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Office of Environmental Analysis
Surface Transportation Board
Attn: Joshua Wayland
295 E Street SW
Washington, DC 20472

Re: Comments on Cultural Resources Identification Report
Conrail Harsimus Branch Embankment
STB Docket No. AB 167 (Sub-No. 1189X)

Dear Mr. Wayland:

My name is Steven L. Hyman. The following comments were prepared by my assistant, as I am not able to prepare them for myself.

My wife, Victoria Hyman is the owner of the limited liability companies ("LLCs") who are consulting parties in the exempt abandonment petition pending before the Surface Transportation Board ("STB"). While I am the former manager of the LLCs, these comments are being submitted solely on behalf of myself in my personal capacity, and are not being submitted by or on behalf of the LLCs.

This letter contains comments in response to the Cultural Resources Identification Report, Conrail Harsimus Branch Abandonment, STB Docket Nos. AB 167 (Sub-No. 1189X), AB 55 (Sub-No. 686X), and AB 290 (Sub-No. 306X), City of Jersey City, Hudson County, New Jersey dated May 5, 2017 and prepared by the Office of Environmental Analysis ("OEA Report").

I would like to express that I was very pleased with the thoroughness and thoughtfulness of the Report, however I find that there are significant issues that must be addressed by the STB. Since the LLCS are already consulting parties in the Section 106 process, the STB must finalize the Section 106 process by negotiating an MOA between the consulting parties

that is limited **only** to the scope of the right-of-way at issue in a manner that is consistent with the STB's regulations.

There are three issues involving the Report that I find troubling. They are:

1. The Report incorrectly assumes that all of the LLC's development plans include demolition, which is demonstrably false.

2. The 0.5 mile buffer(second APE) is designed to mitigate "adverse effects" that don't meet the criteria for Adverse Effects.

3. The recommendations that the Embankment be included in the neighboring Hamilton Park Historic District and/or Harsimus Cove Historic District do not meet the criteria for inclusion in a Historic District.

I. Hypothetical LLC future land use does not, de facto, include Embankment demolition, yet the OEA Report assumes demolition.

The Report states that, "Due to unusual circumstances in this case, OEA has expanded the scope of its Section 106 analysis to include a limited consideration of the two general scenarios of possible post-abandonment land use (Page 1-5, OEA Report)."

I do not understand the logic of this statement. In addition, the conclusions reached are in error.

"Scenario 2: Development by the LLCs" (Page 1-8, OEA Report) states that the OEA considered development applications presented to Jersey City by the LLCs. Coincidentally, the cherry-picked development applications the City provided the OEA all include demolition of the Embankment walls. This led the OEA to assume that all of the LLCs' plans include demolition. They do not. Over the years the LLCs have submitted *many* plans to the City, several of which **do not** include demolition. Arguments for, or against, the Harsimus Exception's hypothetical nature aside,

the OEA Report commences with a false assumption based on incomplete background information.

If the LLC development scenario ends up being the final post-abandonment outcome, demolition of the Embankment walls is not a certainty. In fact, for the last several years, the only plans considered by the LLCs include preservation of the majority of the Embankment walls and dedication of blocks for open space and trails.

When making its final decision, the STB **must** take into account that both the Jersey City and LLC post-abandonment outcomes can include Embankment wall preservation.

II. The 0.5 mile buffer (second APE) was designed to mitigate effects that don't meet the criteria for Adverse Effects.

The STB's website states that the APE **is limited to the right-of-way** and the right-of-way only. It also states that secondary considerations for historic properties located outside the actual right-of-way for the proposed construction may be appropriate:

> For railroad abandonments, **the APE is limited to the actual right-of-way (ROW) of the line**. For construction cases, however, the APE should be determined in consultation with OEA and the appropriate SHPO/THPO. More than one APE may be appropriate depending on the type of resources located along the line and the types of planned activities associated with the construction project. For example, a rail construction project can have **direct physical impacts to archaeological sites located within the right-of-way of the proposed action (first APE) and vibration, aesthetic and visual impacts to historic buildings, structures and other historic properties located outside the actual right of way for the proposed construction** (second APE). (See Question 35: https://www.stb.gov/stb/environment/HistoricPreservation/Section1.htm)

If we assume, for the sake of argument, that the Harsimus Exception is logical, then we can assume the OEA's recommendation to consider a hypothetical "110-foot (11-story) apartment building, as permitted by local zoning… requires a larger APE (1-12, OEA Report)" can be assumed to be valid. I should point out that the application for an 11-story apartment building requires variances and has not proceeded forward due to the legal position taken by the City.

If a larger APE is valid, then the STB must look at Adverse Effects from "aesthetic and visual impacts to historic buildings… outside the actual right-of-way." In an attempt to accomplish this, sophisticated computer models were made to determine which historic resources would be impacted by a hypothetical "110-foot (11-story) apartment building". As a result, a 0.5 mile buffer was established (Page 1-14, OEA Report) to take into account all possible historic resources affected by this hypothetical building.

The implication is that a hypothetical 11-story apartment building would be visible from historic resources outside of the right-of-way (first APE). I cannot dispute that it would, hypothetically. I am confident the computer models are accurate. What *is* disputable is the notion that the visibility of a hypothetical 11-story apartment building creates Adverse Effects requiring extensive review and mitigation measures. **It does not.** In addition, consideration of future development is not within the jurisdiction of the STB.

First, the Embankment exists outside of the Historic Districts that will allegedly be visually impacted. Any argument that a hypothetical 11-story apartment building would change the character of the neighboring historic district is void because the building is not currently part of either district in the first place. This argument also ignores the high-rise development proposed on the Forest City Ratner tract that contained the Harsimus rail right-of-way that extended to the waterfront.

To illustrate my point: Gated communities have strict rules about what their residents can and cannot do to their properties' aesthetics. They **do not** have the authority to tell a neighboring home-owner what he/she can do with his/her property if he/she resides outside of the confines of the gated

community. A hypothetical 11-story apartment building cannot be barred from visually/aesthetically affecting a Historic District it is not a part of. This is not, and has never been, part of the STB's Section 106 review and it should not now be part of that review now.

Second, and most importantly, the criteria for Adverse Effects are very clear, and the visibility of a hypothetical 11-story apartment building from a nearby secondary historic resource **absolutely does not** constitute an Adverse Effect.

Thankfully, 36 CFR 800.5 is very clear on the definition of an Adverse Effect. It states:

> "(1) *Criteria of adverse effect.* **An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.** Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register."

There is no set of circumstances wherein being able to view a distant 11-story apartment building diminishes the integrity of a historic resource's location, design, setting, material, workmanship, feeling, *or* association.

Imagine now, that you are visiting a historic building (such as one of the many beautiful historic churches or the historic firehouse), or you are having a nice picnic at Hamilton Park in the dead of winter when it estimated this hypothetical 11-story apartment building may or may not be visible.

Let us now evaluate, criterion by criterion, the possible diminishment of the integrity of the historic resource you are imagining:

Location - The visibility of a distant hypothetical 11-story apartment building *does not* affect the *location* of the historic resource.

Design - The visibility of a distant hypothetical 11-story apartment building *does not* affect the *design* of the historic resource.

Setting - The visibility of a distant hypothetical 11-story apartment building *does not* affect the *setting* of the historic resource.

Material - The visibility of a distant hypothetical 11-story apartment building *does not* affect the *material* of the historic resource.

Workmanship - The visibility of a distant hypothetical 11-story apartment building *does not* affect the *workmanship* of the historic resource.

Feeling – If we were evaluating a historic resource in a desolate valley in Montana, an 11-story apartment building in the distance may very well change the feeling of the historic resource. However, all logical persons would conclude that in the urban Jersey City environment where there already exist numerous buildings of varying heights and widths in all directions, one new apartment building is not sufficient to change the "mood" of the historic resource. Therefore, the visibility of a distant hypothetical 11-story apartment building *does not* affect the *feeling* of the historic resource.

Association – As previously discussed, at present, the Embankment exists outside the confines of both the neighboring Hamilton Park and Harsimus Cove Historic Districts. It is a separate entity. The visibility of a distant hypothetical 11-story apartment building *does not* affect the *association* of the historic resource.

The 0.5 mile buffer was designed to mitigate an "adverse effect" that does not meet the criteria for an Adverse Effect. Therefore, not only must the STB consider that LLC development doesn't, de facto, include demolition of the Embankment walls, it must also refuse to consider any and all effects within the

proposed secondary APE (those resources within the 0.5 mile buffer). The only legitimate Section 106 concerns lie with the right-of-way and with the Embankment walls themselves.

III. The Embankment does not meet the criteria for inclusion in the neighboring Hamilton Park or Harsimus Cove Historic Districts.

The most troubling assertion of the OEA Report comes from pages 5-12 and 5-14. The Report recommends that the Embankment should be added to the Hamilton Park Historic District and/or to the Harsimus Cove Historic District. It states:

> "OEA has reexamined the role of the nearby Embankment to this history. The Embankment contributes to the Hamilton Park Historic District and the boundaries of the historic district should be expanded to fully encompass this historic resource." (Page 5-12, OEA Report)

and

> "OEA and RGA recommend that, in light of the Embankment's impact on the historic community of Harsimus Cove, the boundaries of the Historic District should be expanded to encompass the full limits of the extant Embankment." (Page 5-14, OEA Report)

These recommendations would be comical were their implications not so grave. The Report spends a significant amount of time describing the Embankment as "blighting".

There are stories of local residents trying to fight against its construction. There are past reports of smoke choking the residents. There are stories of cattle cars parked in the middle of the night reeking of manure and residents being unable to sleep because of infinite mooing. Property values around the Embankment plummeted.

The NHPA was created in the aftermath of our nation losing the famed Pennsylvania Station in New York City. It is apparently now being perverted to argue for the significance of the early 20th century railroad industry ruining property values

and providing a wasteland where there was "opportunity for immigrant communities to move into new neighborhoods. (Page 3-45, OEA Report)"

I'm sure the opportunity thrilled them.

If the absurdity of a past "blight" on the community being hailed as a bastion of opportunity for peoples too poor to live anywhere better is lost, let us then look to the U.S. Code of Federal Regulations. Here we see that adding the Embankment to the Hamilton Park Historic District is a statutory impossibility.

Hamilton Park Historic District:

According to 36 CFR 67.5 "Standard for evaluating significance within registered historic districts":

> "(1) A building contributing to the historic significance of a district is one which by location, design, setting, materials, feeling and association adds to the district's sense of time and place and historical development."

The Embankment does not, and **cannot**, be added to the Hamilton Park Historic District's sense of time and place and historical development. The Hamilton Park Historic District's "period of significance extends from circa 1835 to circa 1887"(the 19th century) (Page 5-12, OEA Report). The Embankment was "constructed in 1901-1917" (the 20th century) (Page 3-55, OEA Report). Even if we assume, for the sake of argument, that the Embankment is significant because it afforded the impoverished a place to "thrive", it did so in a different century altogether.

The Hamilton Park Historic District's time period and the Embankment's time period are incongruous. **There is no basis for the inclusion of the Embankment in the Hamilton Park Historic District.**

Harsimus Cove Historic District:

The Report states:

> "OEA concludes that the Embankment should be included within the Harsimus Cove Historic District because it

> (1) **physically reinforced a spatial boundary** between the commercial and social centers of the Hamilton Park and Harsimus Cove neighborhoods and (2) contributed to the social history of the adjacent neighborhoods by **generating environmental nuisances** that resulted in both the depreciation of real estate values and creation of opportunities for community growth for immigrant populations in the late-nineteenth century."
> (Page 5-14, OEA Report)

36 CFR 67.5 "Standard for evaluating significance within registered historic districts" mandates that we must consider if the Embankments location, design, setting, materials, feeling, and association contribute to the district's sense of time and place and historical development.

According to the OEA, the Embankment is and was nothing more than a "spatial boundary" and an "environmental nuisance". At this very moment in our nation's history we are witnessing the active removal of Confederate monuments. The NHPA's intent was to preserve the best of our nation's history, not to preserve blight and nuisance.

The historical significance of the Harsimus Cove Historic District was its architectural style. The Embankment's proposed inclusion is for a completely separate reason. The supposition that the Embankment "played an important role in the social history of [the Harsimus Cove] district" (Page 5-14, OEA Report) lacks the proper criteria for inclusion.

The OEA Report recommends extending the boundary of the Harsimus Cove Historic District to include a "spatial boundary" that caused negative economic effects and created personal hardships for the people that had to endure it. **There is no basis for the inclusion of the Embankment in the Harsimus Cove Historic District.**

When both the Hamilton Park and Harsimus Cove Historic Districts were nominated as eligible, the Embankment property was considered. At the time, the Embankment was left out because it did not contribute to the criteria that made these districts eligible. This remains true today. In addition, the time periods for the Hamilton Park Historic District and the Embankment are incongruous.

The discussion of what should and should not be designated historic is completely and totally outside of the jurisdiction of the STB. These recommendations must be disregarded.

CONCLUSIONS

1. The STB must fully consider and acknowledge that potential LLC development plans include plans to salvage the Embankment walls.

2. The 0.5 mile buffer was created to analyze potential "adverse effects" that do not meet the criteria for Adverse Effects as defined by 36 CFR 800.5 and must be disregarded.

3. The Embankment does not meet the criteria for inclusion in the neighboring Historic Districts according to the standards set forth by 36 CFR 67.5 and must also be disregarded.

As stated at the beginning of my comments, the issues here are both significant and troubling.

In their efforts to pursue the Harsimus Exception, the OEA has been operating under a false-pretense. LLC development plans **do not**, de facto, include demolition of the Embankment walls.

It seems highly suspicious, and intentionally misleading, that the only LLC development applications Jersey City provided to the OEA for analysis include demolition. The City is fully aware that plans to preserve the walls exist and are numerous.

The majority of the Report is dedicated to analyzing how a hypothetical 11-story apartment building could visually/aesthetically affect historic resources within a 0.5 mile buffer. These effects are minimal at *worst*, and do not meet the criteria for Adverse Effects. Therefore, they do not warrant STB consideration for mitigation.

The most troubling part of the Report is the recommendation that the Embankment be added to the Hamilton Park Historic District and/or the Harsimus Cove Historic District. If these recommendations are given any credence it could trigger more

historical considerations, more lengthy reports, and more lengthy public comment periods. This would only serve to further delay an Exempt Abandonment process that has been delayed far too long already.

The Embankment does not meet the criteria for inclusion in the Hamilton Park Historic District. It **cannot** add to the "sense of time and place and historical development" of the Hamilton Park Historic District. It was built a century after the Hamilton Park Historic District gained its historical significance.

The Embankment **does not** meet the criteria for inclusion in the Harsimus Cove Historic District. "Playing a role in the social history" is a justification wholly separate from the architectural significance of the District.

What should and should not be considered eligible for inclusion in a historic district is not under the jurisdiction of the STB.

Finally, the OEA Report contradicts itself. The Report characterizes the condition of the Embankment as "poor" with a "low" remaining historic fabric. The Report states:

> "The absence of so much of the physical integrity of the branch also represents a significant loss in its integrity of workmanship. Without its connecting bridges or large stretches of iron viaduct, the Branch's integrity of design is largely eroded. The additional absence of numerous iron support bents and two bridge abutments (Brunswick Street and Marin Boulevard) breaks up the linear continuity of the surviving substructures and diminishes the sense of a distinguishable railroad corridor. Together with the absence of the original and all-important rail yard and terminal facilities, as well as the overhead electrified catenary system, the resource no longer retains the character and setting of a major transportation operation. **With significant losses in its original design, materials, workmanship, and setting, the PRR Harsimus Branch no longer conveys the feeling of a major railroad operation or its associations with the contributions of the PRR in the areas of Commerce, Community Planning and Development, Engineering, Politics and Government, and Transportation**

> **under Criteria A or C. For its lack of physical integrity, therefore, the PRR Harsimus Branch Right-of-Way is recommended not eligible individually for listing in the National Register…"**
> (Page 460, OEA Report)

The criteria for an Abandonment Exception are clear. As stated in Friends of the Atglen-Susquehanna Trail v. Surface Transportation Board, 252 F. 3rd 246 (3rd Cir. 2001), The Appeals Court states:

> "The abandonment of a rail line or corridor will qualify as an exempt transaction if the carrier certifies that no local traffic has moved over the line for at least two years, that any traffic on the line can be rerouted over other lines, and that no formal complaints, regarding cessation of service on the line, are pending or have been decided within that two-year period. See 49 CFR 1152.50(b)."

This right-of-way meets these criteria and is clearly eligible for an exemption. The next and final step is for the STB to negotiate an MOA with the consulting parties to mitigate potential Adverse Effects. I implore the STB to limit the scope of the MOA to what is appropriate under the law.

The scope of the MOA must be limited to the right-of-way and the Embankment walls alone. Consideration of historic resources outside of this APE is without merit. The recommendation to include the Embankment in the Hamilton Park Historic District and/or the Harsimus Cove Historic District is also without merit. Both must be wholly disregarded.

FINAL THOUGHTS

The NHPA is a fantastic piece of legislation that was created in the wake of the loss of New York City's famed Pennsylvania Station. The loss of that station is a travesty. The NHPA righteously exists to prevent the United States of America from losing its history and its grandeur.

(Pennsylvania Station)

This is what we are all fighting over:

(Embankment)

Thank you for the opportunity to present my comments. I hope the STB takes them into full consideration.

Very truly yours,

Steven L. Hyman

SLH:jf
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