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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Docket No. EP 702**

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**NATIONAL TRAILS SYSTEM ACT AND RAILROAD RIGHTS-OF-WAY**

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**COMMENTS OF THE MARYLAND TRANSIT ADMINISTRATION**

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Dated: April 12, 2011

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**COMMENTS OF MARYLAND TRANSIT ADMINISTRATION**

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The Maryland Transit Administration, a modal administration of the Maryland Department of Transportation acting on behalf of the State of Maryland (“MTA”), submits these Comments in response to the Board’s Notice of Proposed Rulemaking issued in this proceeding on February 16, 2011. 76 Fed. Reg. 8992; *National Trails System Act and Railroad Rights of Way*, STB Docket No. EP 702 (Service Date Feb. 16, 2011) (“EP 702 Notice”). Specifically, MTA responds to the Board’s request for comments on state sovereign immunity and other state law issues that have arisen in connection with the Board’s application of the National Trails System Act, codified at 16 U.S.C. § 1247(d) (“Trails Act”).

The Board has invited comments on “what, if any, change in our Trails Act rules could accommodate . . . concerns [regarding sovereign immunity], given the plain language of 16 U.S.C. § 1247(d).” The plain language of Section 1247(d) clearly encourages “a State, political subdivision, or qualified private organization” to pursue interim trail use for the purposes of preserving railroad rights-of-way for the possible future reactivation of rail operations. 16 U.S.C. § 1247(d). In their current form and as the Board proposes to revise them, the Board’s railbanking rules at 49 C.F.R. § 1152.29 impose barriers to states and other public entities wishing to serve as interim trail sponsors because the rules do not adequately address inherent limitations on such entities arising out of state law. On its face, the statement of willingness to

assume financial responsibility at 49 C.F.R. § 1152.29(a)(3) (“SWAFR”), which all prospective interim trail sponsors must submit to the Board, can be read to require a blanket waiver of sovereign immunity that would bind states to promises they are unable to make. Furthermore, the current rules do not address the reality that state laws often create restrictions on making commitments to future expenditures, a second inherent limitation on public entities. It is clear that Congress did not intend the Trails Act to alter the inherent attributes of state sovereignty, but intended specifically to encourage state entities to participate in the preservation of railroad rights-of-way.

In order to facilitate the creation of interim trails to preserve railroad rights-of-way, the Board’s proposed revisions to 49 C.F.R. § 1152.29 should continue to require prospective interim trail sponsors to fully obligate themselves to assume all obligations specified in the Trails Act, but must recognize the limitations inherent in the available mechanisms for satisfying potential liability or indemnification at the time such claims may arise. MTA’s proposed revision to the SWAFR expressly acknowledges limitations on state entities relating to sovereign immunity and restrictions on obligations in the absence of appropriation by the legislature. The proposed revisions will eliminate ambiguity and encourage public entities to become interim trail sponsors.

### **DISCUSSION**

The Trails Act provides:

**If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use.”**

16 U.S.C. § 1247(d).

Before an interim trail sponsor can enter into a trail use agreement with a railroad, the Board's Trails Act regulations require the interim trail use applicant to sign and submit its SWAFR to the Board. The SWAFR must provide a brief description of the parties and rail line involved in the transaction and must acknowledge the sponsor's obligation (a) to fulfill the management obligations for the trail and (b) to permit the "possible future reconstruction and reactivation of the right of way for rail service". 49 C.F.R. §§ 1152.29(a)(2), (3). The Board's regulations require the SWAFR to be submitted in the form set forth at 49 C.F.R.

§ 1152.29(a)(3). The Board proposes in this rulemaking to revise the relevant portion of the SWAFR to read as follows:

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by \_\_\_\_\_ [Railroad] and operated by \_\_\_\_\_ [Railroad], \_\_\_\_\_ [Interim Trail Sponsor] is willing to assume full responsibility for: (1) managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right-of-way. . . .

76 Fed. Reg. 8994; EP 702 Notice at 12 - App. A.

#### **A. Inherent State Law Limitations**

Although the SWAFR makes allowance for circumstances in which the interim trail sponsor may be entitled to sovereign immunity, the Board's proposed rule does not acknowledge that a public entity may not be able to fully satisfy a claim of liability or indemnity at the time such claim arises. A state agency's ability to conform to the representations it makes in a SWAFR will be subject to applicable state law limitations. At least one state Supreme Court has held that, without legislative authority, a state cannot waive its sovereign immunity through indemnification of a third party for liability arising out of a public project on that third party's property. *CSX Transportation, Inc. v. City of Garden City, Georgia*, 588 S.E.2d 688, 690 (2003)

(Ga. 2003). Furthermore, it is a feature of state law that a state cannot obligate itself to unlimited future liability but may obligate funds only through an appropriation by the legislature. *See, e.g.,* Code of Maryland Administrative Regulations § 21.07.01.10 (requiring all contracts for procurement by state agencies to include a provision stating that multi-year contracts are subject to appropriation).

At various times, public entities wishing to serve as interim trail sponsors have submitted SWAFRs containing additional language to clarify that the sponsor will assume responsibility to the fullest extent state sovereign immunity or limitations on future appropriations will allow. *See, e.g., Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, Finance Docket No. 32609, slip op. at 3-4 (Service Date Feb. 24, 2011) (SWAFR submitted by the Maryland Department of Natural Resources amended to make reference to the Maryland Tort Claims Act and appropriations by the Maryland General Assembly and SWAFR submitted by the Delaware Department of Natural Resources and Environmental Control subject to appropriation of funds by the Delaware General Assembly); SWAFR of Illinois Department of Natural Resources, *Union Pac. R.R. Co. - Abandonment and Discontinuance of the Elm Industrial Lead in Fulton and Peoria Counties, IL*, STB Docket No. AB-33 (Sub-No. 262X) (Filed Jul. 21, 2008) (Illinois Department of Natural Resources' SWAFR provided that "the Illinois Department of Natural Resources should be immune from liability and in which case will only indemnify the railroad for potential liability *under current statutory authority.*" (emphasis added); SWAFR of Nebraska Game and Parks Comm'n, *Nebkota Ry., Inc. – Abandonment Exemption – In Dawes and Sheridan Counties, NE*, STB Docket No. AB-988X (Filed Aug. 28, 2007) (SWAFR of Nebraska Game and Parks Comm'n represented that

agency was “willing, *to the extent permitted by law*, to assume full responsibility” pursuant to the Trails Act in support of trail use request) (emphasis added).

As the Board has acknowledged, it has on some occasions granted interim trail use authority on the basis of SWAFRs qualified to reflect limitations imposed by state law but has denied railbanking authority in other cases involving materially similar qualifications to SWAFRs. *Chesapeake Railroad Company*, STB Finance Docket No. 32609, slip op. at 9-10. These inconsistent results indicate that the Board has clearly struggled with how to address the inherent limitations of state law on public entity interim trail sponsors. The Board’s rules must acknowledge these limitations in order to eliminate ambiguity and encourage states and other public entities to participate in railbanking.

To address these issues, MTA requests that the Board’s proposed SWAFR be revised to incorporate the text shown in bold typeface as follows:

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by \_\_\_\_\_ [Railroad] and operated by \_\_\_\_\_ [Railroad], \_\_\_\_\_ [Interim Trail Sponsor] is willing to assume full responsibility for: (1) managing the right-of-way, (2) **to the fullest extent allowed under applicable state law**, any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right-of-way. . . .

The revision proposed above continues to explicitly require the interim trail sponsor to assume “full responsibility” for fulfilling the obligations of the Trails Act, and also recognizes that a public entity may not bind a state legislature to an unlimited future appropriation of funds in connection with the assumption of Trails Act obligations. MTA’s proposed revision therefore permits the SWAFR to serve as the interim trail sponsor’s representation to the Board that the implementation of trail use will comport with both federal and state law, as discussed in detail below.

**B. Railbanking Agreements are Private, Voluntary Contracts**

Whether or not a right-of-way becomes subject to interim trail use hinges on the successful negotiation of a trail use agreement. The Board's acceptance of a SWAFR is simply the predicate to private negotiation of a trail use agreement between the prospective interim trail sponsor and the abandoning railroad. The liability and indemnity provisions of the SWAFR are designed to protect railroads, and the revisions proposed by MTA will clarify those provisions. The railroad always has the option of not entering into a trail use agreement if it cannot agree with the prospective interim trail sponsor on terms, including those addressing the scope of liability and indemnity.

It is well established that the abandoning railroad is the party in the best position to evaluate any risk it may incur by entering into a proposed trail use agreement and that the Board cannot compel an unwilling railroad to enter into a trail use agreement:

A railroad presumably would not agree to negotiate with a prospective interim trail sponsor unless that railroad believes the interim trail sponsor will be able to manage the right-of-way and assume legal liability and pay taxes. . . . Thus, the carrier is the most appropriate party to determine whether any offer is likely to prove successful both in meeting the railroad's desires and in fulfilling the statutory and regulatory liability requirements of the Trails Act.

*Central Kansas Ry. Co., LLC – Abandonment Exemption – In Marion and McPherson Counties, KS*, STB Docket No. AB-406 (Sub-No. 6X), slip op. at 3 (Service Date Dec. 18, 1998) (internal citations omitted).

The Board plays no part in the negotiation between the railroad and interim trail sponsor, and has repeatedly held that an expression of financial responsibility and the ability to restore the right-of-way to railroad use are the only requirements for establishing a railbanked corridor and commencing negotiation of a trail use agreement. *See, e.g., T and P Ry. – Abandonment Exemption – in Shawnee, Jefferson and Atchison Counties, KS*, 2 S.T.B. 36, 1997 WL 68211

(S.T.B.), slip op. at \*6 (Service Date Feb. 20, 1997). The Board views itself as taking a “limited” role under the Trails Act, and considers its duties in issuing a certificate or notice of interim trail use upon the satisfaction of the relevant statutory requirements as largely ministerial. *See Kansas Eastern R.R., Inc. – Abandonment Exemption – In Butler and Greenwood Counties, KS*, 2006 WL 1516602 (S.T.B.), slip op. at \*2 (Jun. 2, 2006).

If the parties cannot come to terms on a trail use agreement, the railroad may be authorized to proceed with abandonment of the right-of-way. 49 C.F.R. §§ 1152.29(b)(1)(ii), 1152.29 (c)(1), and 1152.29(d)(1). The negotiation is strictly voluntary; a railroad that does not wish to negotiate or agree to proposed terms and conditions cannot be compelled to do so. *See, e.g., Preseault v. I.C.C.*, 494 U.S. 1, at 7 n.5, 16 n.10 (1990). Accordingly, a railroad’s execution of a trail use agreement will indicate that the railroad has satisfied itself as to its exposure to risk under the terms and conditions of the agreement. The Board’s proposed revisions to its Trails Act rules include a requirement that the parties notify the Board upon executing a trail use agreement, which would provide the Board with a demonstration of the parties’ intent to be bound by the trail use agreement and the requirements of the Trails Act. 76 Fed. Reg. 8995; EP 702 Notice at 16 – App. A (adding 49 C.F.R. § 1152.29(h)).

MTA’s proposed revision maintains the existing framework for private trail use negotiations and the essential element for implementing trail use, namely a voluntary agreement between the interim trail sponsor and railroad.

**C. MTA’s Proposed Revision Advances Trails Act Goals and Criteria**

In the EP 702 Notice, the Board asserts as an alternative to pursuing the railbanking procedures at Section 1247(d) that state entities may acquire railroad rights-of-way for use as recreational trails once such rights-of-way have been abandoned, either through negotiation of a

real property transfer from the abandoning railroad or through the exercise of eminent domain. EP 702 Notice at 6. However, as Congress observed in debating the Trails Act, “[t]he concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.” H. Rep. No. 98-28, at 8-9 (1983). Therefore, while a number of mechanisms are available for the creation of recreational trails, only Section 1247(d) provides for the preservation of existing rail corridors through interim trail use. Accordingly, the Board’s suggestion that states use other means to create recreational trails undermines the express intent of the Trails Act.

The revision proposed by MTA provides a clear framework that states, other public entities and this Board can rely on to implement railbanking in furtherance of the goals of the Trails Act. States can and do pursue a variety of programs to establish recreational trails, and affirmatively choose to use the Trails Act procedures to preserve existing rail corridors. In order to remove barriers to implementation that have emerged in the course of such efforts, the Board’s rules should be revised as MTA requests to remove barriers to participation in railbanking and more fully realize the goals of the Trails Act.

### **CONCLUSION**

MTA’s proposed revision to the SWAFR language will (a) enable public entity interim trail use applicants to submit unqualified SWAFRs, (b) obviate the need for the Board to look beyond the plain language of the SWAFR to ascertain the scope of a public entity’s authority to obligate itself, and (c) allow the Board to continue to rely on the “rebuttable presumption” that the interim trail use applicant is financially responsible. *Jost v. STB*, 194 F.3d 79, 89 (D.C. Cir. 1999). Accordingly, MTA respectfully requests that the Board revise its proposed SWAFR

language at 49 C.F.R. § 1152.29(a)(3) to more fully allow the goals of the Trails Act to be fulfilled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", written over a horizontal line.

Charles A. Spitulnik

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Dated: April 12, 2011