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## **Section 106 Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way**

# Section 106 Program Comment Agenda

- History and Intent
- Overview
  - Two Approaches
  - Applicability
  - Definitions
  - Key Concepts
- Exempted Activities
- Implementation
  - Project Sponsor
  - FRA
- Q&A



Photo Credit: APTA Committee, John Smatlak

# Section 106 of the National Historic Preservation Act

- Directs Federal agencies to consider the effects of undertakings on historic properties
  - Undertakings are federally-funded projects (i.e. grants and loans), the issuance of permits, and safety approvals.
  - Historic properties are:
    - Districts, sites, buildings, structures or objects
    - Generally 50 years of age or older
    - Listed in or eligible for listing in the NRHP
- Is a component of NEPA compliance
- Must be complete prior to the obligation of FRA grant funding and implementation of a project



# The Section 106 Process

## Consultation

### 1. Initiate the Process

- Determine undertaking
- Coordination with other reviews (NEPA)
- Notify SHPO/THPO
- Identify Tribes and other Consulting Parties
- Plan to involve the public

### 2. Identify Historic Properties

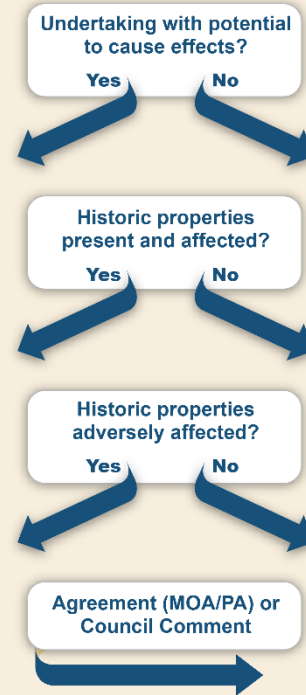
- Determine APE
- Identify historic properties
- Consult with SHPO/THPO, Tribes, and other Consulting Parties
- Involve the public

### 3. Assess Adverse Effects

- Apply criteria of adverse effect
- Consult with SHPO/THPO, Tribes, and other Consulting Parties
- Involve the public

### 4. Resolve Adverse Effects

- Avoid, minimize, or mitigate adverse effects
- Notify ACHP
- Consult with SHPO/THPO, Tribes, and other Consulting Parties
- Involve the public



## Process Complete



## Key Concept: Area of Potential Effects (APE)

- Geographic area or areas within which an undertaking may directly or indirectly cause alteration in the character or use of a historic property
- Will be unique for each project depending upon the scale and nature of the undertaking
- May extend beyond the Rail ROW and involve non-rail properties



# Key Concept: Effects

## Not Adverse



## Adverse



# Fixing America's Surface Transportation (FAST) Act

- Enacted December 4, 2015
- Section 11504 of the Act:
  - Directs the Secretary of Transportation to submit to the Advisory Council on Historic Preservation a proposed exemption of railroad rights-of-way from review under Section 106 of the National Historic Preservation Act
  - States the proposed Section 106 exemption is to be consistent with the exemption for interstate highways approved in 2005



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# ACHP Program Alternatives (36 CFR 800.14)

- a) Alternate Procedures
- b) Programmatic Agreements
- c) Prototypical Programmatic Agreements
- d) Exempted Categories
- e) Standard Treatments
- f) Program Comment



# Section 106 Outreach: 2016-2018

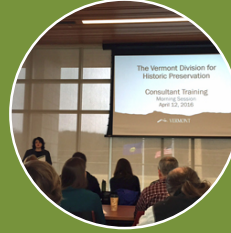


**Stakeholder  
Meetings, Webinars,  
and Conference  
Presentations**



**Federal Register  
Notice on Draft  
Program Comment**

11/17/2017



**Public  
Comment  
Period**

11/17/2017 - 12/8/2017



**Federal Register  
Notice on Final  
Program Comment**

8/24/2018



## Key Concept: Intent of the Program Comment

- Streamline compliance with Section 106 of the National Historic Preservation Act
  - Effects on a variety of common and routine activities were considered in the development of an Exempted Activities List (Appendix A of the Program Comment)
  - Makes documentation of Section 106 compliance easier and faster for select activity types or project areas
  - Focuses Standard Section 106 review on a smaller subset of activities and types of rail properties
- For use by any DOT mode or other federal agency that has an undertaking affecting rail properties located within rail ROW





# POLL 1

# Overview: Two Approaches

- Activity-Based Approach

- Appendix A – Exempted Activities List
  - Focuses on activities that do not to adversely affect historic rail properties
  - Encompasses maintenance, repair and upgrades to existing rail properties
  - Does not apply to major demolition or construction activities
- Can be applied to National Register Eligible or Listed Properties
- Immediate Applicability

- Property-Based Approach

- Collaborative approach between DOT and Project Sponsors
- Allows Project Sponsors to identify “excluded historic rail properties” within a study area
- Rail properties determined historic would be subject to the Exempted Activities List
- Rail properties determined not historic would be exempt from further Section 106 requirements
- Methodology will be defined and applicable once implementing guidance is developed by USDOT and ACHP



# Applicability: Rail ROW Program Comment

- Applies to activities that:
  - Are Federal Undertakings
  - Affect Rail Properties
    - Listed or eligible for listing in the National Register of Historic Places
    - Treated as eligible, based on such factors as age and integrity
  - Are located within:
    - Existing rail ROW (in part or in full)
    - Disturbed portions of the rail ROW
- Projects for which the environmental review has not started or is already in process
- Some projects will be subject to:
  - Both the application of the Program Comment and a standard Section 106 review
  - Other Section 106 Program Alternative or Agreement Document



# Definition: Rail Property

- Passenger stations/depots and associated infrastructure/utilities such as:
  - Platforms
  - Platform shelters and canopies
  - Parking lots and parking structures
  - Passenger walkways
  - Landscaping
  - Utilities
  - Signage (e.g., station identifier, wayfinding, service/schedule information)



# Definition: Rail Property



- Security and safety fencing
- Catenary
- Signals and communication systems



- Rails and tracks
- Ties
- Ballast
- Rail beds
- Switches



- Railyards
- Rail transit yards

# Definition: Rail Property

- Bridges, culverts, tunnels
- Traction power substations
- Freight transfer facilities
- Retaining walls
- Ancillary facilities, ventilation structures
- Equipment maintenance and storage facilities
- Interlocking towers



Photo Credit: FRA Project Files



## Definition: Rail ROW

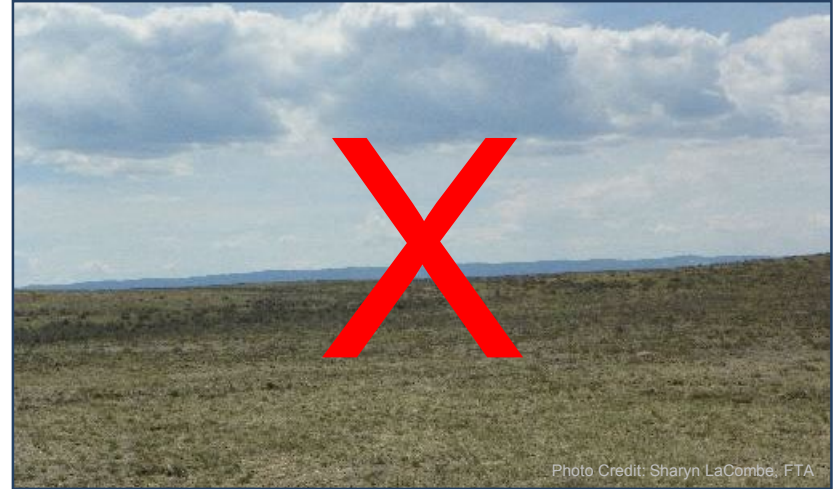
- Developed for existing or former rail use
- Irrespective of ownership
- Regardless of whether rail is operating



- Includes ROW that was previously developed even if infrastructure is modified or removed, or lacks visual evidence of prior use

## Definition: Rail ROW

- Presence of infrastructure that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system



- Does not include land that was never developed for rail use

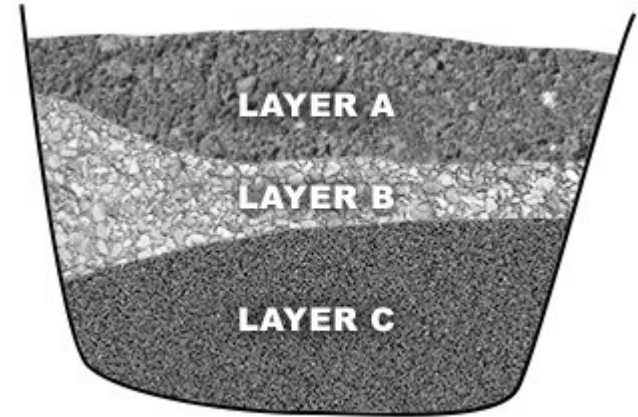
# Key Concept: Rail ROW Program Comment does not apply to:

- Above Ground Historic properties located within the rail ROW that *do not have a demonstrable association with the function and operation of a railroad or rail transit system*
- Above Ground Historic properties located outside of the rail ROW
- Examples:
  - Non-rail properties, such as residential, commercial, or municipal buildings.
  - Property unrelated to existing or former railroads that is proposed to be used for new rail infrastructure (i.e., “greenfield” construction)



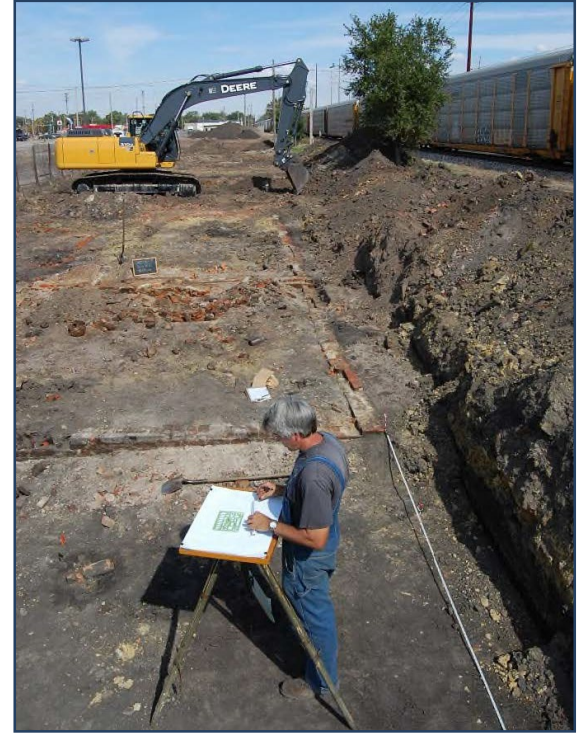
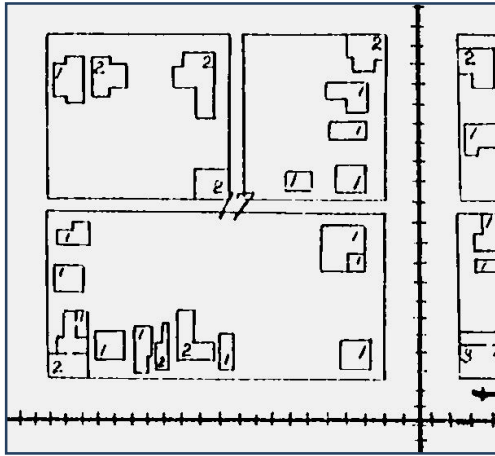
## Definition: Undisturbed Portions of Rail ROW

- Soils that have not been physically impacted by previous construction or other ground disturbing activities such as grading
- Undisturbed soils may occur below the depth of previously disturbed soils or fill
- What may constitute proof?
  - Archaeological reports
  - Auger tests
  - Research by SOI-Qualified Archaeologist
  - Maintenance and/or Construction Records
  - Hazardous Materials Remediation Records
  - Other



# Key Concept: Rail ROW Program Comment does not apply to:

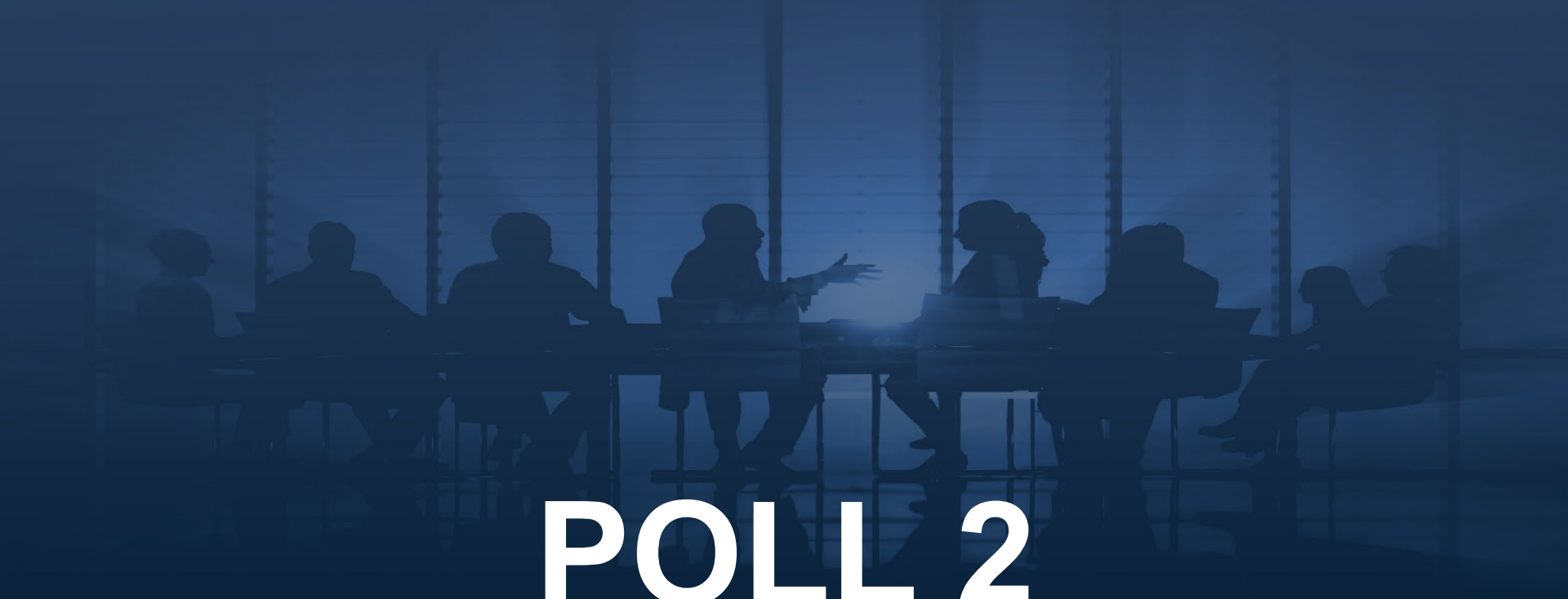
Potential archaeological sites located within the rail ROW even if they are associated with railroads or rail transit systems



## Key Concept: Rail ROW Program Comment does not apply to:

- Undertakings (or parts thereof) that:
  - Are located within or would affect historic properties on tribal lands
  - Could affect properties of religious and cultural significance to federally-recognized Indian Tribes or Native Hawaiian Organizations





# POLL 2

# Appendix A: Overview of Exempted Activities

- 95 Total Exempted Activities
- Broken into 13 Category Types
  - Track and Trackbed
  - Bridges and Tunnels
  - Railroad Buildings and Boarding Platforms
  - Signals, Communications, and Power Generation
  - Roadway At-Grade Crossing and Grade Separations
  - Safety and Security
  - Erosion Control, Rock Slopes, and Drainage
  - Environmental Abatement
  - Operations
  - Landscaping, Access Roads, and Laydown Areas
  - Utilities
  - Bicycle and Pedestrian Facilities, Share Use Paths, and Other Trails
  - Construction/Installation of New Railroad Infrastructure

Section 106 Program Comment for Rail ROW Appendix A: Exempted Activities List	
<b>A. Track and Trackbed</b>	
1.	Track and trackbed maintenance, repair, replacement, and upgrades within the existing footprint ( <i>i.e.</i> , existing subgrade, subballast, ballast, and rails and crossties (track)). These activities must not include alterations to the trackbed that would result in a substantial visual change ( <i>i.e.</i> , elevation or alignment) in the relationship between the trackbed and the surrounding landscape or built environment.
2.	Reinstallation of double tracking on a currently single-tracked line that had historically been double-tracked.
<b>B. Bridges and Tunnels</b>	
1.	In-kind maintenance and repair of bridges and tunnels.
2.	In-kind replacement of bridge hardware and mechanical and electrical components ( <i>e.g.</i> brackets, rivets, bearings, motors).
3.	Maintenance or repair of tunnel ventilation structures and associated equipment ( <i>e.g.</i> , fans, ducting).
4.	Replacement of tunnel ventilation structures that are not located within a previously identified historic district.
5.	Replacement of tunnel ventilation structures that are located and publicly visible within a previously identified historic district, provided the replaced structures are substantially the same size as or smaller than the existing structures and are visually compatible with the surrounding built environment.
6.	Maintenance, repair, or replacement of tunnel emergency egress hatchways.
7.	Maintenance, installation, repair, or replacement of lighting, signal and communications systems, railings, and other safety- and security-related equipment or elements located within the interiors of tunnels.
8.	Removal or replacement of any bridge or tunnel material or added-on element that is not part of the original construction.



## Appendix A: Examples of Exempted Activities

- Majority of exempted activities are focused on **minor/routine maintenance, repair, replacement, and upgrade of existing infrastructure**
- Examples include maintenance, repair or replacement of existing:
  - Track and trackbed (ballast, rails, crossties)
  - Electrical, plumbing, communications, and HVAC systems
  - Previously installed ADA Elements
  - Mechanical components of traction power substations (transformers, circuit breakers, electrical switches)
  - At-grade railroad crossings (crossing signs, signals, gates, warning devices)
  - Above-ground and underground utilities (electrical, sewer, compressed air lines, fuel lines, fiber optic cables)
  - Curbs, gutters or sidewalks made of common materials

## Appendix A: Examples of Exempted Activities

- Exempted Activities **do not** cover substantial new construction projects such as building a new station; major additions to existing facilities; or demolition of existing buildings, bridges, or other structures.
- Examples of limited allowances for new elements, additions, and minor new construction:
  - Installation of new fire and security alarms, HVAC, electrical systems or mechanical equipment in non-publicly accessible areas of stations or depots
  - Additions of lanes, turning lanes, road widening and pavement markings at existing at-grade crossing
  - Installation of safety and security fencing
  - Installation of utility and transmission lines and communications poles
  - Installation of signage
  - \*\*Minor new construction of storage buildings, train car service and inspection facilities, trailers or temporary structures, and fueling stations in areas of the rail ROW where similar infrastructure already exists
- Substantial versus Minor construction

# Appendix A: Examples of Exempted Activities

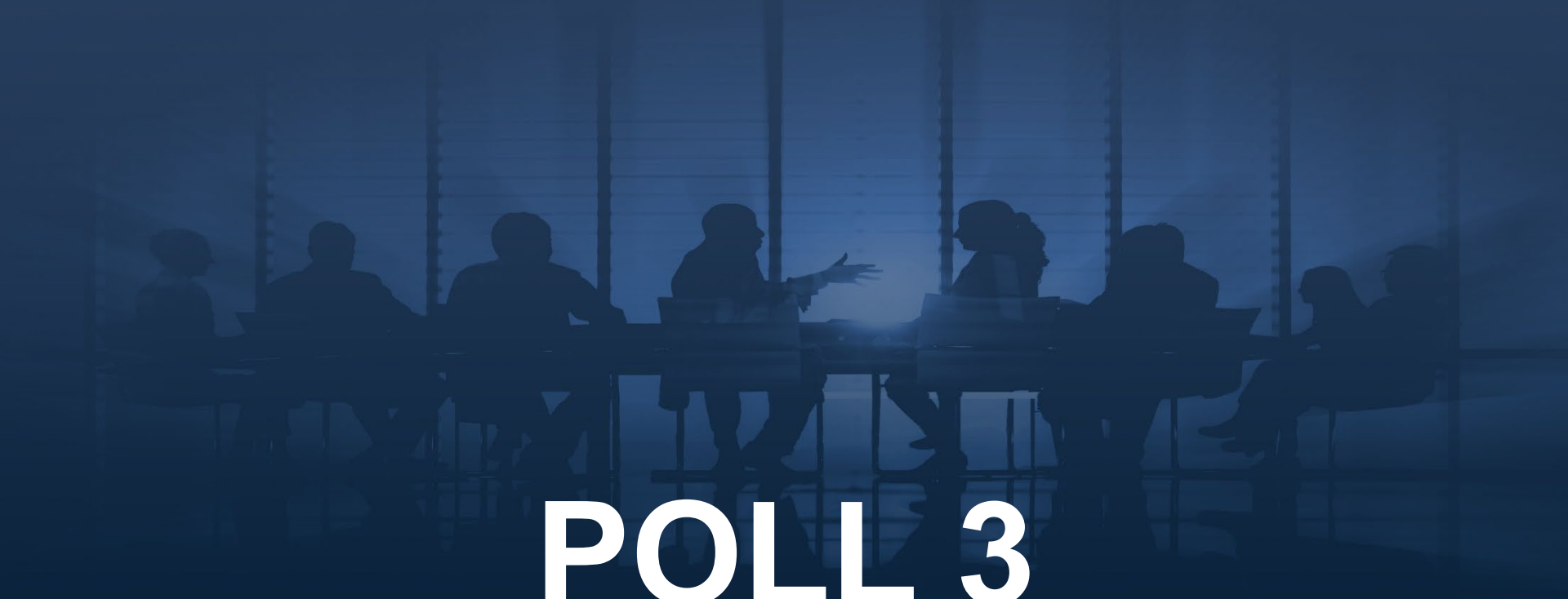
## Historic Considerations

- Whenever possible, historic materials must be repaired versus replaced
- Some activities must be done “in kind” in accordance with the Secretary of Interior Standards for Rehabilitation
  - New materials used in repairs or replacements must match the design, color, texture or visual properties, and where possible materials, of the existing elements
- Examples include the In-Kind maintenance and repair of:
  - Bridges and tunnels
  - Original station architectural features (handrails, ticket counters, mouldings)
  - Character-defining signage in public areas
  - Platform boarding canopies and supports
  - Stone or brick culvert headwalls and wingwalls
  - Signal bungalows, signal houses, control houses, instrument houses
- Examples include the In-Kind replacement of:
  - Bridge hardware (brackets, rivets)
  - Grade-separated crossings of other transportation modes
  - Retaining walls and Landscaping



## Appendix A: Examples of Exempted Activities Historic Considerations

- Some activities must be performed by or under the supervision of individuals that meet the **Secretary of the Interior (SOI) Professional Qualification Standards**
  - These individuals generally hold a graduate degree in historic preservation/architecture, archaeology or closely related field in addition to relevant professional experience
- Examples include:
  - In-kind replacement of character-defining bridge components
  - Replacement of character-defining escalators, elevators, or stairs
  - ADA improvements that require the addition of new ramps or wheelchair lifts
  - Replacement of signal bungalows, signal houses, control houses, and instrument houses
  - Minor new construction and installation of railroad infrastructure
  - Construction of new erosion control, drainage or stormwater management infrastructure (culverts, retaining walls)



# POLL 3

# Implementation: Activities Based Approach Process

Step 1 - Project Sponsor reviews Exempted Activities list to see if proposed project activities are included.

Step 2 - Project Sponsor identifies potentially applicable exempted activities by referring to Appendix A Category and Number for each activity in SOW (ex. A.1 or C.21.d)

Step 3 - Project Sponsor identifies any activities that do not appear to be covered by Appendix A and coordinates with FRA on Standard Section 106 review.\*

Step 4 - Project Sponsor submits information to FRA as environmental documentation following the normal submission procedures.\*

Step 5 - FRA verifies applicability of proposed exemptions and ensures applicability of Appendix A is noted in final NEPA document (e.g., cultural resources section of CE worksheet).\*

\*For SOW elements not covered by the Program Comment, Project Sponsor will work with FRA to prepare a Standard Section 106 Consultation Package

# Implementation: Activities Based Approach Documentation Requirements

- FRA may require the Project Sponsor to provide relevant documentation to verify appropriate usage of the Exempted Activities list
- Triggers may include use of “in-kind” materials, replacement versus repair, use of SOI-Qualified Personnel, or extensive ground disturbance
- Documentation may include:
  - Plans
  - Photographs
  - Materials specifications
  - Replace versus repair justification
  - SOI-qualified professional credentials
  - Documentation of prior ground disturbance
    - Maintenance and/or Construction Records
    - Hazardous Materials Remediation Records
    - Research by SOI-Qualified Archaeologist
    - Archaeological reports
    - Auger tests



## Next Steps

- DOT Publication of guidance for implementing the Property-Based approach of the Program Comment, and associated webinars (anticipated mid-2019)
- FAQs for Exempted Activities Approach
- Webinar and answers to participants' questions will be posted on FRA webpage







# QUESTIONS?



# CONTACT US

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For more information visit us at  
[www.fra.dot.gov](http://www.fra.dot.gov)



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