB under NHPA.

30. Regarding Appendix A to Part 800 of the Regulations,<sup>28</sup> the ACHP has elected to join the review in AB 167-1189 X. All the criteria listed in these regulations for ACHP doing so are implicated in this case. Yet a reader of the draft MOA would come away with the impression that this is a noncontroversial case that sailed through the Section 106 review.

#### **Additional Comments on the MOA Itself**

**NOTE:** As indicated at the beginning of these document, the comments below should not be interpreted as acceptance of the process or the direction this MOA is taking to date.

31. The MOA appears on its face crafted to lead to, and justify, an ultimate decision by the board to authorize abandonment of the Harsimus Branch without any accountability for a rail company whose representatives intentionally or with willful blindness (as we on the ground have observed) or mistakenly (as STB has chosen to believe) sold portions of a regulated rail line to avoid historic preservation and environmental reviews. Conrail also did this to put the property in the hands of its chosen developer. The MOA does not even mention this premature sale, which STB elsewhere categorizes as unlawful de facto abandonment. The first “Whereas” in the MOA text starts with the Conrail, CSXT and NSR 2009 filing as if it is a normal filing and not belated. Together with the succeeding “whereas” statements, a narrative is created that would lead a typical reader to believe this MOA is the end result of a noncontroversial, orderly process in which consulting parties agreed that documentation and signage is fair mitigation for what the MOA assumes will be the destruction of historic resources.

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<sup>28</sup> Appendix A to Part 800 -- Criteria for Council Involvement in Reviewing Individual section 106 Cases

32. Inconsistently, at the same time STB OEA denies that STB has any authority over Conrail post-abandonment, OEA's current MOA presumes to exercise such authority— just not authority that would correct harms Conrail has already done or prevent harms yet to come from Conrail's unlawful actions. In particular OEA claims the power to impose signage requirements on Conrail's successors in interest.
33. STB OEA apparently foresees the destruction of historic resources, while denying same, by requiring documentation and signage. STB cannot have it both ways. If it has power to impose signage requirements, it has power to impose actual preservation measures.
34. The assumption permeating OEA's Section 106 process—that there is nothing STB can do about Conrail's unlawful sale of portions of the Harsimus Branch—shapes the MOA and foreshadows what STB OEA apparently believes will be an ultimate STB board decision to authorize abandonment without conditions. Meaningful comment on ways to “avoid, minimize, or mitigate” adverse effects on historic resources is thus foreclosed.
35. STB OEA's errant assumption that it can do nothing (except signage) is not only an injustice to the public in AB-167 (Sub-no.1189 X), but to the Section 106 process as administered by this agency in any future case. It encourages Conrail, and by extension all rail companies, to evade meaningful historic reviews by unlawfully selling or destroying historic assets before applying for abandonment: STB is signaling there are no consequences. Further, STB OEA's assumption undermines the Section 106 process as administered by other agencies as well. STB OEA's stance makes a mockery of NHPA Sections 106 and 110K.
36. The product of the assumption that STB can do nothing is the current draft MOA, with its misleading “whereases,” giving the decision-making board chair (it's not even clear to us whether the decision-maker(s) is the board chair, the board, or has been delegated to the OEA) partial information suggesting that the Section 106 process is uncontroversial and has been successfully conducted and completed. These “whereas” statements nowhere advise that because of the sale, OEA is taking the position that no means exist to avoid or minimize adverse effects. It does not mention that the STB could deny abandonment authorization and therefore preserve the Harsimus Branch and avoid all adverse effects on the additional resources within the Area of Potential Effects.
37. This draft MOA reads as an agreement between STB and Conrail to memorialize the Harsimus Branch with documentation and signage, not an agreement with all consulting parties to resolve adverse effects on historic resources. OEA has elsewhere proclaimed it cannot predict potential effects of the undertaking, yet here it predicts a tombstone is needed.

38. A course correction is in order if STB is to be a fair and faithful administrator of the National Historic Preservation Act (NHPA) Section 106 review process.

39. Despite the to-date critically flawed process, STB OEA could still explore, in the Section 106 process, actions that could result in true mitigation, not the so-called mitigation of documentation and signage currently in the draft MOA. These possible actions include, but are not limited to, the following:

- A. STB can deny authorization of abandonment, thereby preserving the resource as a forested ruin, valuable in itself in a rapidly developing city losing tree cover to development, and therefore in the public interest. Since Conrail has already purportedly sold the asset, it suffers no loss.
- B. STB can grant discontinuance of services but not authorize abandonment, with the same result as in A. above.
- C. STB can void the deeds unlawfully issued by Conrail to the Limited Liability Companies (LLCs) that purchased parts of a regulated rail line, and grant the City of Jersey City a 180-day public-use condition to institute proceedings under state statutes to secure the property from Conrail. STB OEA has denied STB has the power to do so in historic preservation cases, but it has done so in other cases, especially where, as here, the sale (if allowed to stand) limits the agency's ability to confer remedies, which the agency seems to contend is the case here.
- D. STB can condition abandonment on Conrail reclaiming the property it sold.
- E. STB can condition abandonment on Secretary of Interior Standards being attached to any deed resulting from the unlawful sale.
- F. STB can bar sale of the rail line with a public use condition that would give the City 180 days to exercise eminent domain.
- G. STB can explore the voluntary mitigation plan about which it was notified by the LLCs/developer attorney and cooperate with litigating partners to make it binding, thus clearing the way to abandonment with conditions that would preserve historic resources.
- H. STB OEA and the consulting parties should consider whether there is a public necessity for abandonment authorization in this situation. Without historic preservation conditions, abandonment authorization is decidedly not in the public

interest.

- I. STB OEA can explore the efficacy of preserving the rail line through an Offer of Financial Assistance (49 U.S.C.10904), as the City has reserved the right to file. The leading case for OFA valuation/application involved light rail/passenger rail and the City has consistently indicated that as one of the many reasons to preserve the Harsimus Branch.<sup>29</sup>

STB previously stated in response to a comment, “The OFA process is unrelated to and outside the scope of the Section 106 process. OEA does not have the authority to recommend that the Board make any decision in the OFA process to mitigate potential effects to historic properties.” The Embankment Coalition asks why any step that would avoid adverse effects cannot be considered by the very process designed to consider avoidance of adverse effects, especially when this step is under the agency’s own jurisdiction.

Certainly STB has power to impose a public use condition allowing the City up to 180 days to institute eminent domain or similar state law remedies post-abandonment. (49 USC 10905, 49 C.F.R. 1152.28). This would mitigate the unlawful sales if STB voided the deeds before authorizing abandonment and imposing the condition.

OEA has not explored these options in the context of this Section 106 process or simply ignores or denies them. No true mitigation measures thus find their way into the MOA, but only documentation and signage. In addition to the true mitigation actions above, which should be considered in this process, Conrail should be required to remove its objection to the Harsimus Embankment being listed on the National Register of Historic Places.

If the alternatives above were explored and one or more agreed to, a MOA could incorporate true mitigation.

40. OEA appears to see the rail regulatory agency’s responsibility as protecting the rail industry and its companies, not the public interest in historic preservation. NHPA, however, calls for a wider responsibility. By exploring the options above, and others perhaps to be suggested by the other parties interested in historic preservation, STB OEA may discover there are indeed ways for adverse effects to historic resources to be avoided or minimized or mitigated in material ways, and not limit itself to memorializing their loss.

Further, many of the actions above would presumably not harm Conrail in any way. Even if

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<sup>29</sup> Congressional Research Service <https://crsreports.congress.gov> R47013, VERSION 3 · NEW “Summary,” accessed 7/3/2023self-desc

Conrail were required to return the purchase money for parcels unlawfully sold to the LLCs, the City of Jersey City long ago indicated it had equivalent funds and would purchase the parcels for what Conrail's developer paid. Alternatively, implementing the developer's purported current plan, if along the lines of local Redevelopment Plans written with LLC and City/Coalition cooperation, would enable true mitigation that is agreeable to most litigating parties and presumably of no interest to Conrail. This action would penalize neither the company that unlawfully sold pieces of the rail line nor the LLCs that unlawfully purchased those pieces. It would restore some semblance of fairness to this dispiriting situation.

41. STB by its actions to date in this proceeding is accommodating an applicant that has exhibited a pattern of hostility toward local governments and the public interest in environmental conservation and historic preservation. A decision-maker would never know this from the current MOA. A brief rundown of this pattern, which we believe is supported in the record, follows. Conrail

- received the Harsimus Branch from its predecessor as a profitable "line of rail" and continued to operate it as a profitable "line of rail" under federal regulatory authority;
- removed track and other equipment without required regulatory agency authorization;
- sold off the eastern terminus of the Branch (which ran through Yards and thus had no residents around it to take notice), and which terminus encompassed another line of railroad in addition to the Harsimus Branch, without required application to the federal regulatory agency for its authorization;
- in or about 1994, arbitrarily internally reclassified the "line of rail" as spur track, a de facto unlawful abandonment, without supplying any proof that a mainline track was a spur, because there was none;
- in 1999-2000 objected to listing of the Harsimus Branch Embankment on the National Register of Historic Places;
- in 2003 objected to the City of Jersey City landmarking the Harsimus Branch Embankment;
- In the early 2000s, ignored, repulsed, or delayed efforts by individuals, Hudson County, and the City of Jersey City to negotiate Embankment purchase for historic preservation and compatible uses;
- Around 2004-early 2005, postponed a required site inspection by a City-contracted eminent domain attorney and responded misleadingly to the attorney's inquiry as to abandonment status of the rail line, which by this time basic research by ordinary citizens – without the rail industry knowledge that must be imputed to Conrail - had revealed was a regulated rail line that had not been properly abandoned;
- in mid-2005, while postponing the City's effort to institute eminent domain to secure the property specifically for historic preservation purposes and reuse compatible

- with historic preservation, secretly purportedly sold portions of this regulated rail line, as the deeds clearly stated, to a private developer who promptly sought to demolish the remaining historic structures and develop the property;
- in 2006, implausibly denied in STB proceedings in FD\_34818\_0 that the Harsimus Branch was a line of rail and therefore regulated and subject to Section 106 review;
  - for roughly seven years (2007-2014) challenged, in federal courts, this agency's determination in FD\_34818\_0 that the Harsimus Branch was a regulated rail line;
  - meanwhile, joined its chosen developer in local demolition permit applications, while its developer filed numerous state court lawsuits against the City, Coalition, Rails to Trails Conservancy, and sometimes their officers and lawyers;
  - in 2020, without explanation, walked away at the 11<sup>th</sup> hour, after agreeing on terms, from a binding litigation settlement with other litigants that would have resulted in historic preservation of most resources, with true mitigation of some adverse effects. See EI 32667 (Letter, City et al. to OEA, dated 4 Dec. 2020).

Rather than recognizing this pattern of the company's hostility to rail law, historic preservation law, and the communities in which the rail company operated, STB is using its authority to protect the company and implicitly reward its unlawful actions. STB recently rejected overwhelming evidence that City et al. submitted on 110K violations; the MOA suggests that this 110k decision is a finality without acknowledging that City et al. have reserved its right to challenge the decision when timely to do so. It is even giving the company control over the future documentation and signage narratives.

STB is acting against the spirit of NHPA - to "give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist state and local governments and the National Trust for Historic Preservation ... to expand and accelerate their historic preservation programs and activities." Instead, it burdens state and local governments and the individuals and organizations working to preserve historic resources.

42. The draft MOA in effect assumes that the Harsimus Branch will be destroyed, other resources adversely affected, and the only thing to be done is to memorialize them. The MOA makes no attempt to consider ways to avoid or minimize or mitigate adverse effect on historic resources, but simply to memorialize them.
43. Decision makers should have information conveying the full flavor of the adverse effects that historic resources have already suffered from its owner; these include physical damage to parts of the Harsimus Branch; neglect of the Harsimus Branch property; and most flagrantly, the unlawful sale. They should also have information that conveys the full flavor of the adverse effects that will be unleashed by the authorization of abandonment with no

historic preservation conditions.

The MOA distances decision makers from potential, even likely, effects of their decision. The approach adopted by STB OEA serves to shield decision makers from the concrete effects of their decisions. The documentation available to them does not, for example, put them in the shoes of the hundreds of property owners adjacent to the Branch who are subject to the very real effects of demolition on their adjacent or nearby properties.

Comments on MOA text follow.

**MOA Text Comments**

Para	Text	Comment, Question, or Proposed Text
Title	<p align="center"><b>ABANDONMENT EXEMPTION, IN CITY OF JERSEY CITY, HUDSON COUNTY, NEW JERSEY (The Harsimus Branch Embankment)</b></p>	<p>Pennsylvania Railroad Harsimus Branch is the historic name, or reference could be to the Pennsylvania Railroad Harsimus Branch and Embankment.</p>
1	<p><b>WHEREAS</b>, on January 6, 2009, 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) under 49 C.F.R. § 1152.50 seeking exemption from the requirements of 49 U.S.C. § 10903 for Conrail to abandon and for CSXT and NSR to discontinue service over an approximately 1.36-mile portion of a railroad known as the Harsimus Branch between Milepost 0.00 and Milepost 1.36 in Hudson County, New Jersey; and</p>	<p>The Whereas statements together combine to create a narrative that presents this abandonment like any usual abandonment, conducted prior to portions of the rail line being sold off, but it is not. Unless the Section 106 process spends more time exploring ways to “avoid, minimize, or mitigate” adverse effects, and some real mitigation is included in the MOA, more accurate “Whereas” statements for decision- makers would include something like these:</p> <p>“WHEREAS Conrail et al. filed this notice belatedly, after parts of the regulated rail line were sold for private development and before the companies applied for required authorization to abandon the rail line; and</p> <p>WHEREAS, STB decided to prepare an EA rather than an EIS as requested by hundreds of members of the public concerned about the impacts of possible demolition of a massive structure between Historic Districts as well as the disassembly of a century-old transportation corridor; and</p>

		<p>WHEREAS STB appears to have already decided to do nothing about the unlawful sale of portions of the regulated Harsimus Branch for private development; and</p> <p>WHEREAS STB and consulting parties have not considered in the Section 106 process measures that exist to avoid or minimize adverse effects, including voluntary mitigation plans, and</p> <p>WHEREAS a Section 106 process must be completed in order for STB to authorize abandonment..." etc. etc.</p>
2	<p>WHEREAS, the abandonment of the Harsimus Branch constitutes an Undertaking under Section 106 of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306108, and as defined in 36 C.F.R. § 800.3(a) (the Undertaking); and</p>	<p>See Coalition comments above regarding NHPA and Regulations as they relate to this process and MOA</p>
3	<p>WHEREAS, unless otherwise defined in this Memorandum of Agreement (MOA), all terms are used in accordance with those set forth in 36 C.F.R. § 800.16; and</p>	<p>See Coalition comments above regarding definitions</p>
4	<p>WHEREAS, the Board’s Office of Environmental Analysis (OEA) issued a Draft Environmental Assessment (Draft EA) on March 23, 2009 that evaluated the potential environmental impacts of the proposed abandonment and that included consideration of potential effects on historic resources listed in or eligible for listing in the National Register of Historic Places (National Register), pursuant to 36 C.F.R. § 800.8(a); and</p>	<p>See Coalition comments above on STB’s decision to do an EA rather than a more comprehensive EIS as requested by many members of the public.</p>
5	<p>WHEREAS, OEA recommended that the Board impose a condition barring Conrail from consummating the proposed abandonment until the Section 106 process is complete; and</p>	
6	<p><b>WHEREAS</b>, OEA, in consultation with the New Jersey Historic Preservation Office (the State Historic Preservation Officer or SHPO), began the Section 106 process by delineating the Undertaking’s Area of Potential Effects (APE), defined at 36 C.F.R. § 800.16(d), as centered on the rail right-of-way, but extending outward to include potential visual impacts (as shown in the map in <b>Appendix A</b>); and</p>	<p>There will be more than visual impacts on properties extending outward from the rail right of way, and on the ROW itself. Federal jurisdiction is protecting the resource; once abandonment is authorized and consummated, the ROW, the massive Embankment, and other properties are vulnerable to demolition and redevelopment and/or the effects of</p>

		<p>demolition and/or redevelopment, including heavy construction equipment on the ROW site and truck traffic throughout Historic Districts filled with fragile historic buildings.</p> <p>These impacts are extremely likely, in the case of Block 1 of the Embankment, and will be made more likely for the rest of the Embankment and ROW should STB abandon without conditions for historic preservation.</p>
7	<p><b>WHEREAS</b>, the Board notified and invited the Advisory Council on Historic Preservation (ACHP) to participate early in consultation and, by letter dated April 10, 2009, the ACHP chose to participate in the consultation pursuant to C.F.R. § 800.2(b)(1); and</p>	<p>Did the Board notify ACHP or did other parties bring this controversial case to them and ask them to participate? If the latter, then that fact should be noted in the MOA.</p>
8	<p><b>WHEREAS</b>, the following agencies, organizations, and legal entities have accepted OEA’s invitation to participate in the Board’s Section 106 process as consulting parties, in addition to the SHPO, ACHP, and Conrail: the City of Jersey City, New Jersey; Civic Jersey City; Friends of Liberty State Park; Hamilton Park Neighborhood Association; Harsimus Cove Association; Historic Paulus Hook Association; Hudson County Office of Cultural &amp; Heritage Affairs; Hudson County Division of Planning; Jersey City Landmarks Conservancy; 212 Marin Boulevard, LLC (property owner); 247 Manila Avenue, LLC (property owner); 280 Erie Street, LLC (property owner); 389 Monmouth Street, LLC (property owner); 354 Cole Street, LLC (property owner); 317 Jersey Avenue, LLC (property owner); 415 Brunswick Street, LLC (property owner); 446 Newark Avenue, LLC (property owner); NZ Funding, LLC (property owner); New Jersey Committee for the East Coast Greenway; New York/New Jersey Baykeeper; Newport Neighborhood Association; the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition; Pennsylvania Railroad Technical &amp; Historical Society; Powerhouse Arts District Neighborhood Association; Preservation New Jersey; Rails-to-Trails Conservancy; the Van Vorst Park Association, and the Village Neighborhood Association; and</p>	<p>This passage is misleading in that it implies a very active outreach by STB. The Coalition believes many consulting parties, especially those whose missions are centered on historic preservation, the environment, or the community, requested inclusion. STB OEA has been responsive to requests for inclusion, but we do not think it initiated invitations.</p> <p>This list is missing the National Trust for Historic Preservation, which may not have been invited, as evidenced by their being missing from recent emails to consulting parties and by a recent request to include them. Other consulting parties may have been inadvertently dropped from email lists, e.g., Bergen Arches Preservation Coalition. One organization, Newport Neighborhood Association, is defunct, we believe.</p> <p>There are many more interested organizations that should have been invited and still can be. See Coalition comments above.</p>

9	<p><b>WHEREAS</b>, OEA, in consultation with the Section 106 consulting parties, identified 19 historic properties within the APE that are listed in or eligible for listing in the National Register, as described in OEA’s Cultural Resources Identification Report (May 5, 2017) and Cultural Resources Identification Report Addendum (October 16, 2018); and</p>	<p>OEA has not identified contributor buildings within the Historic Districts but only the Districts as a whole. Individual buildings will suffer adverse impacts should demolition and redevelopment occur as a result of abandonment authorization with no historic preservation protections.</p>
10	<p><b>WHEREAS</b>, OEA determined, in consultation with the Section 106 consulting parties, that the portion of the Harsimus Branch from Control Point Waldo (CP Waldo) to Marin Boulevard, is eligible for listing in the National Register as the Pennsylvania Railroad Harsimus Right-of-Way Historic District; and</p>	
11	<p><b>WHEREAS</b>, the Pennsylvania Railroad Harsimus Right-of-Way Historic District includes the Pennsylvania Railroad Harsimus Branch Embankment, a key contributing element that is also individually eligible for listing in the National Register; and</p>	<p>To accurately convey to decision-makers, the language should read, regarding the Embankment: “...element that was also individually determined eligible for the National Register in 2000 but is not listed because of Owner (Conrail) Objection); and”</p>
12	<p><b>WHEREAS</b>, OEA typically does not consider the effects of potential post-abandonment activities on historic properties as part of the Section 106 process for proposed railroad abandonments but has included some limited consideration of such potential future activities in its Section 106 review for the proposed Harsimus Branch abandonment due to the unique circumstances of this case; and</p>	<p>Typical practice is not what should be followed here. NHPA and NHPA call for downstream activities to be considered. OEA’s consideration of post-abandonment effects is still too limited. The limitation extends to not even considering the effect the premature sale of parts of the regulated rail line is having on the Section 106 process.</p>
13	<p><b>WHEREAS</b>, OEA, working with the consulting parties, identified three possible scenarios that could occur if abandonment authority were granted, and assessed the effects of those scenarios on historic properties in a Cultural Resources Effects Assessment Report (issued March 29, 2019) and an Effects Assessment Report The scenarios were posited by OEA Addendum (issued November 12, 2019); and</p>	<p>The Embankment Coalition believes “working with” is too strong to describe the drafting of these scenarios. Our recollection is that they were created by the contractor/OEA. Please explain, for example, what parties were worked with.</p>
14	<p><b>WHEREAS</b>, the three scenarios are not alternatives under Section 106 because the Board has no jurisdiction or regulatory authority over post-abandonment uses of the Harsimus Branch and</p>	<p>The Section 106 process is supposed to look at adverse effects downstream and cumulative. With demolition permits</p>

	cannot determine which, if any, of these scenarios would occur if the proposed abandonment were to be authorized and consummated; however, the scenarios include reasonably foreseeable effects of abandonment authority here and therefore OEA is including those potential effects on historic properties in its Section 106 review in this case; and	having been applied for by Conrail and the LLCs, it is more than “reasonably” foreseeable that abandonment authorization makes the ROW vulnerable to demolition and redevelopment, thus adversely affecting other historic resources as well.
15	<b>WHEREAS</b> , the only alternative to abandonment in this Undertaking is the No-Action Alternative, which would occur if the Board were to deny abandonment authority; and	If the No-Action Alternative is the only alternative to abandonment, and No Action preserves the historic resource and prevents damage to other resources in the APE, why is STB not recommending it? If STB OEA does not change course and explore true mitigation for inclusion in the MOA, then No Action is preferred by the Coalition until a binding settlement of litigation is reached. NO ACTION would not hurt any of the parties who have agreed on redevelopment plans that mitigate adverse effects. These parties should therefore not object to continued jurisdiction until litigation settlement details are worked out.
16	<b>WHEREAS</b> , OEA has determined that the Undertaking could have an adverse effect on the Pennsylvania Railroad (New York to Philadelphia) Historic District; the New Jersey Railroad Bergen Cut Historic District; the Pennsylvania Railroad Harsimus Branch Embankment; St. Anthony’s Polish Roman Catholic Church and School Complex; St. Anthony of Padua Roman Catholic Church; Hamilton Park Historic District and Extension; the Harsimus Cove Historic District; the Albaniel Dye & Chemical Co./Thomas J. Stewart Co. Building; the Holy Rosary Roman Catholic Church Complex; the Immigrant Roman Catholic Church Historic District; the Pennsylvania Railroad Harsimus Right-of-Way Historic District; and the Italian Village Historic District, which are listed in, or eligible for listing in, the National Register, and has consulted with the SHPO pursuant to 36 C.F.R. Part 800, the regulations implementing Section 106 (historic properties shown on mapping in <b>Appendix B</b> ); and	If this is what OEA is determining, and sees no way to avoid or minimize adverse effects stemming from the Undertaking, why is OEA doing an MOA and not just recommending to the Board that it not authorize abandonment?  If the OEA position is that the Board has to authorize abandonment, and that it can’t avoid adverse effects, why is a Section 106 review even being performed? Why are the consulting parties consulting? Section 106 becomes an absurdist bureaucratic exercise, an extreme form of “check off the box.”
17	<b>WHEREAS</b> , this MOA was developed to address adverse effects to historic properties located within the APE for the Undertaking; and	The current MOA does nothing to address adverse effects in its current state. Please list the adverse effects that

		<p>the MOA is addressing. These cannot be simply the loss of jurisdiction, an abstraction, but what the loss of jurisdiction means in the real world, e.g.:</p> <p>44. “(i) Physical destruction of or damage to all or part of the property;</p> <p>(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (<a href="#">36 CFR part 68</a>) and applicable guidelines;</p> <p>(iii) Removal of the property from its historic location;</p> <p>(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;</p> <p>(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;</p> <p>(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and</p> <p>vii. Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance”<sup>30</sup></p>
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<sup>30</sup> 800.5 (2)

		<p>The noise, trucks, rattling of foundations of historic buildings, intrusion of new development into contiguous Historic Districts, etc. should be analyzed as part of the Section 106 process with the help of consulting parties <i>before</i> developing a MOA. Then Step 4 should resolve adverse effects, leading to a true MOA.</p>
18	<p><b>WHEREAS</b>, pursuant to 36 C.F.R. § 800.6, OEA has consulted with the SHPO and the other consulting parties regarding ways to avoid, minimize, or mitigate potential effects to the historic properties that may result from an abandonment; and</p>	<p>The Embankment Coalition maintains that at least some consulting parties have not been adequately consulted on ways to avoid, minimize, or mitigate potential effects. We gave examples above.</p>
19	<p><b>WHEREAS</b>, OEA has consulted with Conrail, pursuant to 36 C.F.R. § 800.6(c)(2)(iii) and has invited them to be an invited signatory in this MOA; and</p>	<p>Has STB consulted with Conrail and is the so-called mitigation in this draft the only “mitigation” that Conrail would agree to? If so, that fact should be included in the MOA.</p> <p>The MOA does not address property that Conrail has not yet sold. Presumably STB would agree this remains under agency control to mitigate its breakup as a historic transportation corridor. The Embankment Coalition believes mitigating abandonment with a condition preserving the western part of the Branch would benefit Conrail as well as the City, because it would presumably provide access to property Conrail may want to develop. This possibility should at least be explored as part of the Section 106 process.</p>
20	<p><b>WHEREAS</b>, OEA has consulted with the other Section 106 consulting parties regarding the effects of the Undertaking on historic properties and has invited them to sign this MOA as concurring parties pursuant to 36 C.F.R. § 800.6(c)(3); and</p>	<p>We do not believe many of the other consulting parties have been consulted on effects but that we have all been basically viewed as passive recipients of OEA formulations. Any comments City et al. has made to STB that suggest ways to avoid or minimize adverse effects have been ignored or rejected. Most recently the LLCs and their assign notified STB it had a voluntary mitigation plan. The City has also passed one</p>

		<p>Redevelopment Plan that would preserve 7 of 8 Embankment parcels; this Plan is contingent on settlement. These plans should at least be explored as mitigation that could go into a MOA.</p>
21	<p><b>WHEREAS</b>, in accordance with 36 C.F.R. § 800.6(a)(1), OEA notified the ACHP of its adverse effect determination with specified documentation, and the ACHP has chosen to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii);</p>	<p>Isn't ACHP participating because this is a controversial case? If so, please state that.</p>
22	<p><b>WHEREAS</b>, certain parties, including Conrail, other owners of the Harsimus Branch right-of-way, Jersey City, the Embankment Preservation Coalition, and the Rails-to-Trails Conservancy, have discussed potential plans for future reuse or redevelopment of the Harsimus Branch that could take place following an abandonment, including a possible settlement agreement. These future development plans could potentially include partial preservation of the Pennsylvania Railroad Harsimus Right-of-Way Historic District and the Pennsylvania Railroad Harsimus Branch Embankment but, if they occur, they would take place outside of the jurisdiction of the Board and outside the scope of this MOA. This MOA presents measures that the Board can ensure are carried out to avoid, minimize or mitigate the adverse effects of this Undertaking regardless of future reuse or redevelopment of the Harsimus Branch; and</p>	<p>The language “have discussed” implies that these plans have been thoroughly explored and dissected and evaluated as part of the Section 106 review with an eye to inclusion as possible mitigation in the MOA. We encourage STB OEA to take an active role now, while STB has jurisdiction, to help make those plans, currently embodied in two Redevelopment Plans contingent on settlement of litigation, binding. Isn't it the goal of NHPA and this process to do everything we can to preserve our national historic resources?</p> <p>A Redevelopment Plan has already been approved by City Council; the other one is to be considered shortly. Both will provide true mitigation, but they are contingent on settlement.</p> <p>If the MOA included such mitigation, the STB wouldn't necessarily have to be responsible for ensuring the mitigation is carried out post-consummation – this could be left to other parties. We ask more process-knowledgeable consulting parties like SHPO if there are other ways to ensure compliance with mitigation measures, like a Programmatic Agreement, that could be employed here, and that would relieve STB of post-consummation responsibilities.</p> <p>The Redevelopment Plans referred to above would govern the part of the Branch sold to the LLCs.</p>

		<p>Conrail could also voluntarily mitigate adverse effects by dedicating the western part of the Branch it still owns to the City for historically compatible uses. Conrail appears to us to have no other use for this ROW; or, if Conrail has developable property around it, such a dedication could enhance access to such property.</p> <p>If the Section 106 process were to be used to explore true mitigation, as we believe it should be, the items above should be discussed.</p> <p>STB should explore other options as well.</p> <p>Re: "This MOA presents measures that the Board can ensure are carried out to avoid, minimize or mitigate the adverse effects of this Undertaking..." Documentation and signage are not mitigation. Even if they were considered mitigation, how can STB impose this requirement when it says it can't impose any others that would represent true mitigation?</p>
23	<p><b>WHEREAS</b>, 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.</p>	<p>Why is the Board's ability "generally" limited? Who or what generally limits it?</p> <p>How did documentation become the only thing STB can require?</p> <p>Why doesn't this MOA recommend that the Board not end its jurisdiction until there is a binding agreement to save historic resources?</p> <p>Why is the OEA not exploring voluntary mitigation? As notified by the LLCs? As reflected in Redevelopment Plans?</p>
24	<p><b>WHEREAS</b>, the Board paused the Section 106 process as per its decision on May 19, 2021 in order to evaluate whether there was a Section 110(k) of the NHPA violation, and on August 22, 2022 issued a decision finding that there was no violation of Section 110(k); and</p>	<p>Note: This Whereas implies the decision is final. But City et al. reserved the right to challenge this decision when timely, as we noted in comments above. This reservation should be noted in the MOA.</p>

26	<b>WHEREAS</b> , following the Board’s decision that there was no Section 110(k) violation, OEA resumed the Section 106 process and is utilizing this MOA to resolve adverse effects to historic properties	See note above. What will happen if City wins its challenge?  The MOA is not being used to “resolve” adverse effects but to paper over them.
26	<b>NOW, THEREFORE</b> , the Board (through OEA), the SHPO, and the ACHP agree that the Undertaking shall be implemented in accordance with the following stipulations to take into account the effects of the Undertaking on historic properties.	Has OEA itself been delegated with the authority to abandon the Harsimus Branch? Or just delegated with the responsibility to complete a MOA no matter what the content is? Can SHPO and ACHP agree to this abandonment considering that the only so-called mitigation is documentation and signage? We urge them not to sign such a MOA.
27	<b>STIPULATIONS</b>	Please see comments and questions below. It doesn’t make sense to review this section thoroughly until we know if SHPO and ACHP are going along with it and are accepting their responsibilities as described.  <b>Note: Our organization does not object to documentation accompanying mitigation, but we do object to it as stand-alone so-called mitigation.</b>

**Preliminary Comments/Questions on Stipulations**

It is an absurdity and certainly contrary to the aims of NHPA to proceed to memorializing historic resources with documentation when options exist for avoiding, minimizing, and mitigating adverse effects to them.

This dispiriting section should be reviewed only after further consultation on avoiding adverse effects.

If STB’s position is that consideration of adverse effects is terminated (we maintain it has scarcely begun), then this section is only worth reviewing if SHPO and/or ACHP agree to be signatories to the current MOA, which, unless it is vastly improved with true mitigation, we urge them not to be.

At this time we have minimal reactions to specific provisions, below. We are not opposed to documentation per se, but it should accompany true mitigation measures not substitute for them.

1. Re: I. Mitigation: we do not agree that documentation and signage are mitigation.

Re: “Conrail shall retain a historic preservation/cultural resource contractor(s) of its choice...”  
This is a conflict of interest. Conrail, with its hostility to historic preservation that we referred to above, and which prematurely sold off parts of a regulated rail line before obtaining abandonment authorization, thereby evading Section 106, is not the right party to retain a consultant or oversee that consultant’s work. It should not be charged with oversight of documentation, signage, and

educational panels, as these can easily become public relations items rather than objective historical documentation.

Re:

A. Recordation

- i. IS SHPO willing to take on the role prescribed?
- ii. Re: "OEA, ACHP, the SHPO, and the Section 106 consulting parties shall have 30 days to review and comment on the draft document." At least for the all-volunteer organizations with no paid staff, 30 days is an unreasonably short period to review anything of length or substance. Such a short period implies that this is a check-off-the-box step in a bureaucratic process, rather than a request for meaningful review. (**Note:** several of the parties who we thought were already recognized consulting parties were inadvertently dropped from email lists asking them to comment on this draft MOA. Once this is corrected, they will need more time to comment on this entire document.)
- iii. No comment, except to note that Conrail should have long ago provided basic maps and documentation in this case.
- iv. Re: distribution lists. The Embankment Coalition's mission is to preserve the existing Harsimus Branch & Embankment, not to create distribution lists for documentation memorializing the site. If documentation accompanies true mitigation, then the Coalition is happy to assist in creating such lists, as documentation will then be celebratory and contribute to the understanding of the site.

B. Re: Additional Documentation and Signage

- i. If signage is intended for Jersey City, it should be noted there are ordinances controlling signage. The City should be specifically asked by STB OEA what the restrictions are.
- ii. Signage is no substitute for the historic site itself. It can also be a visual eyesore.
- iii. The presence of signage whose narrative is written or controlled by parties instrumental in resource destruction would be a continuing irritant to the thousands of residents in Jersey City who have supported historic preservation for the Harsimus Branch.
- iv. How will appropriate places for educational panels be identified? We can think of no appropriate place. We can't imagine what "education" they would provide. Is SHPO willing and able to store panels? Most important, how can STB "control" post-abandonment downstream placement and "future maintenance" of signage by subsequent owners when it inconsistently claims it has no control over private property and cannot look at post-abandonment mitigation?

Re B2: This section has insufficient detail on which to comment, besides noting that general comments above apply to web pages as well. And that a review period of 30 days is too short a period for volunteer, unstaffed consulting parties to review anything substantively.

2. Re Review Process of Mitigation Items. We repeat: 30 days is too short for substantive reviews of anything by all-volunteer consulting parties such as the Embankment Coalition.
3. Restriction Related to Signage Upon Sale of the Right of Way. Please explain this paragraph: “Conrail agrees that any agreement of sale between Conrail and any immediately subsequent purchaser of the right-of-way underlying the Harsimus Branch shall contain a provision requiring that such purchaser agree to leave the signage Conrail erects (if any, and in compliance with the requirements and stipulations of this MOA) within the right-of-way.”

What is a right of way underlying the Harsimus Branch? Why does it make sense for signage to be in a ROW? How can STB require this of Conrail, but nothing more meaningful?

4. Duration. Request to STB OEA: Please explain why the MOA expires and why and how it might be changed. It appears to be very weak. What interests do consulting parties have in any changes if they do not choose to be signatories?
5. Final comment for this iteration of the MOA: the MOA document provides no mitigation and doesn’t even enforce its weak provisions for documentation. Inconsistently with claims made elsewhere that STB can do nothing, the document seeks to control signage on property subsequently sold.

It is a very dispiriting document and we ask – we hope more than rhetorically - if this is the best that STB, the applicant, and consulting parties can do to comply with the NHPA and avoid adverse effects to the Harsimus Branch and all the historic properties made vulnerable by an STB abandonment decision? We believe that there are true mitigation alternatives that would result in an MOA that could satisfy all consulting parties, if given the attention these deserve in the Section 106 process.

We ask everyone involved to look again at how STB itself and consulting parties can truly resolve adverse effects to the Harsimus Branch.

s/Maureen Crowley, Coordinator, for Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition