

**Follow-up to STB OEA Public Meeting Sept 28, 2023 in
Case AB_167_1189X re Harsimus Branch & Embankment**

Points That the Embankment Coalition Is Making to STB about Environmental and Historic Preservation Review Processes

Environmental and Historic Preservation reviews cannot be adequately carried out under the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA) when a federal agency, in this case, the Surface Transportation Board (STB) and/or its Office of Environmental Analysis (OEA)

1. adopts a narrow view of its responsibilities under NEPA and NHPA
2. does not hold Conrail accountable for selling regulated rail property **BEFORE** applying for required permission to do so, and **BEFORE** environmental and historic preservation reviews
3. does not reverse the sale upon learning of the “unlawful” (language from its own policy) sale, thereby undermining the NEPA and NHPA reviews
4. chooses to allow an expedited abandonment process in a controversial case
5. chooses to conduct a “normal” Environmental Assessment rather than the Environmental Impact Statement requested by hundreds of members of the public
6. uses hypothetical scenarios in its Section 106 review to analyze adverse effects on historic resources rather than examining the real situation on the ground
7. does not fully engage consulting parties in exploring ways “to avoid, minimize, or mitigate” adverse effects to historic resources, as required by Section 106 regulations, and instead asks Conrail to provide documentation, signage, and a web site memorializing the Harsimus Branch & Embankment
8. engages the public late in the Section 106 process only at the urging of consulting parties, when guidelines call for early public engagement by the agency
9. denies its own jurisdictional powers to do anything to truly mitigate adverse effects to historic resources or to address the unlawful sale
10. undermines Section 106 with rail companies by not holding Conrail accountable for its unlawful sale - there are so far no consequences
11. by extension, undermines Section 106 with all applicants for federal permits requiring NEPA and NHPA reviews
12. compartmentalizes responsibilities within the agency so that the NEPA and Section 106 reviews cannot address issues purportedly in the jurisdiction only of the STB board.

Coalition Requests of STB and/or Its OEA

The Coalition is asking STB and/or its OEA to do the following:

1. Expand Section 106 review to
 - a. acknowledge and review plans now in existence^{1 2 3} that “avoid, minimize or mitigate” adverse effects to historic resources, and/or
 - b. if no true mitigation that protects the Branch results from consultation, STB should choose the “No Action” Alternative OEA presented as the least harmful to historic resources; encourage parties who say they want to settle litigation, in ways consistent with the Redevelopment Plans they worked on, to actually do so.
2. If (1) isn’t pursued, then do not authorize abandonment unless conditioned on
 - a. either voiding the deeds or Conrail reacquiring the deeds, **and**
 - b. a 180-day public use condition barring Conrail from alienating the property for 180 days other than for public use. This relief will allow the City to institute eminent domain or 48 NJSA 12-125.1 proceedings to secure the property -- from Conrail. It is also compatible with the relief the City will seek under 48 NJSA 12-125.1 in the event STB does nothing.
3. If STB does not wish to expand the review, as requested in #1 in this list, or impose the conditions in #2, then it should deny abandonment.

Note: The Coalition sees no “public convenience and necessity” for the agency to permit abandonment when removing the Branch from federal jurisdiction has a reasonably foreseeable result of eradicating the historic Harsimus Branch & Embankment and causing adverse effects to other historic properties within the Area of Potential Effects. The weight of “public convenience and necessity” lies with preservation of an important historic corridor needed for environmentally sustainable local and/or regional uses, including transportation, stormwater control in a floodplain, open space, carbon sequestration, oxygenation of air, and other public benefits consistent with NEPA and NHPA and other federal policies. The weight of “public convenience and necessity” rests with the public deprived of meaningful environmental and historic preservation reviews; it does not rest with private companies that unlawfully sell regulated rail property to private developers. The weight of “public convenience and necessity” does not rest with Conrail, which

¹ *6th Street Embankment Redevelopment Plan*. City of Jersey City. 2023 Reviewed by public. Recommended by Planning Board. Passed by Municipal Council July 2023.

² *Luis Munoz Marin Plan Amendments*. City of Jersey City. 2023. Reviewed by public. Recommended by Planning Board. Changed at request of developer once; withheld from Municipal Council consideration at request of developer, October 2023.

³ *Area in Need Study*. City of Jersey City. 2022. Recommended by Planning Board. Approved by Council. Litigated by Conrail, as to non-Embankment parcels of Harsimus Branch.

unlawfully sold part of the regulated line, has no shippers, and suffers no loss from denial of abandonment.

More Background for a Deep Dive

1. NEPA. <https://www.govinfo.gov/content/pkg/CFR-2018-title40-vol37/xml/CFR-2018-title40-vol37-chapV.xml>
2. **Council on Environmental Quality regulations** <https://www.govinfo.gov/content/pkg/CFR-2018-title40-vol37/xml/CFR-2018-title40-vol37-chapV.xml>
3. **STB's Own regulations** <https://www.govinfo.gov/content/pkg/CFR-2018-title49-vol8/xml/CFR-2018-title49-vol8-part1105.xml>
4. The level of environmental review generally required for certain proceedings ([49 C.F.R. §§ 1105.5](#) and [1105.6](#)); Note: this is discretionary.
5. The procedures for conducting environmental and historic preservation reviews in proceedings in which they are required ([49 C.F.R. § 1105.10](#)) Note: some are discretionary.
6. What information is required in the environmental and historic reports that applicants must provide in Board proceedings ([49 C.F.R. § 1105.7](#)). Note: some is discretionary.

The environmental review documents issued by OEA, such as final and draft environmental impact statements, environmental assessments, and notices of public meetings, are part of the formal record for that proceeding and can be found along with all other Board decisions and formal filings in the record using the [Search STB Record](#) function on the website. All other documentation that is part of the environmental review is archived under [Environmental Comments](#), which can be accessed under the menu for "Proceedings & Actions."

NHPA

7. NHPA <https://www.achp.gov/sites/default/files/2018-06/nhpa.pdf>
8. Section 106 of the NHPA, [54 U.S.C. § 300301](#)
9. Advisory Council on Historic Preservation regulations ACHP has promulgated implementing regulations for NHPA at [36 C.F.R. §§ 800 – 812](#).

10. The STB's environmental regulations also include provisions on historic preservation, which can be found at [49 C.F.R. § 1105.8](#). The regulations detail the types of actions for which railroad applicants must prepare and submit historic reports. These historic reports are intended to provide OEA and relevant State Historic Preservation Officer(s) with sufficient information to conduct the Section 106 consultation process required by NHPA. The regulations also set forth the types of actions that generally do not affect historic sites and structures, and therefore do not require a historic report. The STB generally combines the Section 106 process with its NEPA process since Board actions subject to Section 106 usually require some form of NEPA documentation. More information on the Board's historic preservation review process is available [here](#).

STB FAQs on NEPA and NHPA

11. <https://www.stb.gov/resources/environmental/faqs/>

STB Decisions, Filings, and Environmental Comments re AB 167 1189X

12. Search for AB 167 1189 X under Proceedings & Actions/Decisions [or Filings or Environmental Comments] at <https://stb.gov>
13. Also search for prior case FD 34818 under Proceedings & Actions at <https://stb.gov>

State Law Regarding Railroad ROWs

14. 48 NJSA 12-125.1. [Section 48:12-125.1 - Railroad rights of way; acquisition; abandonment; sale, conveyance. :: 2015 New Jersey Revised Statutes :: US Codes and Statutes :: US Law :: Justia](#)