

REPORT TO CONGRESS

STREAMLINING COMPLIANCE
WITH
SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT
AND
SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT
FOR
FEDERALLY FUNDED RAILROAD INFRASTRUCTURE
REPAIR AND IMPROVEMENT PROJECTS

MANDATED BY:

The Passenger Rail Investment and Improvement Act of 2008
(P.L. 110-432) Section 407



March, 2013



U.S. Department of Transportation
Federal Railroad Administration

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Executive Summary

The Passenger Rail Investment and Improvement Act of 2008 (P.L. 110-432) (“PRIIA”) mandated that the U.S. Department of Transportation (U.S. DOT) conduct a study on ways to streamline compliance with the requirements of section 303 of title 49 U.S.C. (Section 4(f)) and Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f) for federally funded railroad infrastructure repair and improvement projects. Congress also directed the Secretary to submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science and Transportation of the Senate, a report on the results of the study making recommendations consistent with railroad safety and the policies and purposes of Section 106 of the NHPA.

The Federal Railroad Administration (FRA) conducted a study assessing the current state of historic preservation for railroad projects and potential for streamlining compliance for those projects in partnership with other U.S. DOT agencies and historic preservation agencies, including Advisory Council on Historic Preservation (ACHP) and the National Conference of State Historic Preservation Officers (NCSHPO) and the National Trust for Historic Preservation (NTHP). The Study drew upon the experiences shared by these agencies and other stakeholders, and on best practices and data extrapolated from case studies. The study found that there is currently no consistent approach on how to address the National Register of Historic Places (NRHP) eligibility of railroad corridors and how to treat the individual resources along the corridor once designated historic. This stems in part from a multitude of entities conducting NRHP assessments, including State Historic Preservation Officers (SHPOs), federal agencies, consultants and railroad operators, and in part from the lack of specific guidance for the classification of railroad resources. This variety of approaches can lead to inconsistent standards, procedures and project delay.

Section 4(f) of title 49 protects publicly owned public parks, recreation areas, and wildlife and waterfowl refuges, as well as significant historic sites from use by U.S. DOT funded projects. Evaluation of potentially historic rail corridors can often involve Section 4(f) analysis, as contributing railroad elements may warrant 4(f) consideration. In this context, streamlining mechanisms addressing Section 4(f) compliance processes for railroad resources could benefit parties engaging in Section 106 analysis and provide significant benefits to project sponsors seeking to improve railroad infrastructure.

Informed by this study, FRA recommends pursuit of one or more of three promising administrative measures for streamlining section 106. In addition, FRA offers options for consideration that would involve legislative measures to streamline compliance with Section 4(f), based on the Study’s comparative analysis and considering implementation effectiveness. Within this report are examples of streamlining administrative measures: a Draft Section 106 Nationwide Programmatic Agreement including exempted categories of undertakings and standard treatments, a Draft Amendment to the Railroads Title of the United States Code, and a Draft ACHP Section 106 Administrative Exemption. The report also offers options for Legislative Exemptions.

Section 106 Administrative Measures

Section 106 regulations provide a series of regulatory mechanisms described as *Program Alternatives* at 36 CFR 800.14 that offer promising streamlining solutions for federally funded railroad infrastructure repair and improvement projects, including: Exempted Categories of Undertakings (800.14(c)); Programmatic Agreements (800.14(b)); and Standard Treatments (800.14(d)). The streamlining solutions available through these *Program Alternatives* can be incorporated into the content of agreements and exemptions to implement the Section 106 administrative measures recommended in this study. The following three Section 106 administrative recommendations can best achieve railroad safety and improvement, while meeting the intent of historic preservation laws through streamlining measures.

1. ***Exempted Categories of Undertakings.*** These offer an efficient opportunity to exempt specific programs or categories of undertakings from Section 106 review, which would streamline the approval of many minor activities and maintenance associated with railroad properties. One potentially useful exempted category would be undertakings that involve maintenance or replacement of railroad infrastructure materials in-kind, even if they are located in a railroad right-of-way that is over 50 years of age. Exempted categories could also be identical to existing *Categorical Exclusions*, enabling coincidental compliance with Section 106 and the National Environmental Policy Act in those cases where the undertaking is also categorically excluded under the agencies' NEPA Procedures. This recommendation addresses the need to streamline the maintenance and repair of railroads for safety and technological improvements because they would no longer be subject to Section 106 review.
2. ***NRHP Eligibility and Level of Significance.*** The study finds that guidance should be prepared to make the evaluation of NRHP eligibility of railroad properties consistent across the entire nation and to ensure that the most significant railroad properties are identified and protected under preservation law. This guidance is necessary to reduce the number of railroad corridors and other railroad properties found eligible for the NRHP that do not represent an important historic context, do not have strong associations with important historic events or persons, or do not possess integrity from an accurately researched period of significance. Two options for implementing this guidance are provided: work with the staff of the NRHP section of the National Park Service to develop an authoritative NRHP Bulletin or use a section 106 Nationwide Programmatic Agreement to develop NRHP eligibility guidance.
3. ***Section 106 Exemption for Railroad Properties.*** A section 106 administrative exemption for railroads would ensure that the most significant element of railroads are identified and protected under preservation law, but all others would be exempt. Pursuant to 36 CFR 800.14(c), the ACHP would publish the section 106 exemption in the Federal Register. A precedent was set in 2005 by ACHP's section 106 exemption for the Interstate Highway System. In that precedent, the section 106 administrative exemption was coupled with a Section 4(f) legislative exemption enacted under SAFETEA-LU.

Section 4(f) Legislative Exemption

A legislative option for effective streamlining would be achieved by modifying the definitions of "use" and "historic site" in Section 4(f), as follows.

- The term ***use*** shall not apply for rail-transportation use of existing or former railroad or rail-transit property.
- The term ***historic site*** shall not include railroad and rail transit lines or corridors that were historically used for transportation of goods or passengers.

The modifications would effectively remove most facilities used by railroads for transportation from Section 4(f) consideration, but would not affect the original intent of Section 4(f) to avoid conversion of historic sites to transportation use. In addition, section 106 would continue to apply, except where otherwise exempted, thereby protecting historic sites that are historic properties and are being used for transportation.

A second legislative option would be to follow the Interstate Highway System exemption enacted under SAFETEA-LU. Following this precedent, the railroads' subtitle of the United States Code could be amended to exempt most of the U.S. Railroads from Section 4(f) except for the most significant elements that would be established by the Office of the Secretary of Transportation. The Section 4(f) legislative exemption would be pursued by U.S. DOT or FRA concurrently with the section 106 administrative exemption by ACHP.

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Acronyms and Abbreviations

AAR	American Association of Railroads
AASHTO	American Association of State Highway and Transportation Officials
ACHP	Advisory Council on Historic Preservation
Amtrak	National Railroad Passenger Corporation
APE	Area of Potential Effects
APTA	American Planning Transportation Association
ARRA	American Recovery and Reinvestment Act of 2009, Pub. L. 111-5
ARRC	Alaska Railroad Corporation
ASLRRA	American Short Line and Regional Railroad Association
BHP	Pennsylvania Bureau for Historic Preservation
BLM	Bureau of Land Management
BNSF	Burlington Northern Santa Fe Railroad
CA HST	California High Speed Train
C.F.R. or CFR	Code of Federal Regulations
CEQ	Council on Environmental Quality
CEQA	California Environmental Quality Act
CE or Cat Ex	Categorical exclusion
CN/IC	Canadian National/Illinois Central
Conrail	Consolidated Rail Corporation
CSX	CSX Transportation, Inc.
CTA	Chicago Transit Authority
CRGIS	Cultural Resources Geographic Information System
DOI	U.S. Department of the Interior
DOT	Department of Transportation
DOT&PF	Alaska Department of Transportation and Public Facilities
EA	environmental assessment
EIS	environmental impact statement
EPA	Environmental Protection Agency
FDOT	Florida Department of Transportation
Fed. Reg. or FR	Federal Register
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
GIS	geographic information system
HABS	Historic American Buildings Survey
HAER	Historic American Engineering Record
HALS	Historic American Landscape Survey
HUD	U.S. Department of Housing and Urban Development

ICC	Interstate Commerce Commission
IHS	Interstate Highway System
INDOT	Indiana DOT
MBTA	Massachusetts Bay Transportation Authority
MDT	Montana DOT
MOA	Memorandum of Agreement or Memoranda of Agreement
MPD	Multiple Property Document
MPDF	Multiple Property Documentation Form
MPO	Metropolitan Planning Organizations
MTA	Metropolitan Transportation Authority
NAGPRA	Native American Graves Protection and Repatriation Act
NATHPO	National Association of Tribal Historic Preservation Officers
NCDOT	North Carolina Department of Transportation
NCSHPO	National Conference of State Historic Preservation Officers
NEPA	National Environmental Policy Act, 42 U.S.C. 4321, et seq.
NHHS	New Haven – Hartford - Springfield High-Speed Intercity Passenger Rail Project
NHOs	Native Hawaiian Organizations
NHPA	National Historic Preservation Act of 1966
NPS	National Park Service
NRHP	National Register of Historic Places
NS	Norfolk Southern Corporation
NTHP	National Trust for Historic Preservation
ODOT	Ohio DOT
OEA	Office of Environmental Analysis
OST	Office of the Secretary of Transportation
PA	Programmatic Agreement
PennDOT	Pennsylvania DOT
PRIIA	Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432
Pub. L. or P.L.	Public Law
ROD	Record(s) of Decision
ROW	Right-of-Way
RTTC	Rails-to-Trails Conservancy
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59, Aug. 10, 2005
Section 106	Section 106 of the National Historic Preservation Act
Section 4(f)	Section 303 of title 49
SHPO	State Historic Preservation Officer
SOI	U.S. Secretary of the Interior
STB	Surface Transportation Board
THPO	Tribal Historic Preservation Officer
Tribes	Indian Tribes, Alaska Native corporations, and Native Hawaiian organizations

TxDOT	Texas Department of Transportation
U.S.	United States
U.S. DOT	U.S. Department of Transportation
U.S.C.	United States Code
UPRR	Union Pacific Railroad
USACE	U.S. Army Corps of Engineers
USDA	U.S. Department of Agriculture
USET	United South and Eastern Tribes
USFS	U.S. Forest Service
USGS	U.S. Geological Survey
UTA	Utah Transit Authority
VAOT	Vermont Agency of Transportation
WSDOT	Washington State Department of Transportation

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Acknowledgements and Preparers

The Federal Railroad Administration (FRA) has prepared this report to Congress on streamlining compliance with Section 303 of title 49 U.S.C. and section 106 of the National Historic Preservation Act for federally funded railroad infrastructure repair and improvement projects. The study is mandated by the Passenger Rail Investment and Improvement Act of 2008 (Pub. L. 110-432—October 16, 2008).

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See also Chapter 2 for a list of all study participants and contributors.

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Chapter 1

Historic Preservation Law and Regulations

Introduction

The Federal Railroad Administration (FRA) has prepared this report to Congress on streamlining compliance with Section 4(f) of title 49 and section 106 of the National Historic Preservation Act (NHPA) for federally funded railroad infrastructure repair and improvement projects. This report and its conclusions are based on existing federal agency regulations and guidance, regulatory instruments used to streamline compliance with federal historic preservation laws, the experiences of relevant agencies and stakeholder groups, and best practices and data extrapolated from case studies. The study is mandated by the Passenger Rail Investment and Improvement Act of 2008 (Pub. L. 110-432—October 16, 2008, hereafter PRIIA), as follows:

SEC. 407. HISTORIC PRESERVATION AND RAILROAD SAFETY.

(a) **STUDY; OTHER ACTIONS**—The Secretary of Transportation shall—(1) conduct a study, in consultation with the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, the Department of the Interior, appropriate representatives of the railroad industry, and representative stakeholders, on ways to streamline compliance with the requirements of Section 4(f) of title 49, United States Code, and section 106 of the National Historic Preservation Act (16 U.S.C. 470f) for federally funded railroad infrastructure repair and improvement projects;

(b) **REPORT**—the Secretary shall submit, to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a report on the results of the study conducted under subsection (a)(1)... The report shall include recommendations for any regulatory or legislative amendments that may streamline compliance with the requirements described in subsection (a)(1) in a manner consistent with railroad safety and the policies and purposes of section 106 of the National Historic Preservation Act (16 U.S.C. 470f), Section 4(f) of title 49, United States Code, and section 8(d) of Public Law 90-543 (16 U.S.C. 1247(d)). (PRIIA §407)

It is important to establish at the outset that most railroads are private companies. Typically, with the exception of rail line abandonments, railroad companies can improve or dispose of their property without federal funds, permits, licenses, or other authorizations requiring the companies to comply with federal historic preservation laws, even if that property was constructed over 50 years ago and has the potential to meet the criteria for listing on the National Register of Historic Places (NRHP, 36 CFR 60.4). When a railroad seeks funding, permits, licenses, or approval from a federal agency for activities such as new construction of a rail line or funding for capital improvements or expansion, however, then the federal agency must comply with federal historic preservation laws. The operating administrations of U.S. DOT that typically fund or approve railroad projects are FRA, the Federal Transit Administration (FTA), and occasionally the Federal Highway Administration (FHWA). The Surface Transportation Board (STB) is an independent agency that is responsible for granting authority for rail line construction and abandonment. Other federal agencies may be involved, such as the Bureau of Land Management (BLM), the U.S. Forest Service (USFS), or the National Park Service (NPS) when a railroad project crosses federal lands, or the U.S. Army Corps of Engineers (USACE) when a project would involve activities in navigable waterways or other waters of the United States. NPS reviews Section 4(f) evaluations for projects that cross NPS

lands. In addition, state DOTs and transit agencies have projects that use historic rail corridors, including commuter rail, light rail transit, streetcars, and busways. Transit projects are generally constructed with state and local funding or federal funding combined with state and local funding.

On June 5, 2008, a Congressional hearing took place before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Committee on Transportation and Infrastructure, which included testimony by the Advisory Council on Historic Preservation (ACHP), the Alaska Railroad Corporation (ARRC), the National Conference of State Historic Preservation Officers (NCSHPO), the National Trust for Historic Preservation (NTHP), the North Carolina Department of Transportation and the Rails-to-Trails Conservancy¹ (see Appendix A). The hearing considered whether federal requirements for preservation of historic properties create unnecessary delays and administrative burdens for improvements to rail infrastructure, and whether there is a need for legislation to change the historic preservation process. There was no consensus among those at the hearing on how to balance timely approval of federal assistance for railroad infrastructure improvements with the responsibility of federal agencies to comply with historic preservation laws, especially when the aging railroad infrastructure was identified as significant to our nation's history. This study involves coordination with these and other stakeholders, as well as consideration of their views, and recommendations on the best ways to make the compliance process more efficient.

Scope of the Study

The scope of the study is limited to federally funded railroad infrastructure repair and improvement projects inside existing railroad rights-of-way² as well as rail line abandonments that are subject to the Rails-to-Trails provision of the National Trails System Act of 1968, as amended.³ In general, the study does not encompass railroad projects without federal funding,⁴ operational changes, licensing to acquire or construct new rail lines and rights-of-way, or the merger of railroad companies; however, these actions may be mentioned for regulatory context.

Chapter 1 summarizes current U.S. DOT historic preservation laws and regulations and environmental guidance and procedures and their applicability to federally funded or licensed railroad improvement projects. In addition to Section 4(f) of title 49 and section 106, relevant sections of the National Environmental Policy Act (NEPA) are discussed.

¹ *The Historic Preservation of Railroad Property and Facilities: Hearing before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Committee on Transportation and Infrastructure House of Representatives*, 110th Cong. (2008).

² Examples of improvement projects inside existing railroad rights-of-way include, but are not limited to, constructing or restoring an additional track or siding, converting freight service to passenger service, increasing clearance to accommodate double-stack containers, or converting diesel power to electric power.

³ *National Trails System Act*, Pub. L. No. 90-543, Section 8, 82 Stat. 919 (1968) (codified, as amended, at 16 U.S.C. Sections 1241-1251). Section 8(d), entitled *Interim use of railroad rights-of-way*, is known as *The Rails-to-Trails Act* (16 U.S.C. Section 1247 (d)) and was amended to the National Trails System Act in 1983.

⁴ Rail line abandonments and the conversion of a rail line proposed for abandonment into a recreational trail under Section 8(d) of the National Trails System Act are not federally funded actions. However, this report includes recommendations for streamlining the Section 106 process that could be useful for reviews of abandonments, and at the request of PRIIA, this report includes recommendations for streamlining that are consistent with the policies and purposes of the Rails-to-Trails Act.

Section 303 of Title 49, U.S.C and Section 138 of Title 23 U.S.C.

Section 4(f)⁵ was enacted as a means of protecting publicly owned public parks, recreation areas, and wildlife/waterfowl refuges as well as historic sites of local, state, or national significance, from conversion to transportation uses. The provision states that the Secretary of the U.S. DOT may approve a transportation project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge, or land from a historic site of national, state, or local significance (as determined by the federal, state, or local officials having jurisdiction over the park, recreation area, refuge or site) only if:

- There is no feasible and prudent alternative to using that land, and
- The program or project includes all possible planning to minimize harm to the Section 4(f) property.
– OR –
- The Section 4(f) use is *de minimis*.⁶

Applicability to Federally Funded Railroad Projects

Section 4(f) applies to the federal agencies in U.S. DOT, including those that may approve railroad-related transportation projects, such as FRA, FTA, and FHWA. STB, the successor agency to the Interstate Commerce Commission (ICC), also has jurisdiction over rail restructuring transactions, such as mergers, line sales, new rail line constructions, and line abandonments. However, STB is not subject to Section 4(f) because it is an independent agency. Although it is administratively affiliated with U.S. DOT, the Secretary of Transportation has no authority to review or alter STB decisions. Section 4(f) is an action forcing regulation and presents different challenges than process regulations such as section 106 of the NHPA and NEPA.⁷

⁵ In 1983, Section 4(f) of the DOT Act was recodified as 49 U.S.C. Section 303.

⁶ *De minimis* is a Latin term that means of no significance or not worthy of consideration. For historic sites, 23 CFR 774.17(2) defines a *de minimis* impact as a DOT Section 4(f) determination in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have “no adverse effect” on the historic property in question.

⁷ There are three types of NEPA reviews: Categorical Exclusions; Environmental Assessments; and Environmental Impact Statements.

- Categorical Exclusion (CE): A CE is a category of actions established, after CEQ and public review, in agency procedures implementing NEPA that is expected not to have individually or cumulatively significant environmental impacts. (40 C.F.R. § 1508.4).
- Environmental Assessment (EA): When a CE is not appropriate and the agency has not determined whether the proposed action will cause significant environmental effects, then an EA is prepared. (40 C.F.R. § 1508.9).
- Environmental Impact Statement (EIS): The most intensive level of analysis is the Environmental Impact Statement, which is typically reserved for the analysis of proposed actions that are expected to result in significant environmental impacts. (40 C.F.R. part 1502).

Section 106 of the NHPA (16 U.S.C. 470f)

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings⁸ on historic properties⁹ and afford ACHP a reasonable opportunity to comment. Under NHPA, a historic property means any property included in or eligible for inclusion in the NRHP. The procedures for implementing section 106 are set forth in ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800), and define how federal agencies meet these statutory responsibilities. As described in 36 CFR §800.1:

The section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.

Consulting parties that play a role in the Section 106 review of federal undertakings include the State Historic Preservation Officer (SHPO), Indian tribes and Native Hawaiian organizations (NHOs), representatives of local governments, applicants for federal assistance, permits, licenses and other approvals, and certain individuals and organizations with a demonstrated interest in the undertaking. As stated in 36 CFR §800.1(a): "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." Section 106, ideally, will balance project goals and preservation values in a manner that is in the public interest.

Typically, a federal agency complies with the ACHP's regulations by following the steps described in section 800.3 through section 800.6 of Subpart B, "The Section 106 Process," which includes the following components:

Section 800.3, Initiation of the Section 106 Process

The federal agency official determines whether the proposed federal action is an undertaking as defined in section 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties are present, the federal agency official has no further obligations under section 106.

An example of activities that may not be an undertaking could be routine repair and maintenance activities, including in-kind replacement of standard railroad operating equipment and materials such as rails, switches, ties, and ballast.

⁸ Undertaking is defined at 36 CFR 800.16(l) to mean "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."

⁹ Historic property is defined at 36 CFR 800.16(y) to mean "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (NRHP) maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet NRHP criteria."

Section 800.4, Identification of Historic Properties

The federal agency official, in consultation with the SHPO and/or Tribal Historic Preservation Officer (THPO) determines and documents the Area of Potential Effects (APE),¹⁰ reviews existing information on historic properties within the APE, seeks information from knowledgeable parties about historic properties in the area, and gathers information from Tribes and issues related to properties that may be of religious and cultural significance to them. The federal agency makes a reasonable and good faith effort to identify historic properties in the APE, which may include background research, consultation, oral history interviews, sample field investigation and field survey. In consultation with the SHPO/THPO, the federal agency evaluates the historic significance of properties within the APE by applying the NRHP criteria, determining whether a property meets NRHP criteria, and seeks SHPO/THPO concurrence with NRHP eligibility or ineligibility. For undertakings where the federal agency finds that there are no historic properties present in the APE, or there would be no effect on them, and the SHPO/THPO agree, the federal agency's responsibilities under section 106 are complete.

Section 800.5, Assessment of Adverse Effects

If the federal agency finds there are historic properties in the APE that may be affected by the undertaking, it assesses whether the effect is adverse. In consultation with the SHPO/THPO, the federal agency applies the *Criteria of adverse effect*, which are set forth in section 800.5(a)(1). In part, 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 NHRP in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association. The ACHP's regulations include seven examples of adverse effect at section 800.5(a)(2), as follows:

- (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

¹⁰ Area of Potential Effects is defined at 36 CFR 800.16(d) and "means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."

- (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.

The federal agency makes a finding of no adverse effect when the criteria of adverse effect are not met or conditions are imposed on the undertaking to ensure there is no adverse effect. The federal agency seeks agreement from SHPO/THPO with the finding of no adverse effect and involves consulting parties prior to carrying out the undertaking.

Section 800.6, Resolution of Adverse Effects

If the federal agency finds the proposed undertaking would have an adverse effect on a historic property within the APE, it continues consultation with the SHPO/THPO and other consulting parties, and notifies the ACHP of the adverse effect finding. The federal agency consults with the SHPO/THPO and consulting parties to seek ways to avoid, minimize, or mitigate the adverse effect(s), typically by entering into a Memorandum of Agreement (MOA) or Programmatic Agreement (PA).

Applicability to Federally Funded Railroad Projects

Section 106 of the NHPA applies to all federal agencies, including those federal agencies that oversee the review of railroad and public rail transportation undertakings, including FRA, STB, FTA and rarely FHWA, and those that manage federal lands where railroads may cross, such as BLM and NPS. Section 106 of the NHPA does not apply to Amtrak because it is not a federal agency; it was created by the Rail Passenger Service Act of 1970 (Pub. L. 91-518) as a private, for-profit District of Columbia corporation. However, if Amtrak requires funding or requires a license from a federal agency for an undertaking, then section 106 would apply.

Generally, each federal agency complies with section 106 by initiating, implementing, and concluding the section 106 process for each undertaking pursuant to Subpart B of 36 CFR Part 800, the ACHP's regulations for implementing section 106. As summarized above, the typical section 106 process involves four primary steps:

1. Initiation of the section 106 Review;
2. Identification of Historic Properties;
3. Assessment of Adverse Effects; and
4. Resolution of Adverse Effects.

The federal agency identifies parties entitled to be consulting parties and determines the scope and level of effort for identifying historic properties to meet the specific conditions of each undertaking. As a result, the section 106 process is repeated for each railroad project that meets the definition of a federal undertaking, but its implementation and results may vary because of the different participants, level of effort prescribed, and the presence and range of historic properties identified for each undertaking.

Subpart C (section 800.14) of the ACHP's section 106 regulations includes a series of federal agency program alternatives that may be used *in lieu* of the typical four-step section 106 process set forth in Subpart B (section 800.3 through section 800.6). These program alternatives are discussed in detail in Chapter 4.

Existing U.S. DOT Guidance and Regulations

STB and several Operating Administrations in the U.S. DOT, including FRA, FHWA, FTA, have guidance and regulations that are used to comply with historic preservation laws or related environmental laws. The guidance and regulations are excerpted as they may apply to federally funded or licensed railroad projects.

FRA's Procedures for Considering Environmental Impacts **(64 Fed. Reg. 28545, May 26, 1999)**

FRA's Procedures for Considering Environmental Impacts (*FRA's Procedures*) cover the process that governs FRA's compliance with NEPA and related environmental and historic preservation laws and regulations. Procedures for sections 4(f) and 106 are included below, in relevant part.

Section 12. 4(f) Determinations

"The Program Office shall obtain the approval of the Administrator for a 4(f) determination before any FRA action is taken which proposes to use Section 4(f) of title 49 protected properties." (Section 12(b)(1)) Section 12 of *FRA's Procedures* sets forth the staff responsibilities, representations of mitigation, and contents for a section 4(f) of title 49 determination.

Section 14. Contents of an Environmental Impact Statement

FRA's Procedures require that documentation of compliance with section 106 and its regulations be included in the draft or final environmental impact statement (EIS) in Section 14(b), (n)(21), and (o), as follows:

- (b) If appropriate, [include] a citation to section 106....
- (n)(21) . . . [I]dentify all historic properties. There should be evidence of consultation with the appropriate [SHPO] and in case of disagreement with the Department of the Interior as to whether a property is eligible for the [NRHP]. The criteria of effect on historic properties found in 36 CFR Part 800 should be discussed with regard to each alternative. In the final EIS, there should be evidence of consultation, concerning the impacts of the proposed action on historic properties, with the appropriate [SHPO(s)], and with state or local historical societies, museums, or academic institutions having special expertise. In the event that FRA in consultation with the [SHPO] finds that a proposed action will have an adverse effect on such property, there should also be evidence in the final EIS of subsequent consultation with the [AHP]....
- (o) A summary of unavoidable adverse impacts of the alternatives and a description of mitigation measures planned to minimize each adverse impact. . . . If a proposed action will have an adverse effect on a [historic] property, this part of the final EIS shall include a copy of any [MOA] with, or other response to comments by, the [AHP], in accordance with 36 CFR Part 800....

Excluded Actions

Section 4(c) of *FRA's Procedures* is entitled *Actions Categorically Excluded*. "Certain classes of FRA actions have been determined to be categorically excluded from the requirements of [FRA's] Procedures as they do not individually or cumulatively have a significant effect on the human environment." However, they must satisfy certain criteria, including Section 4(e)(4), which states, "The action will not: use 4(f)-protected properties [or] adversely affect properties under Section 106

of the National Historic Preservation Act....” When processing CE’s under NEPA the agency must consider whether extraordinary circumstances to Historic Properties are present (40CFR 1508.4).

The following categorically excluded classes of actions from FRA’s Procedures, Section 4,¹¹ listed with their class number in relevant part, are most applicable to federally funded railroad improvement projects and historic preservation compliance:

- (11) Maintenance of: existing railroad equipment; track and bridge structures; electrification, communication, signaling, or security facilities; stations; maintenance-of-way and maintenance of-equipment bases; and other existing railroad-related facilities. For purposes of this exemption “maintenance” means work, normally provided on a periodic basis, which does not change the existing character of the facility, and may include work characterized by other terms under specific FRA programs;
- (12) Temporary replacement of an essential rail facility if repairs are commenced immediately after the occurrence of a natural disaster or catastrophic failure;
- (15) Financial assistance for the construction of minor loading and unloading facilities, provided that projects included in this category are consistent with local zoning, do not involve the acquisition of a significant amount of land, and do not significantly alter the traffic density characteristics of existing rail or highway facilities;
- (16) Minor rail line additions including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right of way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities;
- (17) Acquisition of existing railroad equipment, track and bridge structures, electrification, communication, signaling or security facilities, stations, maintenance of way and maintenance of equipment bases, and other existing railroad facilities or the right to use such facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently or previously existing on the subject properties;
- (18) Research, development and/or demonstration of advances in signal, communication and/or train control systems on existing rail lines provided that such research, development and/or demonstrations do not require the acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail line;
- (19) Improvements to existing facilities to service, inspect, or maintain rail passenger equipment, including expansion of existing buildings, the construction of new buildings and outdoor facilities, and the reconfiguration of yard tracks;
- (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation;
- (21) Alterations to existing facilities, locomotives, stations, and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or

¹¹ On April 23, 2012, the FRA published a notice of intent to amend FRA’s *Procedures for Considering Environmental Impacts* by adding seven new FRA-specific CEs. The CE’s became final on January 14, 2013. *Notice of Updated Procedures for Considering Environmental Impacts by adding categorical exclusions* (78 Fed. Reg. 2713).

modifying lifts, constructing access ramps and railings, modifying restrooms, or constructing accessible platforms;

- (23) Acquisition (including purchase or lease), rehabilitation, or maintenance of vehicles and equipment that does not cause a substantial increase in the use of infrastructure within the existing right of way or other previously disturbed locations, including locomotives, passenger coaches, freight cars, trainsets, and construction, maintenance or inspection equipment;
- (24) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, or security equipment, including surveillance and detection cameras; and
- (27) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way and that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, improving or replacing interlockings, or the installation or maintenance of ancillary equipment.

Applicability to Federally Funded Railroad Projects and Historic Preservation Compliance

While FRA's *Procedures* do not have separate requirements for complying with Section 106 and while actions categorically excluded from NEPA review are not automatically exempted from Section 106 review, some of the classes of actions that are categorically excluded from NEPA review may inform a proposal to establish parallel exempted categories of Section 106 undertakings. Pursuant to Section 800.14(c), a federal agency may develop such exempted categories in consultation with the ACHP, SHPO/THPOs, Indian tribes, NHOs, and other interested parties..

FHWA's and FTA's Environmental Impact and Related Procedures (23 CFR part 771)

FHWA's and FTA's *Environmental Impacts and Related Procedures*¹² include the process that governs their compliance under NEPA for the processing of highway and public transportation projects. FHWA's and FTA's Environmental Procedures for determining categorical exclusions as they may relate to railroad projects are included below, in relevant part.

Section 771.117 Categorical Exclusions

- (a) Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. They are actions which: . . . do not have a significant impact on any natural, cultural, recreational, historic or other resource . . . ;

¹² FHWA's and FTA's *Environmental Impact and Related Procedures* are codified in the U.S. Code of Federal Regulations at 23 CFR Part 771. FHWA's and FTA's *Environmental Impact and Related Procedures* at 23 CFR Part 771 do not apply to FRA. FRA follows its own *Procedures for Considering Environmental Impacts* at 64 Fed. Reg. 28545.

- (b) Any action which normally would be classified as a CE but could involve unusual circumstances will require the Administration, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include:
- (3) Significant impact on properties protected by Section 4(f) of title 49 or section 106 of the National Historic Preservation Act;
- (c) The following actions meet the criteria for CEs in the CEQ regulation (Section 1508.4) and Section 771.117(a) of [FHWA's and FTA's] regulation and normally do not require any further NEPA approvals by the Administration:
- (2) Approval of utility installations along or across a transportation facility.
 - (5) Transfer of Federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.
 - (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
 - (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
 - (14) Bus and rail car rehabilitation.
 - (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
 - (18) Track and rail bed maintenance and improvements when carried out within the existing right-of-way.
 - (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.
- (d) Additional actions that meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval.¹³ The applicant shall submit documentation that demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to¹⁴:
- (3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.
 - (4) Transportation corridor fringe parking facilities.

¹³ On March 15, 2012, the USDOT published a notice of proposed rulemaking in the Federal Register, proposing changes to the agency NEPA regulations that would affect actions by FTA and project sponsors. Revisions are intended to streamline the FTA environmental process for transit projects, and include adding 10 new FTA-specific CEs. This rule became final on February 7, 2013

¹⁴ MAP-21 expands the usage of FHWA and FTA CEs to a variety of other types of projects, including multi-modal projects, projects to repair roads damaged in a declared disaster, projects within existing operational right-of-way, and projects receiving limited Federal assistance.

- (6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.
- (9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
- (11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
- (12) Acquisition of land for hardship or protective purposes. . . . No project development on such land may proceed until the NEPA process has been completed.
- (13) Acquisition of pre-existing railroad right-of-way pursuant to 49 U.S.C. 5324(c).¹⁵ No project development on the acquired railroad right-of-way may proceed until the NEPA process for such project development, including the consideration of alternatives, has been completed.

Applicability to Federally Funded Railroad Projects and Historic Preservation Compliance

Some of FHWA's and FTA's *Environmental Procedures* for determining categorical exclusions may form the basis for parallel categories of FRA, FTA, or FHWA railroad-related undertakings that may be exempt under Section 106. This is also consistent with Section 800.8(b) of the Section 106 regulations, which allows a federal agency to determine whether a project, activity, or program that is categorically excluded from NEPA still qualifies as a Section 106 undertaking. It is acknowledged that the standards are different for establishing NEPA Categorical Exclusions under 40 CFR § 1508.4 than for establishing NHPA Exempted Categories under NHPA under 36 CFR § 800.14(c). A NEPA "categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment whereas the potential effects of an NHPA "exempted category" upon historic properties are foreseeable and likely to be minimal or not adverse.

¹⁵ Allows FTA, under certain conditions, to assist in the acquisition of pre-existing railroad right-of-way (ROW) before the completion of an environmental review for any transportation project that will eventually be built on that ROW. Full text of 49 U.S.C. 5324(c) is available on FTA's website at http://www.fta.dot.gov/documents/Final_Guidance_with_Policy_Council_changes_and_useful_life-clean.pdf.

FHWA's and FTA's Relevant Regulations (23 CFR 774)¹⁶

"FHWA and FTA may not approve the use¹⁷ . . . of Section 4(f) property unless a determination is made under paragraph (a) or (b) [as follows]:

- (a) [FHWA or FTA, whichever is making the approval for the transportation program or project at issue] determines that:
 - (1) There is no feasible and prudent avoidance alternative, as defined in Section 774.17, to the use of land from the property; and
 - (2) The action includes all possible planning, as defined in Section 774.17, to minimize harm to the property resulting from such use; or
- (b) [FHWA or FTA] determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, will have a *de minimis* impact¹⁸, as defined in Section 774.17, on the property.
- (c) If the analysis in paragraph (a)(1) of this section concludes that there is no feasible and prudent avoidance alternative, then [FHWA or FTA] may approve, from among the remaining alternatives that use Section 4(f) property, only the alternative that:
 - (1) Causes the least overall harm in light of the statute's preservation purpose. The least overall harm is determined by balancing the following factors:
 - (i) The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);
 - (ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
 - (iii) The relative significance of each Section 4(f) property;
 - (iv) The views of the official(s) with jurisdiction over each Section 4(f) property;
 - (v) The degree to which each alternative meets the purpose and need for the project;
 - (vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
 - (vii) Substantial differences in costs among the alternatives.
 - (2) The alternative selected must include all possible planning, as defined in Section 774.17, to minimize harm to Section 4(f) property.
- (d) Programmatic Section 4(f) evaluations are a time-saving procedural alternative to preparing individual Section 4(f) evaluations under paragraph (a) of this section for certain minor uses of Section 4(f) property. Programmatic Section 4(f) evaluations are developed by [FHWA or FTA]

¹⁶ 23 CFR Part 774 implements 23 U.S.C. 138 and 49 U.S.C. 303, which were originally enacted as Section 4(f) of the Department of Transportation Act of 1966 and are still referred to as 'Section 4(f)' in the implementing regulations and guidance.

¹⁷ "Use. Except as set forth in Sections 774.11 and 774.13, a "use" of Section 4(f) property occurs:

- (1) When land is permanently incorporated into a transportation facility;
- (2) When there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose as determined by the criteria in Section 774.13(d); or
- (3) When there is a constructive use of a Section 4(f) property as determined by the criteria in Section 774.15."

23 CFR 774.17.

¹⁸ "*De minimis impact.* (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 CFR part 800 that no historic property is affected by the project or that the project will have "no adverse effect" on the historic property in question." 23 CFR 774.17.

based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives. An approved programmatic Section 4(f) evaluation may be relied upon to cover a particular project only if the specific conditions in the programmatic evaluation are met.”¹⁹

A number of exemptions to Section 4(f) have been created and are described in 23 CFR 774.13.. These exceptions are described in detail in Chapter 6.

Applicability to Federally Funded Railroad Projects

Section 4(f) applies to the federal agencies in U.S. DOT, including the FTA, which may provide funding to public transportation projects in former or actively used freight rail corridors, and the FHWA, which in addition to funding highway and bridge improvement projects occasionally funds or approves railroad projects. FRA does not follow 23 CFR Part 774. However, FHWA’s and FTA’s existing Section 4(f) exceptions at 23 CFR 774.13 may serve as examples that may apply to rail-related repair and improvement projects.

FHWA’s “Section 4(f) Policy Paper”

FHWA originally issued the “Section 4(f) Policy Paper” in September 1987. The 2012 paper,²⁰ which is intended to supersede the 2005 edition, provides updated comprehensive guidance on when and how to apply the provisions of Section 4(f) on FHWA projects that propose to use Section 4(f) land or resources. FTA and FRA use FHWA’s policy paper informally to inform the application of section 4(f). Substantive differences between the recent 2012 paper and the 2005 edition involve inclusion of the 2008 regulatory changes to section 4(f) (or “Final Rule” adopted by the FHWA and FTA – codified in 23 CFR Part 774). In addition to these changes, the introduction to the new edition is more comprehensive than the previous edition in order to address the expanded list of “feasible and prudent factors,” “least harm,” “*de minimis*,” and how to approach actions involving multiple alternatives with different types of Section 4(f) uses. Additional Q&As have been added to the 2012 paper to further elaborate on these issues. The following text is based on the 2012 paper.

Section 4(f) applies only to the actions of agencies within the U.S. DOT. The statute does not require the preparation, distribution or circulation of any written document. The statute also does not contain a public comment element. However, U.S. DOT has developed departmental requirements for documenting section 4(f) decisions. When a project proposes to use resources protected by section 4(f), a section 4(f) evaluation must be prepared. There are three options for processing proposed uses of section 4(f) property: (1) individual section 4(f) evaluations, (2) programmatic section 4(f) evaluations, or (3) a determination of *de minimis* impact. These three options are described below and are also addressed in the applicable regulations:

¹⁹ 23 CFR 774.3(a)–(d).

²⁰ U.S. DOT-FHWA Office of Planning, Environment and Realty; Project Development and Environmental Review, *Section 4(f) Policy Paper*, July 20, 2012. Available online at FHWA’s website: <http://www.environment.fhwa.dot.gov/4f/4fpolicy.asp>, accessed on August 13, 2012.

Individual Section 4(f) Evaluations

The section 4(f) evaluation may be developed and processed as a stand-alone document, as in the case of a CE determination, or incorporated into an environmental assessment (EA) or EIS as a separate section of those documents. An individual section 4(f) evaluation must identify and evaluate alternatives, both location and design shifts that entirely avoid the section 4(f) resource, and if unavoidable, analyze all possible measures that are available to minimize the proposed action's impacts on the resource. As part of the evaluation, coordination with the public official having jurisdiction over the resource and with the Department of the Interior (DOI) is required, and with the U.S. Department of Agriculture (USDA) and the U.S. Department of Housing and Urban Development (HUD), as appropriate.

Section 4(f) Programmatic Evaluations

Programmatic section 4(f) evaluations may be used in place of individual evaluations if specific conditions are met. To date only FHWA has adopted programmatic evaluations. FHWA has on request, however, determined applicability of FHWA's programmatic section 4(f) evaluations to FRA and FTA actions on a case-by-case basis (e.g., National Gateway Phase I).²¹

Under a programmatic section 4(f) evaluation, certain conditions are applied such that, if a project meets the conditions, it will satisfy the requirements of section 4(f) that there is no feasible and prudent alternative and that the project includes all possible planning to minimize harm. These conditions generally relate to the type of project, the severity of impacts to a section 4(f) property, the evaluation of alternatives, the establishment of a procedure for minimizing harm to the 4(f) resource, and adequate coordination with appropriate entities. . To date, there are five programmatic evaluations that have been approved for use nationwide:

1. Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects,
2. Historic Bridges,
3. Minor Involvements with Historic Sites,
4. Minor Involvements with Parks, Recreation Areas and Waterfowl and Wildlife Refuges, and
5. Net Benefits to a section 4(f) Property.

Numbers 2, 3, and 5 are most relevant to railroad projects when section 4(f) applies. Programmatic section 4(f) evaluations simplify the documentation, interagency coordination, and approval processes required to complete a section 4(f) evaluation. An analysis of avoidance alternatives is still required; however, interagency coordination is only required with the official(s) with jurisdiction over the site and not with DOI, USDA, or HUD for these Section 4 (f) evaluation processes.

De Minimis Impact Finding

In 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) made the first substantive revisions to Section 4(f) since the passage of the

²¹ See also Appendix B for FHWA's Resource Center-Section 4(f) Workshop entitled *De Minimis* and Section 4(f) Programmatic Evaluations (PE) Comparison Chart at <http://environment.fhwa.dot.gov/projdev/4fnspeval.asp>.

Department of Transportation Act of 1966. Specifically, SAFETEA-LU Section 6009 Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 6009) part (a) modified existing law at 23 U.S.C. 138 and 49 U.S.C. 303 to provide a simplified approval process of projects that have *de minimis* impacts on Section 4(f) property. *De minimis* impact, in general terms, means that the use of the transportation project will not adversely affect the activities, features, and attributes of the Section 4(f) property. The *de minimis* impact criteria and associated determination requirements differ between (1) historic sites and (2) parks, recreation areas, and wildlife and waterfowl refuges. When a *de minimis* impact determination is made, an analysis of avoidance alternatives is not required.

According to Part II, Questions and Answers Regarding Section 4(f) Applicability and Compliance, Question 12 of the 2012 Policy Paper, a determination of *de minimis* impact on a historic property may be made when all three of the following criteria are satisfied:

1. The U.S. DOT has considered the views of any consulting parties participating in the consultation required by Section 106 of the NHPA, including the Secretary of the Interior or his representative if the property is a NHL;
2. The SHPO and/or THPO, and ACHP if participating in the section 106 consultation, is informed of U.S. DOT's intent to make a *de minimis* impact finding based on their written concurrence in the section 106 determination of "no adverse effect," and;
3. The section 106 process results in a determination of "no adverse effect" with the written concurrence of the SHPO and/or THPO, and ACHP if participating in the section 106 consultation.

Applicability to Federally Funded Railroad Projects and Historic Preservation Compliance

Three of the five nationwide Section 4(f) programmatic evaluations are most relevant to railroad projects, and will be discussed in detail in Chapter 7:

- Historic Bridges,
- Minor Involvements with Historic Sites, and
- Net Benefits to a Section 4(f) Property.

A Section 4(f) determination of *de minimis* impact on a historic property is dependent on a Section 106 determination of "no adverse effect" or "no historic properties affected," and some streamlining opportunities for public outreach, mitigation, and support documentation may be available from making these determinations concurrently.

STB's Regulations Requiring "Historic Reports" **Overview²²**

STB, through its Office of Environmental Analysis (OEA), undertakes the section 106 process when a railroad seeks STB authorization for an action that has the potential to adversely impact historic properties or resources, such as when a railroad proposes to abandon an existing rail line or construct a new rail line. Accordingly, STB's environmental regulations include provisions on historic preservation (49 CFR 1105.8) and these regulations detail the types of actions for which railroad applicants must prepare and submit *Historic Reports* (documents providing STB and appropriate SHPO(s) with sufficient information to conduct the section 106 consultation process required by NHPA). STB's 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.

For rail line abandonment proceedings, OEA must consult with the appropriate SHPO(s) and THPO(s), federally recognized tribes that may have ancestral connections to the project area, and other interested parties to identify historic properties, determine if they would be adversely affected, and, if so, consider appropriate mitigation. When a proposed abandonment may affect a historic property and the historic review process is ongoing, STB may impose a temporary condition prohibiting the railroad from selling the line, altering any sites or structures on the line, or conducting salvage activities on the line until the section 106 process is completed, and STB removes the condition. This has the effect of maintaining the status quo pending completion of the section 106 process. Because many existing railroad properties are 50 years old or older, they qualify as potentially historic resources, and as a result, STB processes a high volume of cases that require a historic review. When a historic property is involved, STB's power to protect it is very limited.²³ STB cannot deny authorization for a proposed action because it would have an adverse effect on historic properties or compel a railroad to retain property, sell or donate property to a particular purchaser, or place a restrictive covenant upon property.²⁴ Documentation of historic resources (taking photographs, video documentation, or preparing a history) before they are altered or removed is the only form of nonconsensual mitigation that STB can require.²⁵ However, a railroad may voluntarily agree to protect historic properties beyond what STB can require, and such voluntary mitigation can be incorporated into an MOA.²⁶

Section 1105.8 Historic Reports

“(a) *Filing.* An applicant proposing an action identified in Section 1105.6 (a) or (b), or an action in Section 1105.6(c) that will result in the lease, transfer, or sale of a railroad's line, sites or structures, must submit (with its application, petition or notice) the Historic Report described in paragraph (d) of this section, unless excepted under paragraph (b) of this section. This report should be combined with the Environmental Report where one is required. The purpose of the

²² Closely follows Surface Transportation Board, *Environmental Matters, Historic Preservation, Overview*. <http://www.stb.dot.gov/stb/environment/preservation.html>, accessed on April 12, 2011.

²³ See Implementation of Environmental Laws, 7 I.C.C.2d 807, 828-29 (1991).

²⁴ STB has no ownership interest or federal funding role in railroad rights-of-way.

²⁵ See Implementation of Environmental Laws, 7 I.C.C.2d at 828-29 (1991).

²⁶ 36 CFR § 800.6(c).

Historic Report is to provide [STB] with sufficient information to conduct the [section 106] consultation process required by the [NHPA].

- (b) *Exceptions.* The following proposals do not require a Historic Report:
- (1) A sale, lease or transfer of a rail line for the purpose of continued rail operations where further STB approval is required to abandon any service and there are no plans to dispose of or alter properties subject to STB jurisdiction that are 50 years old or older.
 - (2) A sale, lease, or transfer of property between corporate affiliates where there will be no significant change in operations.
 - (3) Trackage rights, common use of rail terminals, common control through stock ownership or similar action which will not substantially change the level of maintenance of railroad property.
 - (4) A rulemaking, policy statement, petition for declaratory order, petition for waiver of procedural requirements, or proceeding involving transportation rates or classifications.
- (c) *Distribution.* The applicant must send the Historic Report to the appropriate [SHPO(s)], preferably at least 60 days in advance of filing the application, petition, or notice, but not later than 20 days prior to filing with [STB].
- (d) *Content.* The Historic Report should contain the information required by Section 1105.7(e)(1)²⁷ and the following additional historic information:
- (1) A [U.S. Geological Survey] (USGS) topographic map (or an alternate map drawn to scale and sufficiently detailed to show buildings and other structures in the vicinity of the proposed action) showing the location of the proposed action, and the locations and approximate dimensions of railroad structures that are 50 years old or older and are part of the proposed action;
 - (2) A written description of the right-of-way (including approximate widths, to the extent known), and the topography and urban and/or rural characteristics of the surrounding area;
 - (3) Good quality photographs (actual photographic prints, not photocopies) of railroad structures on the property that are 50 years old or older and of the immediately surrounding area;
 - (4) The date(s) of construction of the structure(s), and the date(s) and extent of any major alterations, to the extent such information is known;
 - (5) A brief narrative history of carrier operations in the area, and an explanation of what, if any, changes are contemplated as a result of the proposed action;
 - (6) A brief summary of documents in the carrier's possession, such as engineering drawings, that might be useful in documenting a structure that is found to be historic;
 - (7) An opinion (based on readily available information in the railroad's possession) as to whether the site and/or structures meet the criteria for listing on the [NRHP] (36 CFR 60.4), and whether there is a likelihood of archeological resources or any other previously unknown historic properties in the project area, and the basis for these opinions (including any consultations with the State Historic Preservation Office, local historical societies or universities);

²⁷ The required information is: "*Proposed action and alternatives.* Describe the proposed action, including commodities transported, the planned disposition (if any) of any rail line and other structures that may be involved, and any possible changes in current operations or maintenance practices. Also describe any reasonable alternatives to the proposed action. Include a readable, detailed map and drawings clearly delineating the project." 49 CFR 1105.7(e)(1) (emphasis added).

- (8) A description (based on readily available information in the railroad's possession) of any known prior subsurface ground disturbance or fill, environmental conditions (naturally occurring or manmade) that might affect the archeological recovery of resources (such as swampy conditions or the presence of toxic wastes), and the surrounding terrain.
- (9) Within 30 days of receipt of the Historic Report, the [SHPO] may request the following additional information regarding specified non-railroad owned properties or groups of properties immediately adjacent to the railroad right-of-way: photographs of specified properties that can be readily seen from the railroad right-of-way (or other public rights-of-way adjacent to the property) and a written description of any previously discovered archeological sites, identifying the location and type of the site (i.e., prehistoric or native American).
- (e) Any of these requirements may be waived or modified when the information is not necessary to determine the presence of historic properties and the effect of the proposed action on them.
- (f) Historic preservation conditions imposed by [STB] in rail abandonment cases generally will not extend beyond the 330-day statutory time period in 49 U.S.C. 10904 for abandonment proceedings.”²⁸

Environmental Review

Once the railroad submits its *Historic Report* to STB, OEA begins its work of preparing the appropriate environmental documentation to meet STB's obligations under federal environmental laws and requirements, including NEPA and NHPA. In the environmental document, OEA details any potential impacts to historic properties and recommends mitigation, if appropriate.

Applicability to Federally Funded Railroad Projects and Historic Preservation Compliance

STB's limited jurisdiction and conditioning power may affect how it complies with particular provisions in the section 106 process. The four exceptions in 49 CFR 1105.8(b) that do not require a Historic Report may form the basis for parallel categories of undertakings that may be exempt under section 106.

In addition, pursuant to 49 CFR 1105.8(d), STB identifies what information to include in a Historic Report and itemizes the level of documentation required for identifying historic properties. With more rigor, instruction, and oversight this itemized content may serve as the foundation for how a federal agency may consistently acquire historical information directly from a rail carrier (often not available in the public record) to support its determinations of NRHP-eligible railroad properties.

²⁸ 49 CFR 1105.8.

Summary of Chapter 1

All federal agencies must comply with NEPA and section 106 of NHPA, where applicable, and Operating Administration in the U.S. DOT, including FRA, FHWA, and FTA, also must comply with section 4(f). While there is some overlap of policy and guidance among the U.S. DOT agencies for establishing *de minimis* 4(f) impacts and NEPA categorical exclusions, there is no uniform approach to complying with section 106 regulations, and no procedures established specifically for federally funded or licensed railroad improvement projects.

Chapter 2

Compliance Methods

Section 407 of the Passenger Rail Investment and Improvement Act of 2008 (Pub. L. 110-432) mandated that this study be prepared “in consultation with the [ACHP], the [NCSHPO], the [DOI], appropriate representatives of the railroad industry, and representative stakeholders.”

Chapter 2 identifies the key stakeholders in the compliance process for section 106 and Section 4(f) as they apply to federally funded railroad improvement projects who agreed to assist FRA in this study. FRA contacted each of the key participants to introduce the study, develop interest, identify participation levels, and solicit information. Chapter 2 summarizes the views of the key stakeholders at the outset of the study, and their comments are provided in detail in Appendix C.

Focus Group

FRA created a focus group for the study that consists of the agencies directly responsible for compliance with section 106 or Section 4(f) for railroad and rail transit projects, including:

- FHWA and FTA, the other federal agencies with FRA in the U.S. DOT that may fund or approve railroad infrastructure projects.
- STB, the federal agency that regulates railroad licensing proceedings to abandon a rail line or acquire or construct a new rail line.
- DOI the federal agency that may have responsibility to manage historic railroads that traverse federal lands.
- Historic preservation regulatory agencies and participants, including the ACHP, NCSHPO, NATHPO and NTHP.

The following table lists the members of the focus group and their representatives:

Table 2-1: Focus Group

Acronym	Organization	Name	Title
FRA	Federal Railroad Administration	David Valenstein Colleen Vaughn	Division Chief Environmental Protection Specialist/Federal Preservation Officer
NCSHPO	National Conference of State Historic Preservation Officers	Nancy Schamu	Executive Director
NATHPO	National Association of Tribal Historic Preservation Officers	D. Bambi Kraus	President
ACHP	Advisory Council on Historic Preservation	Charlene Vaughn Louise Brodnitz	Assistant Director Program Analyst

Acronym	Organization	Name	Title
STB	Surface Transportation Board	Christa Dean Stoebner	Attorney Advisor
FTA	Federal Transit Administration	Elizabeth Zelasko Patel	Federal Preservation Officer
FHWA	Federal Highway Administration	Dan Johnson Mary Ann Naber	Environmental Specialist Federal Preservation Officer
OST	Office of the Secretary of Transportation	Rebecca Higgins	Policy Analyst
NTHP	National Trust for Historic Preservation	Elizabeth Merritt	Deputy General Counsel
DOI (NPS)	Department of the Interior (National Park Service)	Jeffrey Durbin Dr. Stephanie Toothman	Historian/Section 106 Compliance Program Manager Federal Preservation Officer/ Associate Director Cultural Resources

FRA had preliminary discussions with each member of the focus group, held a workshop on June 1, 2011, to further develop the scope and content of the study, submitted the First Draft Interim Report for their review on July 15, 2011, set up a project website for the focus group, and held follow up meetings on August 10, 2011, and January 18, 2012 to discuss progress on the study and comments received. The focus group contributed by regular discussions and by providing comments on interim reports throughout the development of this study. Their comments are provided in detail in Appendix C and are summarized at the end of this chapter.

Stakeholders

FRA created a stakeholder group for the study who are not directly responsible for compliance with Section 106 or Section 4(f), but may participate in the compliance process, have experience with railroad undertakings, or have a vested interest in the outcome. The stakeholder group in the study consisted of additional federal agencies, national organizations related to historic preservation and railroads, SHPOs, state DOTs, and rail carriers. FRA solicited comments and information from each of the following participants in the stakeholder group.

Table 2-2: Stakeholder Group

Acronym	Organization	Name	Title
Federal agencies			
EPA	Environmental Protection Agency	Bob Hargrove	Deputy Federal Preservation Officer; Director, NEPA Compliance Division
USFS	United States Forest Service	Michael J. Kaczor Dusty Parson	Federal Preservation Officer Presidential Management Fellow

Acronym	Organization	Name	Title
NPS	National Park Service	Carol D. Shull Paul Loether Paul Lusignan	Interim Keeper of the NRHP NRHP Chief Reviewer: WA, RI, ID, MT, CA, UT, NM, OK, AK, HI, GU
BLM	Bureau of Land Management	Susanne Rowe Dr. Robin L. Burgess	Archaeologist Federal Preservation Officer
National Organizations			
AAR	Association of American Railroads	Michael K. Rush	Associate General Counsel
ASLRRRA	American Short Line and Regional Railroad Association	Keith T. Borman	Vice President and General Counsel
NCSHPO (also in focus group)	National Conference of State Historic Preservation Officers	Ruth Pierpont Elizabeth Hughes Michael Stevens	President, NCSHPO Deputy SHPO New York Vice President, NCSHPO Deputy SHPO Maryland Treasurer, NCSHPO Wisconsin SHPO
RTTC	Rails-to-Trails Conservancy	Marianne Wesley Fowler	Senior Vice President of Federal Relations
AASHTO	American Association of State Highway and Transportation Officials	R. Leo Penne	Program Director for Intermodal and Industry Activities
APTA	American Planning Transportation Association	Richard Weaver	Director – Planning, Policy & Sustainability
State Historic Preservation Officers (SHPOs)			
AK SHPO	Alaska SHPO	Judy Bittner	Alaska SHPO
CA SHPO	California State Historic Preservation Officer	Susan Stratton, Ph.D. Amanda Blosser	Supervisor - Cultural Resources Program State Historian II
MD SHPO	Maryland State Historic Preservation Officer	Elizabeth Hughes	Deputy Director/DSHPO, Maryland Historical Trust
MT SHPO	Montana State Historic Preservation Officer	Stan Wilmoth cc: Mark Baumler, Ph. D.	State Archaeologist Montana SHPO
OH SHPO	Ohio State Historic Preservation Officer	Mark J. Epstein; cc: Dave M. Snyder cc: Nancy H. Campbell	Department Head; Archaeology Reviews Manager History/Architecture Transportation Reviews Manager
TX SHPO	Texas State Historic Preservation Officer	A. Elizabeth Butman cc: Linda Henderson cc: Adrienne V. Campbell	Director, Architecture Division History Reviewer History Reviewer

Acronym	Organization	Name	Title
		cc: Adam Alsobrook	Architecture Division Reviewer
		cc: Bill Martin	Archaeology Reviewer
		cc: Mark Denton	Archaeology Reviewer
WI SHPO	Wisconsin State Historic Preservation Officer	Michael Stevens	Wisconsin SHPO
		cc: Sherman Banker	Compliance Archeologist
State Departments of Transportation (DOTs)			
NCDOT	North Carolina Department of Transportation	Patrick Simmons Shirley R. Williams	Director – Rail Division Manager, Rail Environmental and Planning, Rail Division
WSDOT	Washington Department of Transportation	Larry Mattson	Environmental Manager
FDOT	Florida Department of Transportation	George Ballo	Community Resources Manager
PennDOT	Pennsylvania Department of Transportation	Dr. Ira Beckerman	Cultural Resource Section Chief
Rail Carriers			
Amtrak	Amtrak	Michael Stern	Senior Associate General Counsel
ARRC	Alaska Railroad Corporation	Tom Brooks, P.E Barbara Hotchkin	Vice President Engineering and Chief Engineer Manager, Project Permits and NEPA
NS	Norfolk Southern Corp.	Helen Hart	General Attorney
CSX	CSX Transportation, Inc.	Jeff Styron	Environmental Counsel
UPRR	Union Pacific Railroad	Melissa Hagan	Regional Environmental Counsel
BNSF	Burlington Northern Santa Fe Railway	Russell Light or Dava Kaitala	Senior General Attorney
Conrail	Consolidated Rail Corp.	Tim Tierney	Chief Engineer
CN/IC	Canadian National/Illinois Central	Tom Healey	CN Law Dept-Abandonments

Acronym	Organization	Name	Title
Transit Agencies			
LIRR	Long Island Railroad New York	Paul Manske	Sr. Director – Occupational & Environmental Safety at MTA Long Island Rail Road
MBTA	Massachusetts Bay Transportation Authority Massachusetts	Andrew Brennan	Director of Environmental Affairs
MNR	Metro-North Railroad New York/Connecticut	Karen Timko	Director, Environmental Compliance
MTA	Metropolitan Transportation Authority Maryland	Larry Fleisher	MTA HQ-Chief of Planning
SEPTA	Southeastern Pennsylvania Transportation Authority Pennsylvania	Byron S. Comati	Director of Strategic Planning and Analysis
UTA	Utah Transit Authority Utah	Mary DeLoretto	Environmental Studies Manager

Although all stakeholders participated and shared insight and information, AAR, Amtrak, ARRC, BLM, the Maryland SHPO, Texas SHPO, and the Wisconsin SHPO, in particular, provided extensive comments to FRA that informed this study. The stakeholder comments are summarized below and provided in detail in Appendix C. Those aspects that are most relevant to streamlining section 106 and Section 4(f) compliance for federally funded railroad and rail transit projects were considered along with those from the focus group, and helped form the basis for the potential solutions described in Chapter 8.

Summary of Chapter 2

Preliminary consultation with the focus group and stakeholders included the following key points to be addressed further in the study:

Section 4(f)

- Historic railroad properties that are currently or were historically used for transportation purposes should be treated differently than other Section 4(f) properties that were never used for transportation purposes.
- Modify Section 4(f) relative to *de minimis* impacts for historic properties, so that avoidance, minimization, and mitigation or enhancement measures incorporated into the project can be considered in determining whether the impacts to the Section 4(f) resources qualify as *de minimis*. The same *de minimis* standard should apply to all Section 4(f) properties.
- U.S. DOT could develop and adopt a Programmatic Section 4(f) Evaluation for railroad facilities subject to Rail Safety Act. This document would set forth the basis for a Programmatic Section 4(f) approval that there are no feasible and prudent alternatives to the use of railroad properties

to be replaced or rehabilitated with U.S. DOT funds, and that the projects include all possible planning to minimize harm resulting from such use.

- Applicable FHWA programmatic 4(f) evaluations should be adapted for railroad projects including the Net Benefits Programmatic Section 4(f).

Section 106 Consultation

- Develop clear definitions of what each U.S. DOT agency considers to be an undertaking.
- Exempt certain categories of undertakings from consultation requirements such as railroad track maintenance and repairs.
- Consult with SHPO(s) early and often in the section 106 process.
- Consult with federally recognized tribes early in the section 106 process.
- Identify appropriate consulting parties and involve these parties early in the consultation process (i.e., NPS, local governments, heritage areas, non-profits, neighborhood organizations, etc), seek input and consider their comments in project development.
- Schedule regular conscientious consultation with SHPOs, Tribes, and other stakeholders.
- There should be sunset dates for consideration of comments from interested parties.
- Develop formal interagency procedures for considering historic preservation factors during planning or early project development.
- Consistent consultation guidance should be developed to accommodate staff changes.
- Obtain SHPO concurrence with an APE that includes indirect effects and a survey methodology before fieldwork commences.
- During consultation, develop solutions to avoid adverse effects through context sensitive designs, materials, landscaping (ex. various Amtrak railroad surveillance, security and lighting projects).
- Partner with applicants in the railroad industry to make the process go more smoothly.
- Training for SHPO staff about railroads may be helpful.
- There seems to be a bias towards conditioning approval of a project on the creation of a trail. On the other hand, adding costs and delay to the review process could discourage abandonment projects that might yield a trail.

Section 106 Identification

- APEs for track work should be explicitly limited to the railroad right of way.
- APEs should be considered in the evaluation, assessment of effects, and proposed treatments of railroad corridors.
- For most undertakings, limit the APE to the railroad right-of-way; however, there may some cases where railroad projects might affect historic structures outside the right-of-way. Make clear, consistent procedures for developing and delineating the APE.

- Provide sufficient information for review to ensure that SHPO review staff can complete the review in a timely manner, including historic context.
- There should be a standardized process for conducting reviews among all states with timeframes that are adhered to and documentation standards.
- In each state, there should be a proactive identification and evaluation of railroad resources. This inventory effort will facilitate the section 106 review process for future projects involving these resources. Implementation would require better communication and cooperation among SHPOs and the railroads, and may require access to private railroad records and property.
- Good historic documentation exists with railroads.
- Develop computerized cultural resource inventories, using GIS when possible to identify “red flags” including historic properties protected under Section 4(f).
- Use archeological predictive modeling to characterize and analyze project alternatives and map areas of high archaeological sensitivity within proposed alternatives.
- When evaluating significance, it may be important to consider settings, particularly cultural landscapes that may be relevant to improvements and expansion projects.
- Review historic context statements for railroads prepared by some states including Arizona and Colorado.
- Prepare an advanced study to identify a historic context for rail resources and develop a methodology for their evaluation.
 - It is important to develop and use historic context, and establish a period of significance based on historic research, the strength of association necessary to evaluate under NRHP Criterion A for events and NRHP Criterion B for persons, and how re-grading, re-alignment, and regular replacement of materials affect various aspects of integrity.
 - The historic context should be broad enough to cover large multi-state railroad systems. A nationwide historic context could be developed as a framework, and then subsequent specific contexts could be developed for particular states or carrier systems.
 - This could also be done as a thematic study in consultation with the NRHP staff or using the NRHP Multiple Property Documentation Form, which is used to establish the historic context, property types, and registration requirements.
 - The funding source, cost, and resources needed to implement such an advanced study have not been determined. Funding for a comprehensive railroad study could be appropriated by all transportation agencies on a formulaic basis.
- Rely on the expertise, experience and SHPO relationships that many state DOTs have developed to evaluate linear transportation projects in relation to both archaeological and historic architectural resources. Where a state DOT oversees both highways and rail lines, there may be opportunities to prepare a comprehensive PA for transportation projects.
- Ensure that qualified professionals perform the work, whether federal agency staff or hired consultants. For railroad expansion projects, the project team should include an archeologist and a historian, architectural historian, or historic architect to identify historic properties and evaluate effects.

- Standard procedures for reviewing disputed claims as to the historic nature of a structure would be helpful, e.g., collection of information on changes that have been made to the structure and elevation to a federal agency representative with expertise in evaluating claims of historic significance for review.

Significance

- Develop a philosophy of what are eligible resources that does not presuppose that all railroad lines are historic but rather evaluates each on its own merits.
- Do not presume that if a structure is 50 years old, it is historic. Most railroad infrastructure is much older, but should not automatically be considered historic. Under NRHP Criteria Consideration G a structure is not eligible for designation if it is under 50-years old unless it has exceptional significance. The regulations do not provide for the reverse – that a structure is historic merely because it is over 50 years old.
- Do not find entire rail lines eligible for the NRHP when there are few contributing elements left. Consider that most of the rails, ballast, structures, etc. have been upgraded many times since original construction.
- Designation of entire railroads or entire corridors as historic interferes with routine maintenance activities and the development of important rail infrastructure.
- Historic rail alignments should be evaluated as a collection of interrelated resources. In addition to landmark elements such as depots and bridges, rail systems may be NRHP-eligible as historic districts.
- Some states simply consider all structures of a certain type as historic. Such generic designations are not based on any actual analysis of the structures and should be prohibited.
- Recognize only the most significant historic elements of the railroad network. Historic railroad features should be addressed on a national or regional basis, to come up with a more consistent, systematic approach to their significance, as well as their management and mitigation.
- Look for precedents and set parameters for defining property types and how to evaluate historic significance.
- Exempt those railroad properties from section 106 review that would not be considered historic (e.g., any sections of track replaced or had major repairs within the past 50 years and any structures on the rail right-of-way that consist of common resource types.)
- Exempt those railroad properties from further review if historic review objectives have already been met.
- When evaluating significance, it is important to consider settings, particularly cultural landscapes that may be relevant to improvements and expansion projects.
- In cases where a determination of eligibility has not yet been made, it is important not to confuse ideas with resources. A railroad system is an idea. The resources are the tangible remnants of the implementation of that idea, usually found in associated buildings and bridges.
- In cases of properties already determined eligible, attention needs to be paid to what components still have integrity. Like George Washington's proverbial hatchet, in which the head has been changed twice and the handle three times, some elements in rail corridors have lost their original integrity.

Effects

- Consider the historic importance and continued operations of the railroad system overall, not just focus attention on the effects to common materials such as ties, rails, bridges, and individual buildings, which must be changed to keep it operational.
- Repairs to rails and ties that have been replaced many times and no longer retain historic integrity should not be considered adverse effects.
- Maintaining the historic railroad use into the modern era is a beneficial effect, even if there are some physical changes.
- NEPA documents should be tied to section 106 findings so the NEPA document is not elevated to an Environmental Assessment or Environmental Impact Statement unless it is appropriate.

Preservation

- Routine maintenance or repairs of a structure should not be subject to review if it will not change the structure in any significant way.
- Use standard treatments of tracks and rails, railroad bridges, etc. that could be treated in a routine and systemic way. Standard treatments are used to avoid adverse effects and thus, allow agencies to conclude reviews with no adverse effect findings.
- In order to retain their economic edge, railroads must be able to readily change with the times whether from design changes due to Congressional mandates, to accommodate larger vehicles, or to retrofit structures to protect against perils unanticipated when constructed (e.g., seismic activity or vulnerability to terrorist attack).
- At times, historic preservation objectives are at odds with environmental, safety, or other objectives, particularly with respect to bridges, culverts, and similar structures. In many cases, the railroads find the process for balancing concerns inadequate. The NEPA process can be used to help balance these concerns.
- Protect significant archaeological sites within a rail right-of-way that may not have been disturbed since the construction of a rail line.
- Preserve resource types that are increasingly rare, such as round houses and interlocking towers.
- Where preservation is not possible, pursue adequate mitigation in response to consulting party and public input, such as donating or loaning of a railroad's extensive archives of photographs and drawings; digitization of their records for hosting by a rail museum or major library such as the Library of Congress, which houses many photographic collections, or incorporation of this material into Historic American Engineering Record (HAER), Historic American Buildings Survey (HABS), and Historic American Landscape Survey (HALS) documentation.
- Standardized mitigation, e.g., recordation, can be established for types of structures to reduce lengthy negotiations on mitigation.

Statutory and Regulatory

Exempt Categories of Undertakings

- The NEPA process for the creation of categorical exclusions could be adapted to provide a template for creating exempt categories of undertakings; and existing administrative records supporting the creation of categorical exclusions can inform efforts to establish new Exempted Categories under the NHPA.
- Authorize FRA to accept environment documents under the existing CEQ adoption process that had been approved by other operating administrations as fulfilling NEPA requirements for FRA projects, with just the addition of an addendum covering any specifics that FRA requires.²⁹
- Authorize FRA to allow Categorical Exclusions (CEs) not only from a list of specific project types, but also to allow CEs for projects not listed specifically, but that with a minimal amount of documentation can be shown appropriate for the CE status (often called "documented CEs"), as allowed by existing FHWA regulations.
- Create additional exempt categories of undertakings pursuant to 36 CFR 800.14(c) of the ACHP's regulations, including the following:
 - Maintenance of railroad structures within a historic district when those structures:
 - Are not individually eligible for or listed in the NRHP, or
 - Have not been specifically found to be a contributing element of a historic district.
 - Replacement of any component of a structure in a "like-for-like" manner ("like-for-like" means in a manner that matches the material, details and appearance of the original).
 - Changes to or replacement of any component of a structure when the component in question is not a historically significant element of the structure.
 - Changes to or maintenance of portions of a structure that are not visible or accessible to the public.
 - Additions to or changes to a property that do not require significant contact with a structure and are reversible.
 - Some types of rail line abandonments that are not likely to affect historic properties (e.g., where the rail right-of-way will likely be converted to use as an interim trail or sold to a preservation group, park, or recreation area.)
- The Exemption in 800.14(c) is a higher level national type of exemption that would require more extensive consultation and public notification in the Federal Register.

²⁹ MAP-21, written primarily to apply to Title 23 programs (highways) includes additional streamlining processes which it may be possible for FRA to adopt. For example Section 1314. The Application of CE's for Multimodal Projects (This amends Title 49 to allow a DOT modal agency acting as lead authority for a multimodal project to apply a CE using the authority of another DOT modal agency that is also participating in the project, subject to certain conditions specified in the statutory language.

- When associated with a program or activity, the exempted categories of undertakings in 800.14(c) could also exempt certain types of historic railroads from section 106 when the railroad or type has already been documented and interpreted.

Exempt Railroad Corridors from NRHP Evaluation

- Include language in the Passenger Rail Infrastructure and Investment Act reauthorization that would exempt railroad corridors from evaluation under section 106 of the National Historic Preservation Act.
 - This exemption would pertain to the actual rail "corridor" itself, not to the individual elements within the corridor, and would basically mirror the current exemption provided for the Interstate Highway System in SAFETEA-LU.
 - Such an exemption would not hinder the protection of historic resources, and yet would clarify responsibilities for the railroads and better provide for sustained investment in the rail system through more effective public/private partnerships.

Programmatic Agreements (PAs)

- Encourage federal agencies to develop PAs for complex projects or programs, exempt activities or those that would likely not result in adverse effects on historic properties.

The PAs are most often used to exclude categories of activities from routine reviews.

- Entire classes of repairs can be excluded from review through PAs. These would be effective ways of streamlining the process. It would require FRA to develop clear definitions of what it considers to be an undertaking
- Develop a prototype PA, statewide Pas, regional, or a nationwide section 106 PA pursuant to 36 CFR 800.14(b)(2).
 - The PA(s) should establish procedures and protocols for considering historic preservation factors during both planning and early project development.

A Nationwide PA can be used to develop the advanced study for a nationwide railroad historic context and guidance for evaluating railroads for NRHP eligibility. This would be related to a process similar to the one that FHWA used for the Section 4(f) /Section 106 Exemption for the Interstate Highway System.

Section 4(f)/106 Exemption

Develop a Section 4(f)/106 exemption for the nation's railroads similar to that approved by the ACHP to the Interstate Highway System in 2005, where only the most significant historic elements of the railroad network would be recognized and remain subject to historic preservation laws.

Section 106 Program Comments

Program Comments were recently published by FHWA for the treatment of common post-1945 reinforced concrete and steel bridges, and might support recommendations in this study that certain types of Program Comments be pursued by FRA.

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Chapter 3

NRHP Eligibility Trends

The purpose of Chapter 3 is to analyze trends of those rail related properties that are included in or determined eligible for inclusion in the NRHP.

First and foremost, it is important to understand that the data obtained from NPS does not include railroad properties determined eligible for the NRHP by a federal agency with SHPO concurrence through the section 106 process. Such data is likely to form the majority of properties found NRHP eligible, but would have to be obtained from the records of individual SHPOs, which was not part of the scope of this study.

The NPS maintains a database of NRHP listings and determinations of eligibility by federal agencies. FRA obtained the data from NPS on January 26, 2011, and created a subset of data on rail related properties listed in the NRHP or found eligible through federal agency-Keeper determination. It is also important to note that individual NRHP listing requires consent of the property owner, therefore the NRHP data is likely skewed to those properties transferred from railroad to private ownership or that are located within historic districts.

The raw data obtained from NPS was converted into a searchable database and analyzed to determine various findings and trends. 2,915 properties were classified in the NRHP data with a historic sub-function of “rail related,” including at least 23 rail corridors.

NRHP Criteria for Evaluation

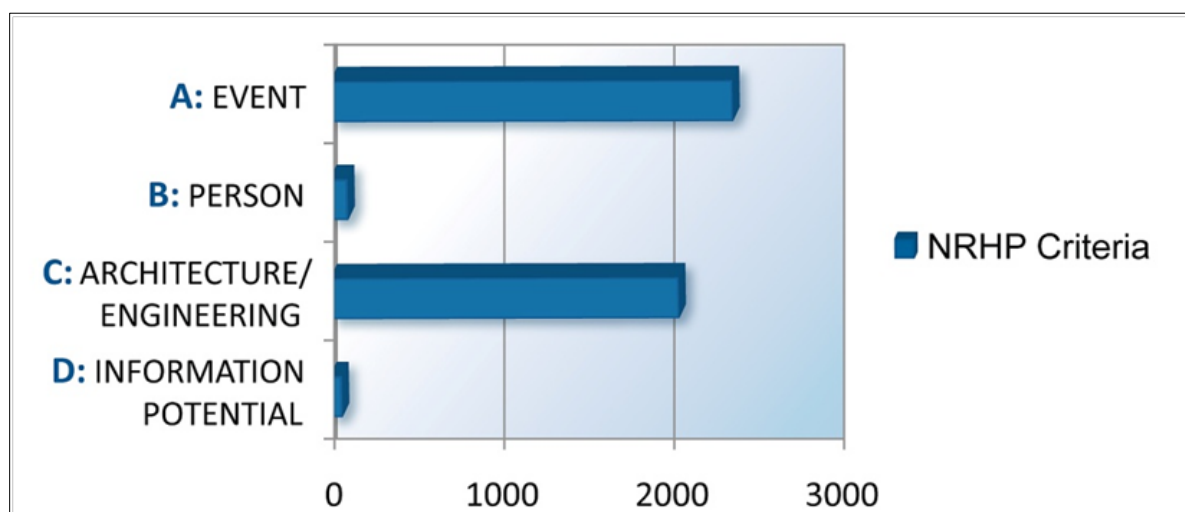
The NRHP criteria for evaluation are:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.³⁰

An analysis of the NRHP data indicated that overwhelmingly, most rail related properties met Criterion A: Event (2,361) or Criterion C: Architecture/Engineering (2,044). Only 92 met Criterion B: Person and only 59 met Criterion D: Information Potential. More than one criterion may be used per NRHP listing. The majority of those found to meet Criterion A also met Criterion C.

³⁰ 36 CFR 60.4.

Figure 3-1: NRHP Criteria

Rail Corridors Listed in the NRHP

The NRHP data includes the following 23 rail corridors that were listed in the NRHP.

Table 3-1: Rail Corridors Listed in the NRHP

Resource Name	Address	State	City	Date Listed
Grand Canyon Railway	From Williams, AZ, to Grand Canyon National Park	Arizona	Williams	2000-08-23
Niles Canyon Transcontinental Railroad Historic District	Railway corridor from Niles to Pleasanton	California	Fremont, Sunol, and Pleasanton	2010-10-13
Denver & Rio Grande Railroad San Juan Extension	Between Antonito and Chama, NM via Cumbres Pass	Colorado	Antonito	1973-02-16; 2007-04-24
Royal Gorge Bridge and Incline Railway	NW of Canon City	Colorado	Canon City	1983-09-02
New Castle and Frenchtown RR Right-of-Way	Off U.S. 40 between Porter, DE, and Frenchtown, MD	Delaware	Porter	1976-09-01
Wilmington and Western RR	DE 41	Delaware	Hockessin	1980-09-08
St. Charles Streetcar Line	St. Charles Ave. route from downtown to Carrollton	Louisiana	New Orleans	1973-05-23
Western Maryland RR Right-of-Way between Mileposts 126 and 160	Milepost 126 to Milepost 160	Maryland	North Branch	1981-07-23
Quincy Granite Railway	Bunker Hill Lane	Massachusetts	Quincy	1973-10-15
Raton Pass	U.S. 85-87, CO/NM border	New Mexico	Raton	1966-10-15
Arcade and Attica RR	Railroad right of way from Arcade to N. Java	New York	North Java	1980-11-17
McHenry Railroad Loop	E side of ND 20	North Dakota	McHenry	1986-10-02

Resource Name	Address	State	City	Date Listed
Hocking Valley Railway Historic District	Roughly between Bridge #494 in Logan and Bridge #629 in Nelsonville	Ohio	Nelsonville	1988-05-05
Mt. Hood Railroad Linear Historic District	Mt. Hood RR right-of-way from Hood River to Parkdale	Oregon	Hood River	1994-01-24
East Broad Top Railroad	1 mi. W of Orbisonia on U.S. 522	Pennsylvania	Rockhill Furnace	1966-10-15
Johnstown Inclined Railway	Johns St. and Edgehill Dr.	Pennsylvania	Johnstown	1973-06-18
Mauch Chunk and Summit Hill Switchback RR	Between Ludlow St. in Summit Hill and F.A.P. 209 in Jim Thorpe	Pennsylvania	Jim Thorpe	1976-06-03
Burlington and Quincy High Line Hill City to Keystone Branch	Along RR right of way from 222 Railroad Ave to Keystone Depot	South Dakota	Hill City	2003-02-05
Central Pacific Railroad Grade Historic District	87 mi. segment between Umbria jct. 9 mi. E. of NV border around N end of Great Salt Lake to Golden Spike NHS	Utah	Park Valley	1987-05-15
Transcontinental RR Grade	Roughly, from 6 mi. W of Corinne running approximately 13 mi. along UT 83	Utah	Corinne	1994-12-08
Union Pacific Park City Branch RR Grade	RR grade parallel to I-80 from Echo to Park City	Utah	Echo	1996-04-25
Manassas Gap RR Independent Line	7504 Royce St.	Virginia	Annandale	2001-05-30
Cass Scenic Railroad	Along railroad tracks from Cass to Bald Knob	West Virginia	Cass	1974-07-12

Rail Corridors Determined Eligible for the NRHP by a Federal Agency

The following 12 rail corridors were determined eligible for the NRHP by a federal agency, and are listed in the NPS data. This list does not include rail corridors determined eligible for the NRHP through a consensus of a federal agency and SHPO resulting from section 106 consultation.

Table 3-2: Rail Corridors Determined Eligible for the NRHP by a federal Agency

Federal Agency	Resource Name	Address	State	County	Status Date
BLM	Denver & Rio Grande Rockwork & Railroads	Along Denver & Rio Grande	Colorado	Jefferson	3/27/1978
FHWA	Denver & Rio Grande Railroad	Along Denver & Rio Grande	Colorado	Garfield	3/19/1980
FHWA	Denver & Rio Grande Western Railroad	Along Denver & Rio Grande	Colorado	Lake	8/18/1981

Federal Agency	Resource Name	Address	State	County	Status Date
FHWA	Delaware and Hudson Canal Company Railroad	From Honesdale to Carbondale	Pennsylvania	Lackawanna	9/3/1992
FHWA	West Virginia Central and Pitts Railway		West Virginia	Randolph	12/10/1997
USFS	Milwaukee Road	Between St. Regis, Montana and Avery, Idaho	Idaho	Shoshone	2/23/1995
ICC	Illinois Central Gulf RR Abandonment	Between Woodville, Mies. & Hardwood	Louisiana	West Feliciana	9/30/1977
ICC	West Feliciana Railroad	Illinois Central Gulf RR right-of-way btwn. Hardwood & Bayou Sara	Louisiana	West Feliciana	1/29/1985
NPS	Western Maryland Railway Right of Way Milepost 126 to Milepost 160		Maryland	Washington	6/9/1981
NPS	Quartette Mining Company Railroad		Nevada	Clark	1/27/1984
NPS	U.S. Government Construction Railroad		Nevada	Clark	1/27/1984
NPS	Las Vegas and Tonopah Railroad Grade	Death Valley Monument	Nevada	Nye	7/8/1981

To partially supplement the NPS data, FRA/FHWA determined the following railroad resources eligible for the NRHP as part of the National Gateway Phase I project section 106 compliance:

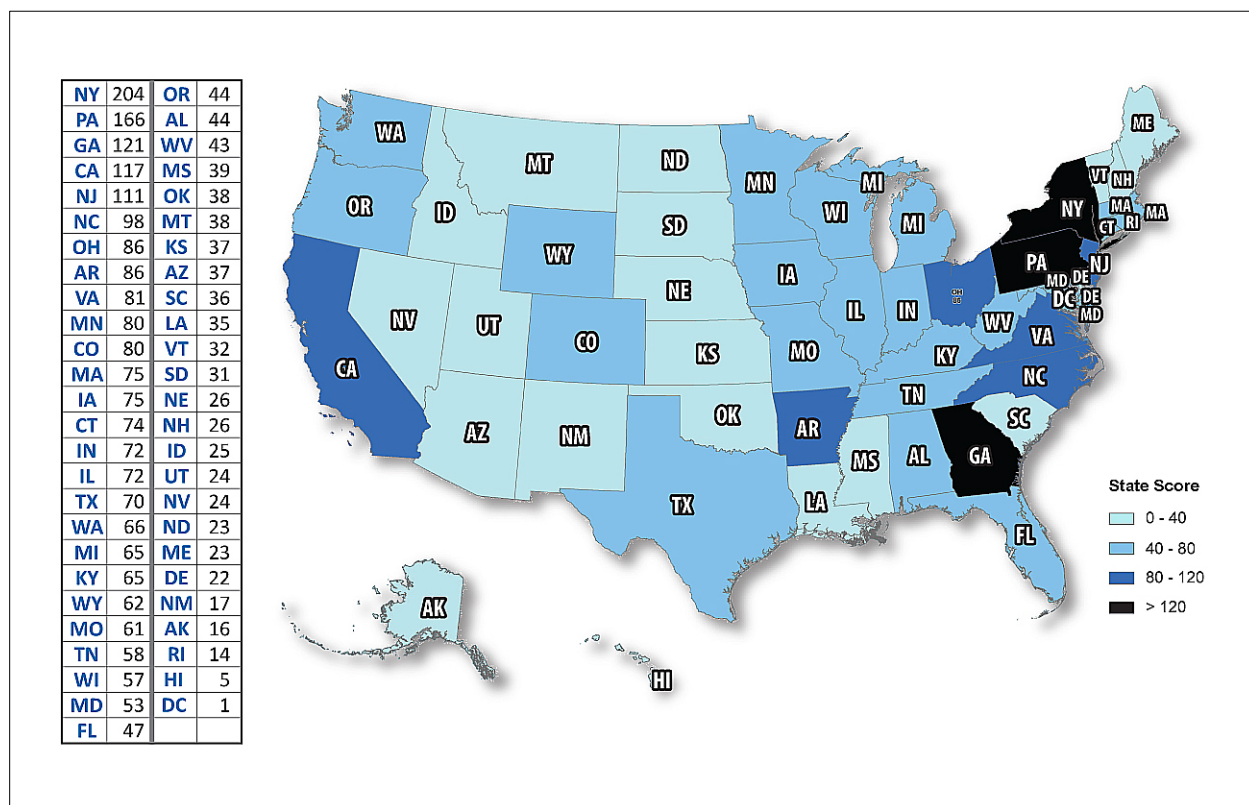
Table 3-3: Railroad Properties Determined NRHP Eligible by FRA/FHWA for the National Gateway Phase I Project

Resource Name	State	County(ies)	Status Date
Baltimore & Ohio (B&O), Pittsburgh Division	Pennsylvania	Allegheny, Bedford, Somerset	12/14/2009
Pittsburgh & Lake Erie RR (P&LE)	Pennsylvania	Lawrence, Beaver, Allegheny, Westmoreland & Fayette	12/14/2009
B&O, Magnolia Cutoff	West Virginia	Hampshire, Morgan	12/09/2009
B&O, Magnolia Cutoff	Maryland	Allegany	12/09/2009

Geographic Distribution

The NRHP data was analyzed to determine geographic distribution, and the following map identifies the number of rail-related historic properties in each state. New York had the most rail related historic properties with 204, followed by Pennsylvania with 166, Georgia with 121, California with 117, New Jersey with 111, North Carolina with 98, Ohio and Arizona with 86, Virginia with 81, Minnesota and Colorado with 80, and Massachusetts and Iowa with 75. The remaining states had less than 75.

Figure 3-2: Geographic Distribution



NRHP Categories of Historic Properties

The NRHP data includes the five different categories of historic properties defined by the NRHP criteria for evaluation at 36 CFR Part 60:

Building: A building is created principally to shelter any form of human activity. Typical rail related buildings are train depots, train stations, engine terminals, warehouses, watchman’s towers, sheds, and office buildings.

Structure: A structure is used to distinguish from buildings those functional constructions made usually for purposes other than creating human shelter. Typical rail related structures are bridges, tunnels, culverts, railroad grades, turntables, signal bridges, wyes, locomotives, and trolley cars.

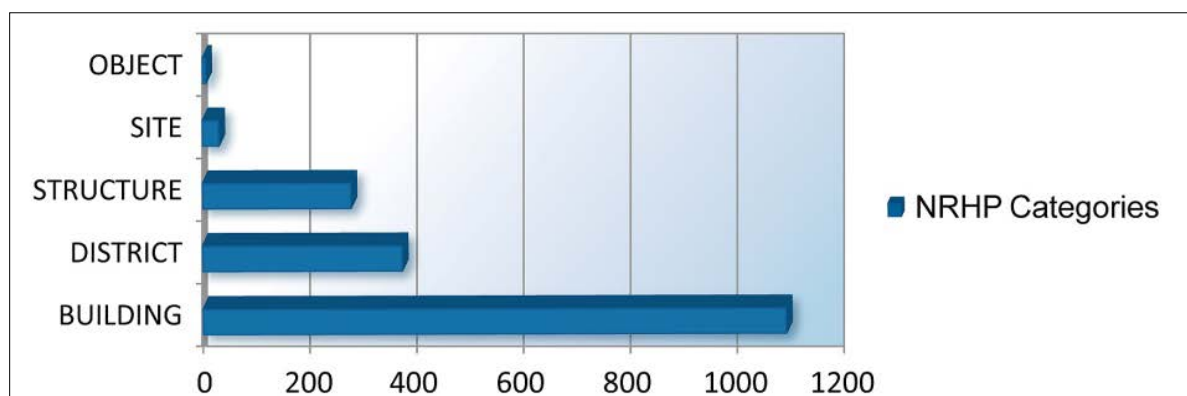
Site: A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure. Typical rail related sites are the site of a historical event, an abandoned railroad line or segment, or the ruins of a rail related building or structure.

Object: Objects are those constructions that are primarily artistic in nature or are relatively small in scale and simply constructed. Typical rail related objects are mileposts, call boxes, sign posts, hand switches, and boundary markers.

Districts: A district possesses a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically by plan or physical development. Typically rail related districts are railroad lines, corridors, yards, or streetcar lines.

The following table and chart depict the relative distribution of the five NRHP categories among rail related historic properties, with buildings the most common (1,090) and objects the least (2). Districts are the second most common category selected (372), but they represent the largest number of properties because they may include many buildings, structures, sites and objects, and may be large in size or length.

Figure 3-3: NRHP Categories

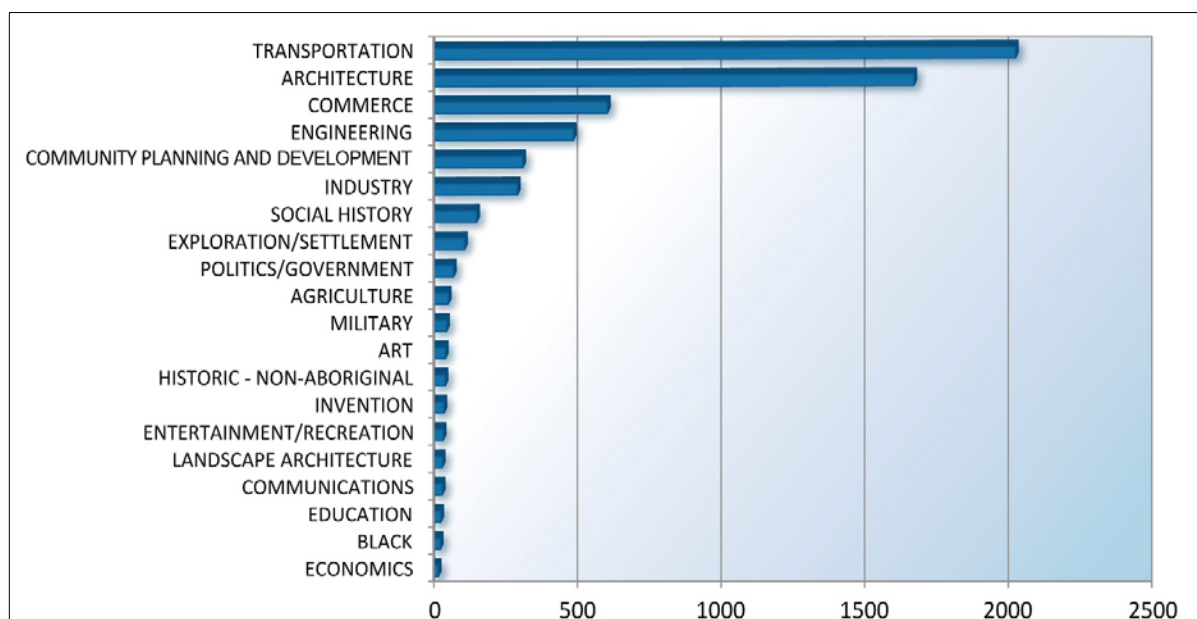


NRHP Category	No. of Rail-Related Historic Properties
Building	1,090
District	372
Structure	276
Site	29
Object	2

Area of Significance

The NRHP data provides at least one area of significance in which the property qualifies for NRHP listing. More than one area of significance may be used per NRHP listing. Overwhelmingly, rail related historic properties were found significant in the areas of transportation (2,032), architecture (1,678), commerce (609), engineering (490), community planning and development (314), industry (295), social history (153) and exploration/settlement (111). The remaining areas of significance had less than 75 occurrences. The chart below indicates those areas of significance where ten or more railroad properties met NRHP criteria.

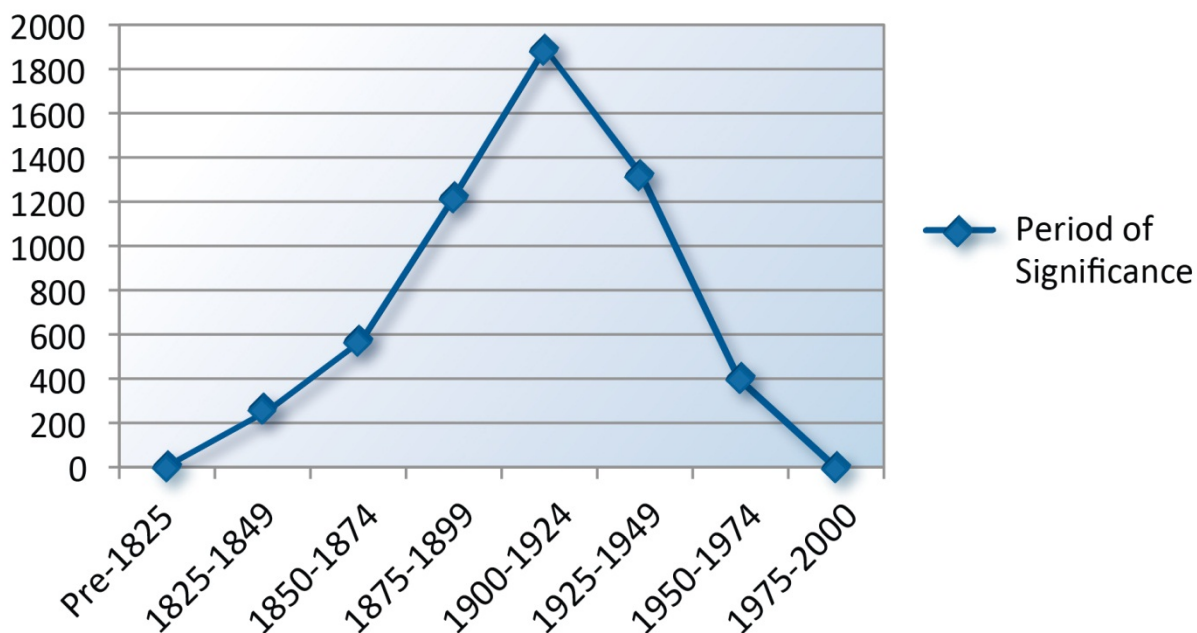
Some of the seldom used areas of significance reveal interesting historic associations. For example, the Downtown Rock Springs Historic District in Wyoming is listed under the “Ethnic Heritage-Asian” area of significance and the Niles Railroad Depot in Michigan is listed under the “Performing Arts” area of significance.

Figure 3-4: Area of Significance

Period of Significance

The NRHP data includes a series of periods of significance, each 25 years in duration. Railroad history in the United States essentially began in the 1820s, and the NRHP data includes seven period of significance ranges between 1825 and 2000.³¹ More than one period of significance may be used per NRHP listing. The periods of significance most often assigned to rail related properties in the NRHP data are 1900-1924 with 1,901 properties, 1925-1949 with 1,320 properties, and 1875-1899 with 1,220 properties. Of course, properties constructed before 1875 are less likely to have survived because of their advanced age and properties constructed after 1950 are less likely to be listed in the NRHP because they have not met the 50 year criterion consideration G for more than a decade. Following is a table and chart that depict the distribution of rail related properties in the NRHP data among the various period of significance ranges.

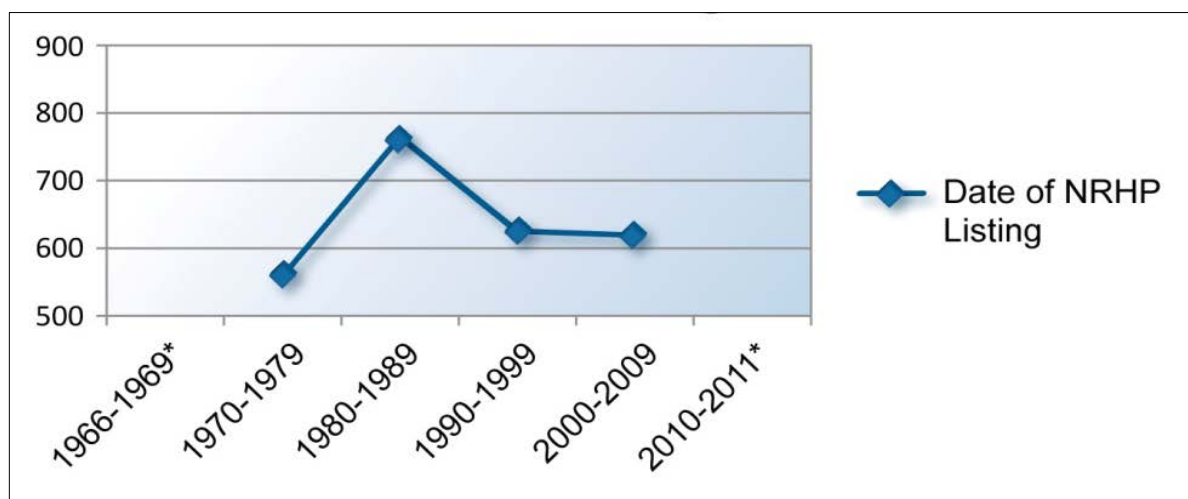
³¹ The NPS data also includes 209 rail-related properties with a period of significance before 1825. Most likely, these are railroad properties that contribute to historic districts with an earlier period of significance, or are associated with an archaeological site.

Figure 3-5: Period of Significance

Period of Significance	No. of Rail-Related Historic Properties
1825-1849	255
1850-1874	571
1875-1899	1,220
1900-1924	1,901
1925-1949	1,320
1950-1974	397
1975-2000	2

Date of NRHP Listing

The NRHP data includes the date of NRHP listing or federal agency eligibility determination, since the NHPA was enacted in 1966. The only discernible trend is that listings peaked in the 1980s when there were 765 listings, and were rather consistent in the 1970s (565 listings), 1990s (625 listings, and 2000s (619 listings). As expected, the partial decades of the 1960s and 2010s have much fewer listings (18 and 30, respectively). It is important to note that the NPS data does not include federal agency/SHPO consensus determinations of eligibility through the section 106 process. If the data regarding section 106 determinations of NRHP eligibility were obtained from the states, and the dates of such determinations were analyzed, different trends may be revealed. For example, 106 reviews may tend to follow cycles of economic growth and infrastructure-improvements that require federal funding or approval.

Figure 3-6: Date of NRHP Listing

Date of Listing	No. of Rail-Related Properties
1966-1969*	18
1970-1979	565
1980-1989	765
1990-1999	625
2000-2009	619
2010-2011*	30

Railroad Historic Contexts

A nationwide historic context statement to evaluate railroads under NRHP criteria has not yet been developed.³² State-specific historic contexts for railroads have been prepared in several states, as described below.

Multiple Property Documentation Form

Colorado

Colorado prepared an NRHP Multiple Property Documentation Form (MPDF) entitled *Railroads in Colorado 1858-1948* that was accepted by the NPS on March 13, 1998. It includes an extensive statement of historic contexts encompassing four periods of significance. The close of the period of significance ended in 1948, set at 50 years before preparation of the MPDF. It also includes a

³² In 1998, the NPS prepared a multi-state historic context statement for the *Underground Railroad*, but this refers to the effort to assist persons held in bondage in North America to escape from slavery, and transportation routes such as railroads were excluded as a property type.

detailed description of associated property types with their significance and registration requirements, including:

1. Railroad Tracks and Roadbed
2. Miscellaneous Right-of-Way Structures
3. Depots
4. Housing and Maintenance Structures
5. Drainage and Separation Structures

Minnesota

The Minnesota Department of Transportation prepared the *Minnesota Statewide Historic Railroads Study* in 2007, which was subsequently submitted to NPS as an MPDF entitled *Minnesota Railroads, 1862-1956*. The historic contexts were divided into six statewide thematic contexts and 14 railroad company-related contexts.

North Dakota

The MPDF entitled *Railroads in North Dakota* features a historic context *Railroad Development in North Dakota, 1872-1956*, histories of six railroads, and descriptions and registration requirements for the following seven property types:

1. Railroad Corridor Historic Districts
2. Railroad Station Historic Districts
3. Railroad Yard Historic Districts
4. Railroad Grade Separation Structures
5. Railroad Depots
6. Railroad Engine Houses, Transfer Tables, and Turntables
7. Railroad Section Houses

Context Statements

South Dakota

In 1998 and revised in 2007, the South Dakota Historic Preservation Office had a document prepared entitled: *South Dakota's Railroads: An Historic Context*. The context has two major chronological periods, essentially the nineteenth century and twentieth century. The context includes four major property type categories with description, significance, registration requirements and integrity, as follows:

1. Railway Service and Operations Buildings
2. Railway Structural and Engineering Features
3. Railway Yards and Operational Complexes
4. Railway Rolling Stock

Delaware

In 2008, the Delaware DOT developed a historic context for railroads in the state of Delaware from 1827-1996. The context includes an extensive historical narrative, and was primarily used to support Delaware's historic bridge program.

Arkansas

The Department of Arkansas Heritage prepared *Historic Railroad Depots of Arkansas 1870 to 1940: A Historic Context Written and Researched*. The context encompasses the history of nine railroads over two major chronological periods analogous to the nineteenth century and twentieth century.

Historic Bridges

While not exclusive to railroad bridges, the following historic contexts for bridges have been developed:

- *A Context for Common Historic Bridge Types: NCHRP Project 25-25, Task 15*, prepared for the National Cooperative Highway Research Program, October 2005.
- *Indiana Bridges Historic Context Study: 1830s-1965*, prepared for INDOT, February 2007
- Evaluation of National Register Eligibility: Task C3 of the Historic Bridge Inventory and Management Plan, prepared for New York State DOT and FHWA, January 2002.

Research, Documentation, and Evaluation Guidance

Pennsylvania

The Pennsylvania Bureau for Historic Preservation (BHP) developed a website³³ entitled *Railroads of Pennsylvania*, with an accompanying document entitled *Researcher's Guide for Documenting and Evaluating Railroads*, with the objective to provide information, reference materials, and research methods that will aid efforts to document historic railroads.

The website provides a developmental railroad history overview encompassing three broad time periods: Railroad Growth and Development, 1830s–1850s; Age of Railroad Dominance, 1860s–1910s; Railroads in the Highway Era, 1920s–1990s. The website has online links to a variety of primary and secondary resources, including manuscripts, records, maps, photo galleries, and BHP's Cultural Resources Geographic Information System (CRGIS). BHP is in the process of mapping historic railroad lines into CRGIS and, in an effort to improve ease of use, has established a *Naming Standardization Guide* for identified railroad properties.

BHP's *Researcher's Guide for Documenting and Evaluating Railroads* was developed to establish a consistent method of recordation and evaluation of railroads. The guidance establishes the following:

- A designated railroad property type, the 'Railroad Corridor Historic District'

³³ <http://phmc.info/parailroads>.

- Basic description standards
- Areas of significance for NRHP eligibility evaluation and research questions for history and context development
- The applicable qualities of integrity for a Railroad Corridor Historic District

The guidance also defines elements of railroad systems that would be considered ‘non-contributing’ elements to a Railroad Corridor Historic District, therefore, excluded from any evaluation.

Summary of Chapter 3

It is important to establish that the NPS data is very limited because it only includes properties listed in the NRHP or determinations of eligibility by federal agencies. Therefore, trends identified in this chapter may be quite different if supplemental data were obtained from states for rail related properties determined eligible for the NRHP through the section 106 process. But the NPS data does indicate some strong trends:

- Rail related historic properties were overwhelmingly found to meet NRHP Criterion A: Events (2,361) and Criterion C: Design/Engineering (2,044).
- The five states with the most rail related historic properties were geographically spread, but were predominantly in the Northeast: New York (204), Pennsylvania (166), Georgia (121), California (117) and New Jersey (111).
- Overwhelmingly, rail related historic properties were found significant in the areas of significance of transportation (2,032) and architecture (1,678).
- Most rail-related historic properties were constructed in the late-19th/early 20th centuries, within the following periods of significance: 1900-1924 (1,901 properties), 1925-1949 (1,320 properties), and 1875-1899 (1,220 properties).
- Historic contexts have been developed for railroads in several states, but not for the nation or entire multi-state railroad systems.

Based on ACHP comments, a post-study analysis of NRHP-eligibility data obtained from individual states that is derived from section 106 identification efforts would be helpful to understand how such findings are made, how they might be made more consistent among the states and what type of streamlining measures may be developed. No funding source, potential cost, or resources needed was identified.

Chapter 4

Administrative Flexibility within Section 106 Regulations

While all of the section 106 Regulations at 36 CFR Part 800 may be applied to federal agency funding or approvals of railroad projects, compliance usually follows the section 106 process in Subpart B (36 CFR 800.3 through 800.12).

Chapter 4 discusses some other subsections and parts of the section 106 regulations that have particular relevance to railroad improvement projects, and may offer some ways to make the compliance process more effective and more efficient.

No Potential to Cause Effects

Section 800.3(a) allows the federal agency official to determine whether the proposed federal action is an undertaking as defined in Section 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the federal agency official has no further obligations under section 106. The federal agency makes a unilateral decision about whether a proposed action meets the definition of an undertaking.

Applicability to Federally Funded Railroad Projects

An example of activities that may not be an undertaking could be routine repair and maintenance activities, including in-kind replacement of standard railroad operating equipment and materials such as rails, switches, ties, and ballast. Similarly, STB-OEA indicated that rail line abandonments are not likely to affect historic properties in those cases where the rail right-of-way will likely be converted to use as an interim trail or sold to a preservation group, park, or recreation area. In addition, on April 8, 2009, Amtrak submitted comments to FRA that included the following five categories of activities that they believed may not be undertakings:

1. Maintenance of railroad structures within a historic district when those structures:
 - a. Are not individually eligible for or listed in the NRHP, or
 - b. Have not been specifically found to be a contributing element of a historic district.
2. Replacement of any component of a structure in a “like-for-like” manner (“like-for-like” means in a manner that matches the material, details and appearance of the original).
3. Changes to or replacement of any component of a structure when the component in question is not a historically significant element of the structure.
4. Changes to or maintenance of portions of a structure that are not visible or accessible to the public, unless they are significant character defining features.
5. Additions to or changes to a property that do not require significant contact with a structure and are reversible.

As a result of a federal agency official defining the above or other activities not to be undertakings, project delivery would be streamlined because the section 106 process would be completed at the initiation step. No separate agency consultation or section 106 studies to identify historic properties or assess effects on historic properties would be required.

Tribal Lands

The Federal Government has a unique legal relationship with Indian Tribes, and section 800.2(c), Consulting parties, describes their roles in the section 106 consultation process. Railroad projects on Tribal lands would require special consultation with Tribes or the Tribal Historic Preservation Officer (THPO). Consultation is also required where a railroad project would affect historic properties off tribal lands to which a Tribe attaches religious and cultural significance. Typically, Tribes or the THPO would be interested in non-railroad features and materials, such as archaeological sites, or continued access to medicinal plants or sacred sites, and these areas of concern may not be affected by railroad improvement projects. However, tribes may also be interested in the cultural and natural landscapes within which the railroad travels. This view may offer alternatives to the typical consultation process with SHPOs, who have an interest in railroad features, which are often directly affected by railroad improvement projects. As a result, there may be alternatives to the procedures for Tribal or THPO consultation for railroad improvement projects that are different than the typical procedures for SHPO consultation.

Applicability to Federally Funded Railroad Projects

If a project crosses tribal lands or could affect historic properties of religious or cultural significance, the applicant and federal agency typically need to consult with Tribe(s) through government-to-government consultation. Specific streamlining measures may be developed between the Tribe(s) and the federal agency to simplify consultation. For example, upon the implementation of an agreement document, ground disturbing activities where ground was not previously altered to build the railroad might be excluded from consultation. Further acquisition of or access through Tribal land would likely require consultation with the Tribes or THPO because it may affect historic properties of religious or cultural significance to Tribes. Work within the existing railroad right-of-way or on railroad facilities may not require consultation if no grading or other ground disturbance activities are planned, because there is little likelihood the work would affect historic properties of religious or cultural significance to Tribes. Other measures may include developing guidance and training, Memorandums of Understanding (MOUs), and conferences among tribal organizations, railroad companies, and transit agencies. Further consultation with the NATHPO and Tribal groups would be necessary to develop appropriate streamlining measures for federally funded railroad improvement projects, and to ensure some consistency with measures developed for those parts of railroad projects when Tribes are not consulting parties.

Coordination with Other Federal Laws

NEPA

Section 800.2(d)(3) of the Section 106 regulations provides, “*Use of agency procedures.* The agency official may use the agency’s procedures for public involvement under [NEPA] . . . in lieu of public

involvement requirements [under the section 106 process (Subpart B)] . . .” Section 800.8, *Coordination with the National Environmental Policy Act*, Section 800.8 provides general principles, and guidance on compliance with section 106. Section 800.8(b) provides guidance for actions categorically excluded under NEPA about making an undertaking determination regarding the actions, and Section 800.8(c) allows for and provides standards on the use of the NEPA process for section 106 purposes.

Applicability to Federally Funded Railroad Projects

The use of the NEPA process for section 106 purposes in section 800.8(c) could be reviewed for consistency with FRA’s *Procedures* at 64 Fed. Reg. 28545, FHWA’s, FTA’s *Environmental Procedures* at 23 CFR part 771, and STB’s *Environmental Rules* at 49 CFR part 1105. A comparative study may identify streamlining opportunities for the federal approval of railroad projects by more closely coordinating the procedures, timing, and level of effort for environmental and historic preservation laws.

Section 4(f)

Section 800.3(b), *Coordinate with other reviews*, states, in part, that “the agency official may use information developed for other reviews . . . to meet the requirements of section 106.” Section 4(f) develops information for alternatives to avoid using historic properties and planning to minimize harm to historic properties.

Applicability to Federally Funded Railroad Projects

If 4(f) indicates *de minimis* use, then the U.S. DOT Operating Administration may be able to use the information developed for this finding to support the “no adverse effect” documentation required under 36 CFR 800.11(e). The Section 4(f) analysis cannot be finished until section 106 is completed, but some redundancy of effort may be reduced by coordination of the documentation supporting the findings. If a *de minimis* finding is proposed, the consulting parties identified in accordance with 36 CFR part 800 must be consulted; and FRA must receive written concurrence from the pertinent SHPO or THPO, and from the ACHP if participating in the consultation process, in a finding of “no adverse effect” or “no historic properties affected” in accordance with 36 CFR part 800.³⁴ FRA also must inform these officials of its intent to make a *de minimis* impact determination based on their concurrence in the finding of “no adverse effect” or “no historic properties affected.” Public consultation would follow section 106 procedures.

Section 4(f) requirements to “minimize harm” may also parallel the requirements to resolve adverse effects on historic properties under section 800.6. Because the Section 4(f) requirements are legally binding, they present an opportunity for a U.S. DOT agency to substitute them for similar stipulations typically required in an MOA (See 36 CFR 800.6(c)). A U.S. DOT agency could conclude section 106 without preparing a separate MOA when there has been appropriate consultation with ACHP, SHPO/THPO and other section 106 consulting parties throughout the compliance process, the undertaking is modified or conditions are imposed to avoid adverse effects, and all parties agree to the proposed mitigation to avoid, minimize, or mitigate adverse effects.

³⁴ 49 U.S.C. § 303(d)(2).

If Section 4(f) considerations indicate there is “no prudent and feasible alternative” and harm to historic properties is minimized then the U.S. DOT agency may be able to use the Section 4(f) analysis to comply with continuing SHPO/THPO consultation under section 800.6(a) instead of developing and evaluating separate alternatives.

State Environmental or Historic Preservation Laws

Under 36 CFR 800.3(b), an “agency official may use information developed for other reviews under . . . state . . . law to meet the requirements of section 106.” Accordingly, a study could be prepared that researches state historic preservation and environmental laws to see if any are rigorous enough to be used in lieu of certain requirements of the section 106 process.

In California, for example, the guidelines for complying with the California Environmental Quality Act (CEQA) state that in some cases, archival documentation alone does not mitigate the loss of a historic building to a level that is less than significant.³⁵ Therefore, if a project is also subject to CEQA, additional mitigation may be required that is more stringent than NEPA or section 106 when a project results in the loss of a historic building. As a result, there may be streamlining opportunities when a lead government agency adopts mitigation for historic properties through CEQA compliance, and a federal agency must also comply with section 106 for the same properties. Because the CEQA mitigation is legally binding if the project is approved, perhaps it could be submitted by the federal agency to SHPO, without preparing a separate MOA, assuming there has been appropriate consultation with ACHP, SHPO/THPO and other section 106 consulting parties throughout the compliance process.

Emergency Situations

Under 36 CFR 800.12, the agency official, in consultation with the SHPO/THPO and ACHP may develop procedures for taking historic properties into account during operations responding to a declared disaster or which respond to other immediate threats to life or property. This may regularly apply to railroad properties, when a flood, fire, tornado, or earthquake destroys a bridge, or a building or structure is in imminent danger of collapse or deemed no longer safe for continued use. This may also apply when unsecured or abandoned railroad facilities are subject to trespassing and vandalism that may endanger lives. The ACHP encourages federal agencies to develop procedures for how an agency will address emergencies in advance. This would allow railroads to implement protocols to address disasters and emergencies without delay.

³⁵ The CEQA Guidelines state: “In some circumstances, documentation of a historical resource, by way of historic narrative, photographs or architectural drawings, as mitigation for the effects of demolition of the resource will not mitigate the effects to a point where clearly no significant effect on the environment would occur.” Cal. Code Regs. tit. 14, § 15126.4(b)(2).

Section 106 Subpart C—Program Alternatives

Subpart C (36 CFR 800.14) of the ACHP's section 106 regulations includes a series of federal agency program alternatives to comply with section 106 without going through the typical steps of the section 106 process in Subpart B (sections 800.3 through section 800.6) for each undertaking, including:

- a. Alternate procedures
- b. Programmatic agreements
- c. Exempted categories
- d. Standard treatments
- e. Program comments.

Each of the five program alternatives has the potential to streamline section 106 reviews and approvals and make them more consistent and predictable.

Alternate Procedures

Under 800.14(a), an agency official may develop Alternate Procedures to all or part of the section 106 process (Subpart B), if they are consistent with the ACHP's regulations pursuant to section 110(a)(2)(E) of the NHPA.

As explained by ACHP:

Alternate procedures allow Federal agencies to restructure and streamline the section 106 process to meet the missions of the agency specifically. For a smaller agency whose missions are limited in scope or deal with limited historic resources, *Alternate Procedures* can result in both time and cost savings. Larger, multiple-mission agencies can develop alternate procedures that allow different organizational elements to tailor their approach to section 106 to best meet their individual needs. Time and cost savings to the agency can be realized here as well.

Many larger Federal agencies have developed agency-wide policies to address their individual historic preservation needs, such as land management and permit issuance. These policies can be incorporated into *Alternate Procedures* to provide a more holistic approach to an agency's historic preservation program.

An agency must consult with ACHP in developing its *Alternate Procedures*. The agency must also consult with the National Conference of State Historic Preservation Officers or individual SHPOs/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations (36 CFR 800.14(f)). In addition, ACHP recommends that agencies consult with the National Association of Tribal Historic Preservation Officers (NATHPO). Finally, the agency must seek public input into the development process.³⁶

Applicability to Federally Funded Railroad Projects

As of 2011, the only federal agency to adopt *Alternate Procedures* is the U.S. Army.³⁷ The U.S. Army Alternate Procedures are not particularly relevant to federally funded railroad projects because they

³⁶ See <http://www.achp.gov/altpro.html>.

³⁷ 69 Fed. Reg. 20576 (Mar. 25, 2004).

apply to U.S. Army installations and activities, and do not apply to the Civil Works and permitting functions of the USACE. However, rail agencies could collaborate with ACHP on the definition of “undertaking” that tracks with the regulations but offers more clarity and certainty.

Programmatic Agreements

PAs are the most frequently used program alternative. Under 800.14(b), an agency official may negotiate a PA as an alternative to the section 106 process to:

- Govern the implementation of a particular program (e.g., high speed rail projects funded by the American Recovery and Reinvestment Act of 2009 [ARRA]); or
- Resolution of adverse effects on historic properties from:
 - Certain complex project situations;
 - Multiple undertakings (e.g., ARRA funded infrastructure improvements); or
 - Undertakings within states and/or tribal lands that have executed Prototype PAs.

ACHP’s section 106 regulations provide several examples of where PAs may be used, including one very relevant to railroad projects or mergers: “when effects on historic properties are similar and repetitive or are multi-state or regional in scope.”³⁸ Nationwide PAs have been developed by federal agencies, including the FCC and DOE under 800.14(b)(4). They allow the ACHP to designate a prototype PA that may be used for the same type of program or undertaking in more than one case or area. The ACHP and DOE entered into a prototype PA for several of its energy efficiency grant programs that may be used as a model for each state to develop its own PA for implementation of the programs within its jurisdiction.

Non-Transportation Agency—BLM

The BLM has negotiated a National Programmatic and individual Statewide Protocol Agreements for streamlining *routine* BLM undertakings through the section 106 process. The nationwide PA streamlines and simplifies section 106 procedural requirements, and maintains relevant streamlining provisions of BLM Statewide PAs currently in force in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, and Wyoming. The BLM Statewide PAs may apply to railroad projects that are BLM undertakings, for example, improving or modifying a railroad to serve expanded mining activities on land managed by BLM. Relevant protocols include:

- The manner in which the State Director will ensure the SHPO's involvement in the BLM state management process;
- Preservation planning;
- Cooperative stewardship;
- Agreement as to types of undertakings and classes of affected properties that will trigger case-by-case review (case-by-case review will be limited to undertakings that BLM finds will affect historic properties; the parties to this agreement agree that such case-by-case review will be minimized); and

³⁸ 36 CFR 800.14(b)(1)(i).

- BLM/SHPO approaches to undertakings involving classes of, or individual examples of, historic properties for which the present BLM staff lacks specialized capabilities.

Applicability to Federally Funded Railroad Projects

The statewide PAs may apply to railroad projects that are BLM undertakings, for example, improving or modifying a railroad to serve expanded mining activities on land managed by BLM. For Prototype PAs to be applicable to federally funded rail lines, the railroads must be signatory to the Prototype PA.

FHWA, FRA, FTA and State DOTs

FHWA and several state DOTs have entered into PAs that include provisions that are very relevant to this study, including the evaluation of historic bridges, historic roads and linear features, innovative approaches to historic context, surveys, and inventories, effects analyses, and mitigation measures. While the majority of the FHWA-state DOT PAs are focused on highway-related activities, some have stipulations that are very relevant to railroad infrastructure improvement projects, including those in effect in Alaska, Indiana, Montana (in 2007 and 2011), Ohio, and Pennsylvania. FRA has executed PAs with the ACHP, California SHPO and California High-Speed Rail Authority for the California High-Speed Train Project; the Delaware SHPO and Amtrak for future projects at the Wilmington Shops; and an MOA with the ARRC and Alaska SHPO regarding timber bridges along the Alaska Railroad. FRA and FTA are executing a PA with the Connecticut and Massachusetts SHPOs for the New Haven–Hartford–Springfield High-Speed Intercity Passenger Rail Project. FTA has executed PAs with: the Pennsylvania SHPO, New Jersey SHPO and New Jersey Transit Corporation; the ACHP, Maine SHPO and Maine DOT (with FHWA); and the ACHP, Vermont SHPO and Vermont Agency of Transportation (VAOT). The most pertinent parts of existing PAs are organized under the following headings, and some PAs may be mentioned under more than one heading:

- Historic Bridges
- Historic Roads and Railroad Grades
- APE for Railroad Improvement Projects
- Contexts, Surveys and Inventories
- Public Education

Historic Bridges

FHWA-Pennsylvania DOT

Appendix C to the Pennsylvania DOT (PennDOT) PA, includes an exemption for Bridge Projects (Section 2(A)(4), p. 26) for non NRHP eligible bridges and for in-kind bridge, curb, and gutter replacement activities. Bridge rehabilitation projects involving the replacement of parapets on bridges that are over 50 years old, regardless of the NRHP eligibility, and bridge beautification activities must be reviewed by the District Cultural Resource Professional.

FHWA-Indiana DOT

The Indiana DOT (INDOT) PA defines a process to categorize NRHP eligible bridges into two classes:

- *Select Bridges* that are most suitable for preservation and are good examples of a given bridge type and

- *Non-Select Bridges* that are not considered excellent examples of a type or are not suitable for preservation.

The INDOT PA also includes:

- Development of a “Standards for Rehabilitation of Bridges on Low Volume Roads” for the INDOT Design Manual;
- Scope of services for the development of a historic bridge inventory; and
- A standard treatment approach for all Select Bridges and when the selected alternative includes preservation of a Non-Select Bridge.

FHWA-Montana DOT

The 2007 Montana DOT (MDT) PA includes Stipulation 3 for Undertakings Involving Historic Bridges. Among the provisions for determining NRHP eligibility, effects, and mitigation Stipulation 3E institutes an adopt-a-bridge program to find new locations, uses and/or owners for certain historic bridges that are NRHP eligible and have been designated for replacement or demolition because rehabilitation and preservation in-place is not feasible.

FRA-ARRC

In January 2007, FRA executed an MOA with the ARRC and Alaska SHPO regarding timber bridges along the Alaska Railroad, including the following mitigation measures for impacts to NRHP eligible timber bridges:

- Prepare a *Timber Bridge Booklet* that addresses timber bridge engineering, construction, materials, design, builders and architects.
- Prepare an annotated bibliography of ARRC and related timber bridge references.
- Digitize ARRC’s timber bridge engineering drawings (standard plans).
- Preserve, to the extent possible, a minimum of two timber bridges to resemble their existing appearance.

Applicability to Federally Funded Railroad Projects

Railroad bridges are like highway bridges in that they may fall into definable property types, many may be from common standard designs, and some may have exceptional architectural or engineering significance. Bridge projects also tend to fall into categories, such as repair, improvement, strengthening, and replacement. The PennDOT, INDOT, and MDT PAs offer procedures for repair and improvement projects, standards for rehabilitation, and standard treatments for the most significant bridges, innovative approaches to prioritizing the significance of NRHP eligible bridges, and mitigation. There may be an opportunity to combine many of these provisions into a nationwide PA for federally funded railroad bridge improvement projects.

Historic Roads and Railroad Grades

FRA/FTA-Connecticut/Massachusetts NHHS

The 2012 New Haven–Hartford–Springfield High-Speed Intercity Passenger Rail Project (NHHS) PA agrees to treat the 62-mile long, Amtrak-operated NHHS corridor as eligible for the NRHP. Potential cumulative effects of the historic NHHS corridor would be resolved through the implementation of

the NHHS Corridor Treatment Plan presented in Attachment A of the PA. The Treatment Plan includes standards for historic documentation, the identification of vacant industrial properties eligible for federal historic preservation tax credits, and the donation of historic engineering materials to historic railroad preservation groups. Potential cumulative effects consider the construction of elevated platforms and pedestrian bridges at multiple historic passenger stations that affect the integrity of setting of the historic NHHS corridor. Individual MOAs will be implemented to resolve adverse effects, if any, to specific individual contributing resources to the historic NHHS corridor. Each subsequent MOA will include avoidance, minimization, and protective measures for NRHP-eligible properties identified in the technical reports such as preservation-in-place; processes for addressing project design changes or refinements after the technical reports for each site specific project are completed, and a process for efficiently addressing unanticipated, discoveries in the post-review period.

FHWA-Montana DOT

The 2007 MDT PA includes Stipulation 2 for Undertakings Involving Historic Roads. For roads built after 1859 under MDT's jurisdiction, MDT in consultation with SHPO will compile a list of a minimum of 12 historic road segments in Montana that are *especially significant* for their historic associations and/or engineering and associated features (i.e., bridges, roadside architecture, proximity to abandoned segments of historic road, etc.) For roads on the final list, MDT will record each road and incorporate preservation and context sensitive design early in the planning process. For historic roads that would be adversely affected, the MDT PA refers back to 36 CFR 800.6 and 800.7.

In 2011, FHWA, MDT, and Montana SHPO entered into another PA, to streamline the section 106 review of highway projects with historic railroad grades in the APE. The ACHP includes the 2011 MDT PA as a case study of a good PA on its website.³⁹ The 2011 MDT PA establishes protocols for the NRHP evaluation of abandoned railroad grades as historic districts with contributing and non-contributing elements.

When an abandoned railroad grade contains historically significant features, a plan to preserve or avoid the features is developed.

All abandoned railroad grades longer than 2,000 feet, and those associated with railroad related buildings and structures will comply with the typical section 106 process per 36 CFR 800.3 through 800.6.

For impacts to NRHP-eligible abandoned railroad grades less than 2,000 feet in length, standard treatment measures are provided in the PA instead of complying with the typical section 106 review for each project.

FHWA-Alaska DOT&PF

The Alaska Department of Transportation and Public Facilities (DOT&PF) PA includes Stipulation 5 for Linear Feature Guidance and Context Development. The components include a roads workshop attended by FHWA, DOT&PF, and SHPO, development of linear feature guidance for determining NRHP eligibility of roads, and development of Historic Roads Context. Although the term linear

³⁹ http://www.achp.gov/fhwa_section106_montana.html, searched May 25, 2011.

feature is limited in this PA to highways and roads, the framework for developing the guidance and context is applicable to railroads.

Applicability to Federally Funded Railroad Projects

Railroads are long linear features like highways and roads bridges. They present some of the same challenges to evaluation under the NRHP criteria, in that they often connect important places, have an association with the development of those places in the areas of transportation and economics, but may have integrity considerations because their design, materials, setting and even location change over time. The MDT and Alaska DOT&PF PAs may offer a framework for evaluating railroad segments for NRHP criteria in a consistent and predictable way. The NHHS contains a treatment plan for adverse effects on a historic railroad corridor that is undergoing infrastructure improvements for continued service.

APE for Railroad Improvement Projects

FRA California HST

The 2011 California High-Speed Train (HST) PA includes in Attachment B provisions for delineating the APE that may exclude properties long associated with nearby railroad activity. The APE includes “[p]roperties near the undertaking that were either used by a railroad, served by a railroad, or where railroad materials, features, and activities have long been part of their historic setting, *but only in such cases* where the undertaking would result in a substantial change from the historic use, access, or noise and vibration levels that were present 50 years ago, or during the period of significance of a property, if different.”

For the California High-Speed Train Project, a key phrase in the APE definition in the section 106 regulations contained within 36 CFR 800.16(d) is "may . . . cause alterations in the character or use of historic properties" because many of the undertakings involve the construction of high speed rail alongside existing railroads. In such cases, potential historic properties near the proposed undertaking historically had railroad features, materials, and activities within their setting that contributed to their character, or may even have been used by or served by the railroad. For example:

- The character and use of a historic railroad passenger or freight depot or railroad bridge *would not change* unless it would be put out of service, destroyed, altered, or moved for the undertaking;
- The character and use of an industrial building next to existing railroad tracks *would not change*, unless freight railroad service was an important association and the spur lines or loading areas would be removed by the undertaking;
- The character and use of buildings *would not change* if they would be separated from the undertaking by an existing railroad; however,
- The character of a non-railroad or non-industrial building *would likely change* if the building is visually sensitive and the proposed undertaking introduces an elevated grade separation or other large building or structure;
- The use of a non-railroad or non-industrial building *would likely change* if the building is sensitive to noise, like a school, museum or library, and the frequency of noise or vibration events from passing trains is increased over historic-era railroad events.”

FRA/FTA-Connecticut/Massachusetts NHHS

The 2012 NHHS PA includes language for limiting delineation of the APE in Attachment B very similar to that in the California HST PA in its approach to varying the extent of the APE for indirect effects based on the sensitivity of the historic character of use to continued railroad activity.

Applicability to Federally Funded Railroad Projects

This type of PA language may limit the APE to the railroad right-of-way when properties long associated with nearby railroad activity would not be sensitive to changes in the nature and frequency of railroad activity. It would effectively reduce the number of properties requiring NRHP evaluation and section 106 effects analysis for railroad infrastructure and improvement projects, and conversion of existing railroad corridors to high speed train.

Contexts, Surveys, and Inventories

As discussed in Chapter 3, Context Statements in Delaware, Pennsylvania, South Dakota and Arkansas offer a framework for evaluating NRHP eligibility of railroad properties.

NPS Guidance

NPS could prepare an NRHP Bulletin to address strength of association, period of significance, etc. In addition, a nationwide historic context, or individual statewide or rail-line historic contexts may be possible with the cooperation of private railroads as owners of historic documents. Funding would need to be determined, but could be tied to mitigation measures.

FHWA-ODOT

The ODOT PA includes stipulation 2(H) for the establishment of “Innovative Programs” to address special needs of programs and activities. Relevant examples include:

- Statewide thematic or other surveys of historic properties;
- Development of historic contexts and preservation priorities;
- Identification and survey of properties considered eligible for the NRHP; and
- Identification of innovative field methods that promote reduction in costs and time, and promote improvements in the quality and appropriateness of data gathered.

FHWA-Montana DOT

The 2007 MDT PA includes Stipulation 4.C to develop NRHP Multiple Property Documents (MPDs) for steel truss, reinforced concrete, steel stringer, girder, and timber bridges in Montana. The MPDs will provide the basis on which historic bridges are evaluated by MDT and SHPO according to NRHP criteria. The National Park Service published guidance for the preparation of MPDs in NRHP Bulletin 16B, including development of:

- Statement of Historic Contexts
 - Historical theme;
 - Geographical area; and
 - Chronological period.

- Associated Property Types
 - Property Type Description;
 - Property Type Significance; and
 - Registration Requirements.

Indiana DOT

The INDOT PA provides tasks to develop a historic bridge inventory in Appendix A, as follows:

1. Develop Contextual Study of Historic Bridges in Indiana, including historical research, oral histories, historic context report, and search of previous bridge inventories.
2. Develop Methodology for Bridge Inventory, including stratifying bridge population, testing assumptions of methodology, and prepare draft bridge stratification report with list of subgroups and data needs. The consultant draft is concurrently reviewed by INDPT, INSHPO, and FHWA Indiana before the final bridge stratification report is prepared.
3. Develop Evaluation Criteria for NRHP Eligibility, including criteria, integrity considerations, and implementation procedures.
4. Conduct Bridge Inventory and populate database.
5. Analyze Inventory Data to Make Eligibility Determinations.
6. Develop Criteria for Identification of “Select” and “Non-Select” NRHP-eligible bridges.
7. Analyze Inventory Data to Make “Select” and “Non-Select” bridge determinations.
8. Public involvement.

FHWA-Ohio DOT

The FHWA-Ohio DOT (ODOT) PA includes stipulation 2(A)(1) for the employment of qualified personnel at ODOT and for pre-qualifying consultants working at ODOT. While the personnel and consultants must meet the Secretary of the Interior’s Professional Qualifications Standards (36 CFR Part 61) in the fields of history, archaeology or architectural history, FHWA and the Ohio SHPO delegate to them the responsibility for making NRHP determinations of eligibility (ODOT PA stipulation 3(E) and (F).)

Applicability to Federally Funded Railroad Projects

The ODOT, INDOT and MDT PAs offer an innovative methodology for establishing historic context, survey, inventory and evaluation techniques for NRHP eligibility for highway property types, which could be adapted and broadened for railroad property types.

The MPD approach in the MDT PA streamlines the method of organizing information collected in surveys and research for NRHP evaluation and preservation planning purposes. It facilitates the evaluation of individual properties by comparing them with resources that share similar physical

characteristics and historical associations. It can be used to establish preservation priorities based on historical significance.⁴⁰

If FRA [or U.S. DOT] in consultation with NPS established guidance tied to a nationwide or narrower context study, it would greatly increase efficiencies in compliance with NEPA, Section 4(f) and section 106. Such guidance could address a number of concerns including inconsistent application of NRHP criteria, and guidance on resolving eligibility issues with the Keeper. Further, such guidance would put in place protocols that would span staff changes at agencies. One option would be for FRA to hire a consultant with qualified historians, architectural historians and historic archaeologists experienced in evaluating rail-related properties to develop the context and guidance with NPS responsible for the review of outlines, interim drafts and final product. A second option would be for NPS to revisit the NRHP bulletin that was drafted but not completed for linear transportation resources, and complete it with a primary focus on rail-related properties.

Public Education

FHWA-Montana DOT

The 2007 MDT PA includes Stipulation 5 for Education and Outreach Programs. For roads, it will expand its historical marker program to specifically concentrate on Montana's transportation history, update and republish Montana's Historic Highway Markers and revise and expand its unpublished document *Roads to Romance: The Origins and Development of the Road and Trail System in Montana*. For bridges, MDT will develop, deploy, and maintain a Statewide Bridge Database/GIS in consultation with SHPO but shared with the public via the Montana State Library's website. MDT will also sponsor employee and additional public educational and outreach programs for historic roads and bridges.

FHWA-Alaska DOT&PF

The Alaska DOT&PF PA includes Stipulation 6 for development of an *Alaska Historic Transportation Routes Booklet* for distribution to the general public that depicts architectural, natural, cultural, and transportation related features along Alaska's road system.

Applicability to Federally Funded Railroad Projects

The public education components of the 2007 and 2011 MDT PAs and the Alaska DOT&PF PA offer mitigation that has broad accessibility to the general public, helps promote each state's transportation history, and increases awareness of the role of historic properties in their community.

⁴⁰ National Park Service. *National Register Bulletin 16B: How to Complete the National Register Multiple Property Documentation Form*. 1991, p. 2.

Exempted Categories of Undertakings

Section 800.14(c) of the Section 106 regulations allows the federal agency official with ACHP approval to identify a program or category of undertakings that may be exempted from section 106 review if the program or category meets the following criteria:

- The actions within the program or category would otherwise qualify as “undertakings” as defined in 800.16;⁴¹
- The potential effects of the undertakings . . . upon historic properties are foreseeable and likely to be minimal or not adverse; and
- Exemption of the program or category is consistent with the purposes of the [NHPA].

Any undertaking that falls within an approved exempted program or category requires no further review pursuant to the section 106 regulation unless the agency official or the ACHP determines that there are circumstances under which the normally excluded undertaking should be reviewed under the section 106 regulation. The Exempted Categories of Undertakings section 106 program alternative has a broad reach for potential streamlining of linear resources as illustrated by ACHP’s exemptions of the Interstate Highway System and Natural Gas Pipelines (See Chapter 5.)

FHWA and State DOTs

FHWA and several State DOTs have also entered into PAs that identify exempted categories.

ODOT-Track and Rail Bed Improvements

The ODOT PA includes stipulation 4(A)(1), which delegates to ODOT the ability to determine that an undertaking is a type of activity that does not have the potential to cause effects to historic properties, assuming such historic properties were present, thereby completing the section 106 process. Item 7 in Appendix A is especially relevant to railroads because it exempts from section 106 review improvements to track and rail bed, including maintenance activities and installation of railroad warning devices within existing right-of-way.

PennDOT Rail-to-Trail Projects

Appendix C to the PennDOT PA, includes an exemption for rail-to-trail projects (Section 2(A)(8)(c), p. 28) provided the project does not require the removal of the railroad bed or existing bridges, and there are no known archaeological sites within the project APE, as determined from the Cultural Resources GIS or visible evidence on the ground surface in the APE.

Alaska DOT&PF-Undertaking Thresholds

The Alaska DOT&PF PA includes Stipulation 3 and Appendix A for Undertaking Thresholds for the PA Regarding Alaska’s Highway System Roads. When the DOT&PF Professional Qualified Individual determines that an undertaking falls within the thresholds for an NRHP-eligible historic road or

⁴¹ “*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.” 36 CFR 800.16(y),

highway, it is exempt from further section 106 review. The relevant types of undertakings fall under four broad categories:

1. Minor road widening;
2. Minor road realignment;
3. Surface material change; and
4. New construction for compliance with the Americans with Disabilities Act and for the installation of drainage improvements (including ditches and culverts).

Maine DOT-Exempt Projects

The Maine DOT Stipulation 2 includes a series of projects limited to certain activities that shall not require section 106 consultation with SHPO, including:

1. Activities not resulting in construction
2. Replacement with the same type/size and no impact to previously undisturbed area
 - Road base, pavement
 - Non Historic Bridge: decks, wearing surfaces, railings, wing walls (excludes railroad bridges)
 - Culverts (excludes railroads)
 - Rail: track structure, ballasts, ties
 - Signs, traffic signals
 - Fences (not including stone walls)
 - Marine facility infrastructure
3. Routine maintenance and repair that restore original/constructed conditions
 - Items listed under 2, Replacement
 - Drainage systems
 - Crack sealing
 - Filling in scour holes, eroded areas
 - Re-establishing ditches
4. Structural work limited to non-historic, non-eligible bridge, not within a historic district (includes abutment repair above ground only)
5. Work within previously constructed limits with no visual changes apparent
 - Installing in-pavement or in-fill technologies (e.g., scales)
 - Rail lines
6. Work within existing non-interstate intersections, medians, highways, rail lines, within previously constructed limits (Archaeology only)
 - Paving shoulders
 - Installing signals

Exemptions by Age or Period of Significance

50-Year Threshold

Ordinarily, properties having achieved significance within the last 50 years are not eligible for the NRHP unless they meet NRHP Criteria Consideration G, that is, they have exceptional importance. A simple exempted category could be undertakings that are limited to affecting properties less than 50 years of age that do not have exceptional importance. Such railroad projects are a category of undertaking that could be considered exempt under section 800.14(c). Most existing railroad properties were constructed well over 50 years ago so such an exemption would have little practical use, except in those cases where there is clear documentary evidence of the construction date.

It is important to note, however, that much of the materials within railroad rights-of-way are regularly replaced in-kind through routine maintenance (e.g., ties, rails, ballast, switches, and other operating equipment) and are not original materials over 50 years of age, even when the underlying railroad grade is well over 50 years of age. A second exempt category, therefore, would be undertakings that are limited to maintenance or replacement of materials in-kind that are less than 50 years of age, even if they are located in a railroad right-of-way that is over 50 years of age.

Period of Significance:⁴² Closed More than 50 Years Ago

NRHP Bulletin 16A (pg. 42) states: "Fifty years ago is used as the closing date for periods of significance where activities begun historically continued to have importance and no more specific date can be defined to end the historic period." The first major railroad in the United States was the Baltimore & Ohio in 1828, and a vast rail network was in place by the 1920s, well over 50 years ago. Historic research to evaluate railroad properties for the NRHP may conclude that the period of significance for some railroad properties closed more than 50 years ago, perhaps more than 100 years ago. In such cases, an exempted category could be undertakings that affect only those portions of railroad properties constructed after the close of their established period of significance (see example exemption).

Example exemption: A railroad was built from Port City A to Factory City B in 1850 when a new industry was first established. Factory City B prospered, a large factory district making related products developed, and the railroad served the entire district with multiple trips each day. In the 1920s, the type of industry in Factory City B was beginning to decline and largely went out of business during the Great Depression. The freight railroad continued to operate but ran only one train per week, as it continues to do so today. In the 1990s, a historic district of the industrial area in Factory City B was found eligible for

⁴² National Register Bulletin 16A (page 42) defines period of significance as "the length of time when a property was associated with important events, activities, or persons, or attained the characteristics which qualify it for National Register listing. Period of significance usually begins with the date when significant activities or events began giving the property its historic significance; this is often a date of construction." Bulletin 16A also provides the following additional guidelines. "The property must possess historic integrity for all periods of significance entered. Continued use or activity does not necessarily justify continuing the period of significance. The period of significance is based upon the time when the property made the contributions or achieved the character on which significance is based. Fifty years ago is used as the closing date for periods of significance where activities begun historically continued to have importance and no more specific date can be defined to end the historic period."

the NRHP under Criterion A and C, with a period of significance from 1850 to 1929. No NRHP determination was made for the railroad segment outside the historic district boundary.

Proposed undertaking: The local transit agency applied for federal funds to convert the railroad between Port City A and Factory City B from freight service to electrified commuter rail. The freight rail carrier has clear records that all the tracks and operating equipment were replaced after World War II. The existing tracks, ties, switches and ballast are proposed to be removed and replaced, but no alterations are proposed to the few still extant stone arch bridges and culverts.

Applicability of the proposed exemption: Because the post-World War II materials to be removed or altered were constructed after the close of a clearly documented period of significance (1929), this undertaking would qualify for an exemption as described above, if such an exemption existed. The proposed exemption, however, would *not* apply to work such as proposing to demolish one of the stone arch bridges, because the bridge was likely constructed during the period of significance and was not previously evaluated for the NRHP.

Applicability to Federally Funded Railroad Projects

A category of undertaking exempt under section 800.14(c) could be railroad projects that are limited to the repair, alteration, removal, or replacement of materials or features installed after the close of the period of significance or within the past 50 years. This could allow such activities receiving federal funding to be approved quickly, without stepping through the standard section 106 process for each individual undertaking.

Standard Treatments

Section 800.14(d) of the ACHP's regulations allows Standard Treatments as a program alternative to the section 106 process. Under 800.6(b)(1)(ii), adverse effects on historic properties may be resolved without the ACHP using Standard Treatments established under 800.14(d) as a basis for an MOA. Under 800.14(d), the ACHP, on its own, or at the request of another party [including a federal agency] may assist federal agencies in satisfying the requirements of the section 106 process by establishing standard methods for:

- The treatment of a category of historic properties (e.g., depots, bridges, segments, engine terminals, warehouses, etc.);
- A category of undertakings (e.g., abandonment, no physical improvements, increased railroad traffic, repair, replacement, routine maintenance, Americans with Disabilities Act (ADA) accessibility, etc.); or
- A category of effects on historic properties (e.g., no potential to affect historic properties, no adverse effect with standard conditions, etc.).

This last effect determination, no adverse effect with standard conditions, may apply to railroad buildings, structures, and objects under 800.5(b) when rehabilitation plans are consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR Part 68) and reviewed by the SHPO. This provision could apply to ADA compliance, which may be categorically exempt under NEPA, but not exempt from section 106.

FRA with the Delaware SHPO and FHWA with several state DOTs have entered into PAs that identify standard treatments.

FRA-Delaware SHPO

Design Guidelines may be a useful type of Standard Treatment. On a basic level, Design Guidelines could outline an approach for alterations to existing historic buildings and structures and appropriateness of scale, materials and setting when modern buildings and functions are introduced within a historic setting. While the following isn't a direct example of a Standard Treatment because the PA was mitigation for an adverse effect, the concepts it presents may be useful. In 2007, FRA, the Delaware SHPO, and Amtrak entered into a PA for future demolition and construction activities planned at Amtrak's Wilmington Shops, which is listed on the NRHP. The PA requires all modifications of existing structures, demolition of existing structures, and construction of new structures shall conform to Design Guidelines that are attached to the PA. The Design Guidelines sort the buildings, structures and open space into five categories based on their construction era and level of integrity, as follows:

- Category I: 1903-era & 1929-era buildings/structures/open spaces with integrity of original design
- Category II: 1903-era & 1929-era buildings/structures/open spaces lacking integrity of original design
- Category III: all other standing buildings/structures
- Category IV: remnants of buildings/structures
- Category V: remaining areas of the site

Category I includes the most historically significant buildings, structures, and open spaces at the Wilmington Shops. The Design Guidelines ensure Category I elements will receive a high level of preservation during future construction activities and will be treated in a manner consistent with the Secretary's Standards. The Design Guidelines provide detailed treatments for: exterior walls; windows and doors; floor materials; framing systems; roofing systems; lighting systems, heating, cooling and ventilation systems; electrical distribution systems, equipment in buildings, additions, excavation, paving, and design review by the Delaware SHPO.

Category II includes less significant elements and would receive a level of preservation commensurate with their present levels of integrity. In general, repair projects and ongoing maintenance projects will emphasize the protection and preservation of as much of the remaining historic materials and character of space as possible. New construction and partial demolition will be permitted, with conditions.

There are few restrictions for construction and demolition activities that would affect elements in Categories III, IV, and V.

FHWA-PennDOT

Stipulation V and Appendix F to the PennDOT PA include standard treatment options to avoid or mitigate adverse effects. To avoid adverse effects, standard treatment options include:

- Activities within or adjacent to historic properties
 - Installation of new lighting (in-kind or historic replica)
 - Replacement of curbs, curbing and sidewalks provided in-kind or compatible modern materials are used

- Installation of new curbing and sidewalks using brick, slate, granite or other stone; or concrete when already present within a historic district
- Archaeology
 - PennDOT may use protective geotextile fabric and fill in temporary construction areas such as bridge runarounds, haul roads, and other work areas when the temporary construction area is located in a high probability area for archaeological sites. [With conditions for soil characteristics, vehicle size and weight, and to avoid soil compaction.]

If an adverse effect would occur, the following standard treatment for mitigation may be applied, provided FHWA, SHPO and consulting parties have an opportunity to provide their views:

- Historic Bridges
 - Marketing Historic Bridges
 - Replacement of Bridges Contributing to a Historic District
 - A replacement design may be used that either mimics the appearance of the contributing bridge or incorporates a context sensitive design. Bridges that are individually eligible may require additional mitigation.

FHWA-Indiana DOT

Stipulation I.A of the INDOT PA requires INDOT to develop and include Standards for the Rehabilitation of Bridges on Low-Volume Roads in the INDOT design manual, which will be utilized to evaluate if rehabilitation of a given historic bridge for vehicular use is feasible and prudent. Attachment B to the INDOT PA provides a standard treatment approach that applies to all Select Bridges and the preservation of Non-Select Bridges.

Rehabilitation

- The bridge owner will develop plans to rehabilitate the bridge in accordance with the Secretary's Standards for Rehabilitation or as close to the Standards as is practicable.
- The bridge owner will provide rehabilitation plans to the Indiana SHPO at approximately 30% complete, 60% complete, and when final design plans are complete.
- IN SHPO will have 30 days to review and provide comments to the bridge owner and notify them of any photo documentation requirements.
- The bridge owner will provide written responses addressing IN SHPO comments before the design is advanced to the next phase.
- The bridge owner will ensure that the historic bridge will be maintained for a minimum of 25 years.
- If the bridge is currently listed in the NRHP, then INDOT will seek approval of the DOI to keep it on the NRHP.
- The bridge owner will complete any photo documentation in accordance with the specifications provided by the Indiana SHPO.

Demolition

The INDOT PA also provides a stand treatment approach when a Non-Select Bridge is to be demolished, including:

- The bridge owner will consult with the IN SHPO to determine if photo documentation of the bridge is needed. The IN SHPO will specify the photo documentation standards and distribution requirements.
- The bridge owner will complete any required photo documentation in accordance with the specifications provided by the IN SHPO.
- Salvage of elements may be stored and used for future repair of similar historic bridges.

FHWA-Montana DOT

The 2011 MDT PA provides standard treatment measures for NRHP-eligible abandoned railroad grades less than 2,000 feet in length, including:

1. \$10,000 funding for Montana Historical Society Press publications about independently operated railroads in the state.
2. GIS files for all documented active and abandoned railroad routes in Montana.
3. Annual summary for SHPO of impacts to abandoned historic railroad grades.
4. Installation of 10 interpretive signs about historic railroads by June 2015.

Applicability to Federally Funded Railroad Projects

Section 800.14(d) of the ACHP's regulations may allow standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties. These standard methods could allow federal funding to be approved quickly, with regular procedures for consultation and predictable treatment and outcomes.

Program Comments

Section 800.14(e) of the Section 106 regulations allows a federal agency official to request the ACHP's comment on a category of undertakings, in lieu of conducting individual reviews under sections 800.3 through 800.6. Federal agencies must consider, but are not obligated to follow, the ACHP's comments. If an agency does not follow the ACHP's comments, the ACHP may withdraw them, in which case the agency will continue to comply with section 106 in its usual case-by-case basis pursuant to sections 800.3 through 800.6. In March of 2009, ACHP issued a Program Comment at the request of GSA on select repairs and upgrades to windows, lighting, roofing, and heating, ventilating, and air-conditioning systems within historic public buildings, intended to streamline and facilitate repair and upgrade projects funded by the ARRA and other sources. On November 16, 2012, ACHP issued a Program Comment were at the request of FHWA for the treatment of common post-1945 reinforced concrete and steel bridges. Figure 4-1 is an ACHP diagram⁴³ that identifies the

⁴³ <http://www.achp.gov/altguidance/process.html>

steps in the program comment process as outlined in the ACHP’s regulations. The left hand column provides requirements in the program comment process while the right hand column provides corresponding ACHP recommendations to federal agencies. These recommendations help the ACHP in reviewing an agency’s needs for program comments, planning consultation, reducing delays in issuing program comments, and ensuring adequate monitoring of issued program comments.

Applicability to Federally Funded Railroad Projects

A Program Comment may streamline and facilitate section 106 approvals for a particular category of undertakings instead of conducting individual reviews. For example, the ACHP may issue a Program Comment for ARRA funded railroad infrastructure improvements, or for regular federally funded railroad safety improvements.

Figure 4-1: Program Comment Process

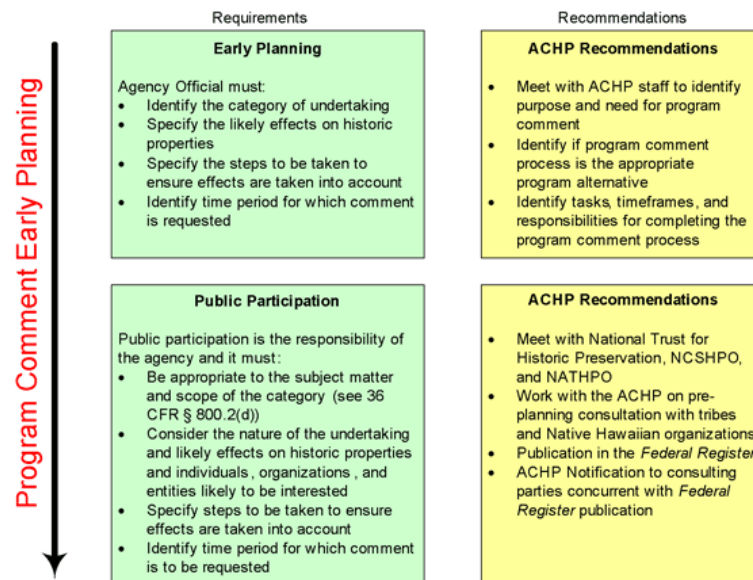
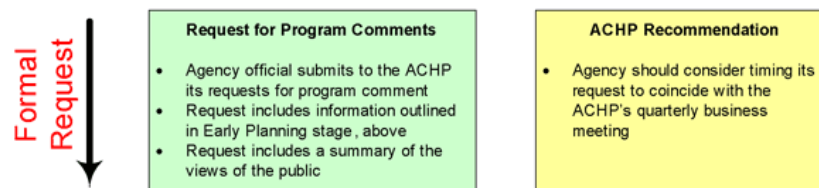
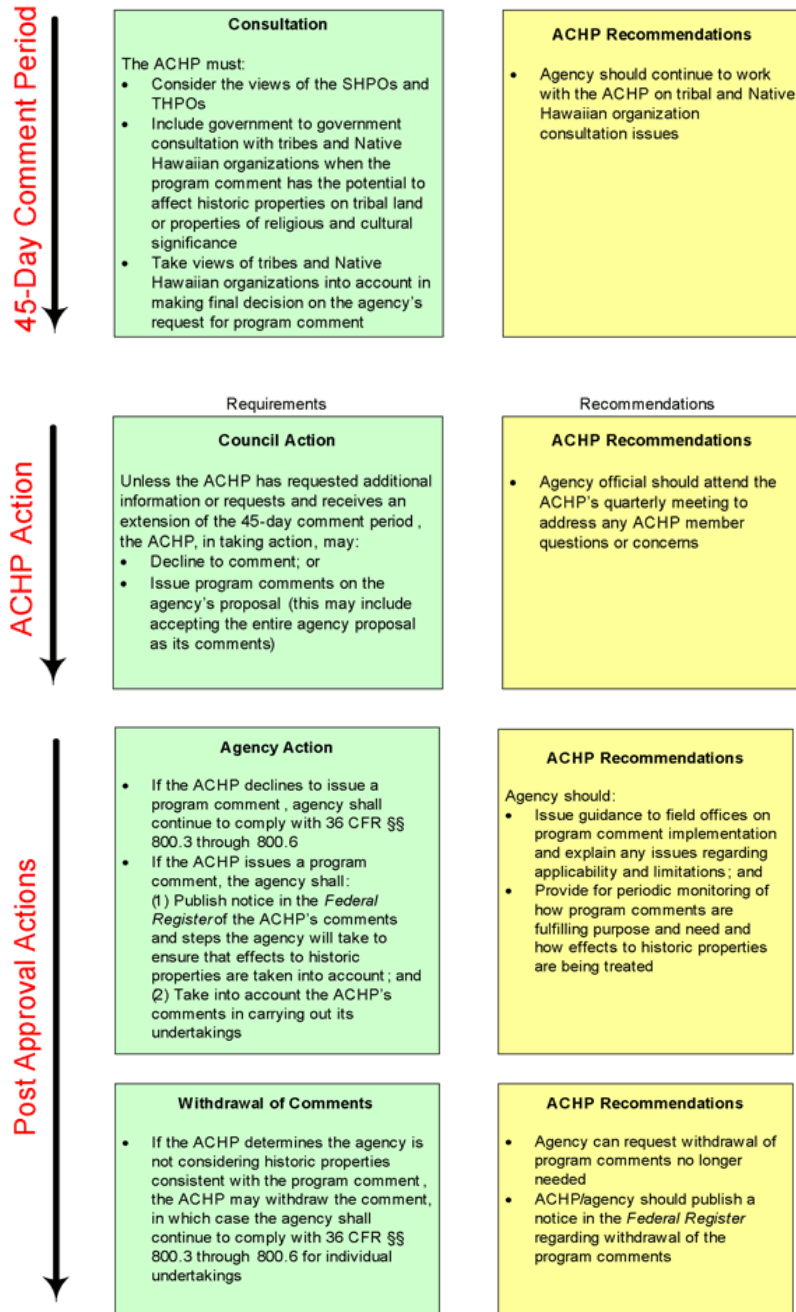


Figure 4-1: Program Comment Process (Continued)





Summary of Chapter 4

Other subsections and Part C of the section 106 regulations offer some ways to make the compliance process more effective and more efficient, including:

- Program Comments* may streamline and facilitate section 106 reviews for a particular category of undertakings, for example, regular federally funded railroad safety improvements.

- *Exempted Categories of Undertakings* offer an efficient opportunity to exempt specific programs or categories of undertakings from section 106 review, which would streamline the approval of many minor activities and maintenance associated with railroad historic properties. It could also exempt certain types of historic railroads from section 106 when the railroad or type has already been documented and interpreted. A potentially useful exempt category would be undertakings that involve maintenance or replacement of railroad infrastructure materials in-kind, even if they are located in a railroad right-of-way that is over 50 years of age.
- *Programmatic Agreements* have been used both nationwide and in individual states to address many aspects of section 106 compliance for railroad properties and projects, and can be executed among more than one federal agency. Nationwide PAs offer precedents and a solid framework for further development and broader application while individual PAs remain useful for large individual expansion projects.
- *Standard Treatments* could be developed to apply to specific categories of railroad historic properties, undertakings, and effects. These could be beneficial if developed on a nationwide government-wide basis.
- Compliance coordination with other federal laws, such as NEPA and Section 4(f) of the U.S. DOT Act, could lead to streamlining opportunities for public outreach, document submission, and mitigation.
- Compliance coordination with state environmental or historic preservation laws could lead to streamlining opportunities for public outreach and mitigation, which could be useful for railroad projects in certain limited circumstances.
- Emergency situations may be streamlined with specific standard procedures and measures when railroad properties are damaged by natural disasters that would be of greatest benefit if established on a government wide basis.
- Specific measures for railroad projects on Tribal lands may be developed to streamline consultation with the Tribes or THPO when ground disturbance activities would or would not occur.
- Prototype Programmatic Agreements can be executed more rapidly than nationwide PAs because they are adapted and executed by individual states and apply to rail lines within those states. Multiple states with rail lines can join forces to execute a joint Prototype PA.
- Alternate procedures to the section 106 process in Subpart B may be developed for federal agencies, but to date only one federal agency has adopted *alternate procedures*. Given the rare use of alternate procedures, and the added complication of multiple federal agencies, this approach would probably be inefficient and cumbersome to establish for the large variety of railroad properties and undertakings.

Chapter 5

Streamlining Techniques—Linear Resources

Chapter 5 analyzes section 106 streamlining techniques that have been applied to linear resources throughout the United States, including the Federal Interstate Highway System, pipelines, utility corridors and historic trails. This chapter compares and contrasts similarities that these resources share with rail infrastructure and rail corridors. This chapter discusses nationwide exemptions and agreements by federal agencies responsible for linear resources, including FHWA, the Federal Energy Regulatory Commission (FERC), and DOI, and how these streamlining techniques could be adapted to historic railroad properties.

Highways

Highways and railroads are linear resources subject to section 106/4(f) review by federal agencies in the U.S. DOT. Therefore, effective historic preservation streamlining techniques developed for highways may also be applicable to railroads. Highways listed or determined eligible for the National Register include the Pasadena Freeway, Merritt Parkway, Hana Highway, and portions of the Lincoln Continental Highway and Route 66. Many states have completed surveys of historic bridges on highways that may be eligible for the NRHP, even when the entire highway is not.

Interstate Highway Section 106 and 4(f) Exemptions

As the Interstate Highway System approached its 50-year anniversary on June 29, 2006, large sections of the 46,700 mile long system would have met the age threshold at which resources are evaluated for the NRHP. In order to address the volume of administrative work this could foster, the ACHP adopted the *Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System* on March 10, 2005.⁴⁴

ACHP's exemption effectively excludes the majority of the Interstate Highway System from consideration as a historic property under section 106. In addition, SAFETEA-LU includes a provision that exempts the bulk of the Interstate Highway System from consideration as a historic resource under Section 4(f).⁴⁵ With these two exemptions in place, federal agencies are no longer required to consider the vast majority of the Interstate Highway System as historic property under section 106 and Section 4(f) requirements. Excluded from these respective exemptions are elements of the Interstate System that are exceptional in some way or meet a national level of significance under the criteria for the NRHP.⁴⁶

⁴⁴ 70 Fed. Reg. 11928.

⁴⁵ Pub. L. 109-59, Section 6007.

⁴⁶ *Interstate Highway System*, FHWA's website at <http://www.environment.fhwa.dot.gov/histpres/highways.asp>, searched June 15, 2011.

In the exemption notice, the ACHP stated:

The final exemption releases all Federal agencies from the section 106 requirement of having to take into account the effects of their undertakings on the Interstate System, except for a limited number of individual elements associated with the system. The exemption embodies the view that the Interstate System is historically important, but only certain particularly important elements of that system, as noted below, warrant consideration. Such elements would still be considered under section 106. The exemption takes no position on the eligibility of the Interstate System as a whole.

The Interstate System elements that will still be considered under section 106 are limited to certain defined elements, such as historic bridges, tunnels, and rest areas, that: (a) Are at least 50 years old, possess national significance, and meet the National Register eligibility criteria (36 CFR part 63); (b) are less than 50 years old, possess national significance, meet the National Register eligibility criteria, and are of exceptional importance; or (c) were listed in the National Register, or determined eligible for the National Register by the Keeper pursuant to 36 CFR part 63, prior to the effective date of the exemption. FHWA, at the headquarters level, in consultation with stakeholders in each state, will make the determination of which elements of the system meet these criteria. . . .

The exemption is also consistent with the purposes of the NHPA. Among other things, the NHPA establishes as the policy of the Government to ‘use measures . . . to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations’ and to ‘encourage the public and private preservation and utilization of all usable elements of the Nation’s historic built environment.’ 16 U.S.C. 470–1(1) and (5). By facilitating the ongoing maintenance, improvements, and upgrades to the Interstate System that ensure the system can continue being utilized for its purposes, and providing for consideration of particularly important, historic elements of the system, the exemption is consistent with the expressed purposes of the NHPA.

The Final List of Nationally and Exceptionally Significant Features of the Federal Interstate Highway System was published in the Federal Register on December 19, 2006, and is available on FHWA’s website.⁴⁷ The criteria used for determining significance by the appropriate FHWA region, SHPO, and state DOT is as follows:

Criteria for Interstate Highway System Elements to Be Excluded from the Exemptions

Individual elements that may be excluded from the exemptions include bridges, tunnels, rest areas, medians, interchanges, ramps, highway segments, culverts, pedestrian overcrossings, lookout sites, visitor centers, retaining walls, signage, lighting, toll booths, and landscaping that are part of the Interstate Highway System. Elements must possess adequate integrity to convey their importance within the appropriate area(s) of significance: engineering, transportation, social history, or commerce. In addition, per section III of the section 106 exemption, elements must meet at least one of the following criteria:

1. **National Significance.** The element is at least 50 years old and meets the National Register criteria for national significance, defined in 36 CFR 65.4(a) as follows in relevant part:

The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering, and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association, and:

- (1) That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States

⁴⁷ 71 Fed. Reg. 76019; http://www.environment.fhwa.dot.gov/histpres/highways_list.asp.

- history and from which an understanding and appreciation of those patterns may be gained;
or
- (2) That are associated importantly with the lives of persons nationally significant in the history of the United States; or
 - (3) That represent some great idea or ideal of the American people; or
 - (4) That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or
 - (5) That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture.
2. **Exceptional Significance.** The element is less than 50 years old and meets the National Register criteria consideration for exceptional importance.
 3. **Listed or Determined Eligible by the Keeper.** The element is listed in the National Register or has previously been determined eligible by the Keeper of the National Register.
 4. **State or Local Significance.** At the discretion of FHWA, elements may be considered if they are at least 50 years old, were later incorporated into the Interstate Highway System, and meet the National Register criteria for evaluation defined in 36 CFR Part 60.4 at the state or local level of significance, as follows:

The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

 - (a) That are associated with events that have made a significant contribution to the broad patterns of our history; or
 - (b) That are associated with the lives of persons significant in our past; or
 - (c) That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
 - (d) That have yielded or may be likely to yield, information important in prehistory or history.

When applying all of the criteria, it is important to remember that the exemptions do not apply to resources outside the Interstate Highway System right-of-way, such as restaurants, service areas, motels, scenic areas, natural landforms, and residential subdivisions.⁴⁸

Significant Features Excluded from the Exemption

FHWA summarized the implementation of the criteria as follows:

FHWA and a team of federal, state, and local stakeholders within each state used these criteria to establish a preliminary list of exclusions to the exemptions. The preliminary list was published in the Federal Register on June 16, 2006. FHWA received 55 sets of comments from state DOTs, state

⁴⁸ FHWA. *Guidance to Apply the Criteria for the Identification of Nationally Significant and Exceptionally Significant Elements of the Interstate Highway System*. Prepared by ICF International for FHWA under subcontract to Battelle Memorial Institute, 2005. (71 Fed. Reg. 76019). <http://federalregister.gov/a/E6-21581>.

Historic Preservation Offices (SHPOs), state and local governments, transportation-related organizations, and other private groups and citizens. Most of the comments requested the addition or removal of specific elements, while others suggested changing the selection process, stating that the procedure was either too inclusive or too exclusive.

The next challenge for FHWA was to organize and address all of the comments it had received. For comments that could result in a possible revision to the exemption list, FHWA consulted with the team of representatives who helped to formulate the preliminary list, asking them to review the comments and working with them to revise the list as appropriate given the national perspective. In a continuing effort to keep the public involved in the decision-making, in states where an element was being considered for addition to or removal from the list, the process included any stakeholders who had submitted comments.

During the comment period, 26 elements were removed from the preliminary list and six were added. The Final List of Nationally and Exceptionally Significant Features of the Federal Interstate Highway System, published in the Federal Register on December 19, 2006, included 132 features to be excluded from the section 106 and Section 4(f) exemptions. These exceptional elements include 81 bridges, 22 highway segments, and 13 tunnels among other unique resources such as rest areas and parks.⁴⁹

Applicability to Federally Funded Railroad Projects

The Interstate System was developed with uniform design standards, but design features were performed by State Highway Departments and varied according to their respective design guidelines. Both the Interstate System and railroad system are linear transportation systems that have had significant influence on the economic prosperity of the nation. In order to retain their economic edge, they must be able to readily change with the times, whether it be to replace worn surfaces, adapt to new technologies, accommodate larger vehicles, or to retrofit structures to protect against perils unanticipated when constructed (e.g., seismic activity or terroristic risk). An important aspect of the Interstate System Exemption guidance and criteria is that the most exceptional elements were identified for future section 106 and 4(f) compliance, and the bulk of the standard and common design features were made exempt. This is an important precedent that can serve as an example for the evaluation of railroads, which are largely constructed according to common standard plans and engineering standards, but may have some buildings and structures that were constructed with a higher quality of design and materials or were major engineering achievements.

FHWA was able to take advantage of the fact that the highways were public rather than private, and had available ample documentation; applicability to private railroads is more limited due to private ownership of rail lines and documentation. Additionally, there is widespread interest in railroad history that could result in the need for extensive public involvement.

⁴⁹ FHWA, *Celebrating 50 Years of the Interstate*, Monthly Newsletter dated March 2007, <http://environment.fhwa.dot.gov/strmlng/newsletters/mar07nl.asp>.

Pipelines and Utility Corridors

Natural Gas Pipelines

Natural gas pipelines and transmission line utility corridors fall under section 106 review by FERC, and they are similar to railroads in that they are long linear resources with occasional support facilities, but in some cases they can be buried underground for long distances. Several natural gas pipelines were found eligible for the NRHP, and this led to a proposed Congressional amendment to the NHPA to exempt them from section 106. In response to this legislative proposal, on April 5, 2002, the ACHP issued an administrative exemption that relieves federal agencies from the requirement of taking into account the effects of their undertakings on historic natural gas pipelines.⁵⁰ The only exception is when NRHP-eligible pipelines are abandoned, and then they must get documented prior to abandonment.

In the exemption notice, the ACHP stated:

The exemption releases all Federal agencies from the Section 106 requirement of having to consider the effects of their undertakings on historic natural gas pipelines. Historic natural gas pipelines are defined as those natural gas pipelines that meet the criteria for listing on the National Register of Historic Places. The exemption applies unconditionally for all undertakings except for those that entail the abandonment of a historic natural gas pipeline. The sole condition for those cases is that the historic natural gas pipeline gets documented prior to abandonment. The documentation requirements are enumerated in the exemption document. Finally, the exemption does not apply on tribal land.

In the same exemption notice, ACHP reiterated an earlier point that is relevant to the character of rail line segments:

As the Council has noted before, natural gas pipelines exhibit considerable redundancy and uniformity in form over their entire extent. Accordingly, these minor abandonments are unlikely to affect the integrity of the pipeline as a historic property or jeopardize adequate documentation of the pipeline in the future.

Utility Corridors

Southern California Edison's Big Creek Hydroelectric Project included three transmission lines (period of significance 1911-1929) that were determined eligible to the NRHP. In 2006, FERC, ACHP, the California SHPO and the Sierra National Forest entered into a PA, which includes a treatment plan in the event the transmission lines are modified in the future. Other transmission lines, like those included in the Hoover Dam Historic District, have been determined eligible for the NRHP.

Applicability to Federally Funded Railroad Projects

Pipelines and utility corridors are similar to rail lines in that they were constructed using regular, uniform parts that were designed to be fitted together and form a functional linear resource, often of great length. Typically, when those uniform parts wear out, they are replaced in kind so that the entire linear resource can continue to function. Rail lines are usually more prominent as they may sometimes be carried on bridges or culverts that are more substantial structures than are needed to

⁵⁰ 67 Fed. Reg. 16364.

carry gas pipelines or electrical lines. Most are common standard design, but significant engineering structures may also be present. The ACHP's pipeline exemption recognizes the uniform construction character, need for continued operation, and relieves federal agencies from the section 106 requirements except when NRHP-eligible pipelines are abandoned.

Historic Trails

To date, the BLM (DOI) manages 10 National Historic Trails on BLM land totaling 4,877 miles in 10 western states, including the Iditarod, Nez Perce, Mormon Pioneer, Lewis and Clark, Oregon, California, Juan Bautista de Anza, El Camino Real de Tierra Adentro, Old Spanish, and Pony Express. As discussed in Chapter 4 (page 4-6), the BLM has negotiated a National Programmatic and individual Statewide Protocol Agreements for streamlining *routine* BLM undertakings through the section 106 process.

The NPS manages the Historic Trails System created by the National Trails System Act of 1968 and has historic trails and railroads that traverse lands under its control.

In addition, In 2008, the NPS (DOI) entered into a nationwide PA with the ACHP and NCSHPO for compliance with activities within the National Park System. Stipulation III.C.2. of the NPS PA allows for a Streamlined Review Process that may be applied to NRHP-eligible trails as follows, in relevant part:

Rehabilitation and/or Minor Relocation of Existing Trails, Walks, Paths, and Sidewalks: The Streamlined Review Process may also be used for undertakings proposed on existing historic trails, walks, paths, and/or sidewalks, provided that the proposed undertaking is conducted in accordance with an approved treatment plan (such as a historic structure report, cultural landscape report, or preservation maintenance plan).

If the project activities include ground disturbance, archeological monitoring may be appropriate throughout the ground disturbing activities, in accordance with any recommendation of the [Cultural Resource Management] CRM Team. When monitoring is recommended, members of any appropriate federally recognized Indian Tribes or Native Hawaiian organizations may be invited to participate in monitoring.

This streamlined activity includes the following undertakings, as well as others that are comparable in scope, scale, and impact:

- In-kind re-grading, graveling, repaving, or other maintenance treatments of all existing trails, walks and paths within existing disturbed alignments.
- Minor realignment of trails, walks, and paths where the ground is previously disturbed as determined by a qualified archeologist.

Repair/Resurfacing/Removal of Existing, Roads, Trails, and Parking Areas: The Streamlined Review Process may be used as follows: ...

- Existing roads, trails, parking areas, and associated features that have been determined eligible for the [NRHP] in consultation with the SHPO/THPO, may be repaired or resurfaced in-kind. The project, including staging areas, cannot exceed the area of the existing surface and cannot exceed the depth of existing disturbance.

Applicability to Federally Funded Railroad Projects

Historic trails are similar to rail lines in that they are long linear resources that, once graded, seldom have major re-grading or realignments. However, historic trails generally are narrow, lack major

structural support, do not have the restrictive width and slope requirements that railroads do, and often their exact location cannot be determined. Furthermore, historic trails as pedestrian and animal-drawn vehicle routes are more likely to be a source for historic and pre-historic archaeological sites whereas railroad lines contain above-ground buildings and structures related to the construction and operation of the railroad, and potentially prehistoric sites in areas undisturbed by grading. Some of the streamlined section 106 review processes outlined in the NPS PA for historic trails may have some applicability for similar activities on railroads. For example, a streamlined nationwide review process could be established for:

- In-kind re-grading, ballasting, and re-tracking within existing disturbed railroad alignments.
- Minor realignment of railroads within existing railroad right-of-way or where the ground outside existing railroad right-of-way is previously disturbed as determined by a qualified archeologist.
- Existing railroads and associated features that have been determined eligible for the [NRHP] in consultation with the SHPO/THPO, may be repaired or resurfaced in-kind.

Summary of Chapter 5

Other linear resources have been subject to streamlining review that may be applicable to railroads.

The ***Interstate Highway System Exemption*** resulted in:

- Development of guidance and criteria that recognized the significance of the most exceptional elements
- Exemption of standard and common design features from section 106 and 4(f) review.

The ***Natural Gas Pipeline Exemption*** resulted in:

- Recognition of the uniform construction and character of long linear resources, and the need for continued operation.
- Relief of federal agencies from the section 106 requirements except when NRHP-eligible pipelines are abandoned.

The ***NPS PA for Trails*** streamlined section 106 review processes that may be applicable for similar activities on railroads, as follows:

- In-kind re-grading, ballasting, and re-tracking within existing railroad alignments.
- Minor realignment of railroads within existing railroad right-of-way or where the ground outside existing railroad right-of-way is previously disturbed as determined by a qualified archeologist.
- Existing railroads and associated features that have been determined eligible for the NRHP in consultation with the SHPO/THPO, may be repaired or resurfaced in-kind.

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Chapter 6

Streamlining Solutions—Section 106

Chapter 6 evaluates section 106 streamlining solutions to efficiently achieve railroad safety and provide federal support for railroad improvements while meeting the aims of the NHPA and recognizing that most railroads are privately owned. Explored are administrative measures and legislative changes that would establish uniform procedures and standards or other potential measures for the treatment of railroad corridors and/or individual railroad resources. Where possible, Chapter 6 provides documented examples of the use of identified streamlining mechanisms, including language and application guidance and qualitatively outlining benefits, costs, and implementation considerations.

The section 106 streamlining solutions that can be implemented most quickly and effectively by a federal agency are discussed first, followed by those that are more complex or require the involvement of other agencies or changes in law.

Administrative

As discussed in Chapter 4, the section 106 regulations provide a series of streamlining solutions described as Program Alternatives at 36 CFR 800.14. The following three Program Alternatives offer the most effective streamlining solutions for federally funded railroad infrastructure repair and improvement projects:

- ***Exempted Categories of Undertakings (800.14(c))*** are proposed by the federal agency,⁵¹ approved by the ACHP, and published in the Federal Register.
- ***Programmatic Agreements (800.14(b))*** are negotiated between the ACHP and the federal agency to govern the implementation of a particular program, including when effects are multi-state in scope. PAs involve consultation, as appropriate with NCSHPO, SHPO/THPOs, Tribes, other federal agencies, and members of the public. This chapter examines two types of PAs: a *Prototype PA* for adaptation and use in different states and a *Nationwide PA*.
- ***Standard Treatments (800.14(d))*** established by the ACHP for assisting the federal agency, with the ACHP conducting the public participation and SHPO/THPO consultation.

Each of these Program Alternatives may provide similar streamlining solutions for certain issues, and to avoid redundancy in this chapter, solutions are not repeated after they are first introduced. For example, Exempted Categories of Undertakings may also be included as an attachment to a Prototype PA or Nationwide PA but because exempted categories were discussed earliest in the sequence of this chapter, they would be not repeated in detail in subsequent sections.

⁵¹ Exempted categories of undertakings may also be proposed by the ACHP under 36 CFR 800.14(c), and such an exemption is hereafter referred to as a “Section 106 ACHP administrative exemption.”

Exempted Categories of Undertakings

Exempted Categories of Undertakings are a section 106 Program Alternative described by ACHP at 800.14(c) of the Section 106 regulations. The federal agency would propose the exempt categories of undertakings with potential effects upon historic properties that are foreseeable and likely to be minimal or not adverse and when the exemption is determined to be consistent with the purposes of the NHPA. An exempted undertaking would not be subject to any section 106 review. The federal agency would make the proposed exemption available for public participation, and consult with SHPOs, THPOs and Tribes. The federal agency then would submit the proposed exemptions for a 30-day review by ACHP and the ACHP shall then approve or reject the proposed exemption. As the proponent of the exemption and in accordance with 800.14(c)(8), the federal agency would publish notice of the approved exemption in the Federal Register.

Compliance with federal environmental regulations could be streamlined when the section 106 Exempted Categories of Undertakings are also Actions Categorically Excluded from NEPA. Such actions may include:

- Actions Categorically Excluded from FRA's Procedures for Considering Environmental Impacts at 64 Fed. Reg. 28545: #11, #12, #15, #16, #17, #18, #19, 20, 21, 23, 24, and 27.. (See Chapter 1 for the full text.) In January 2013, FRA added seven Categorical Exclusions to section 4(c) of FRA's Procedures, and they could also be added to Exempted Categories of Undertakings if they have no potential to adversely affect historic properties.⁵²
- Actions that meet the criteria for Categorical Exclusions in 23 CFR 771.117(a) of FHWA's and FTA's Environmental Impacts and Related Procedures: #2, #5, #6, #8, #14, #15, #18, and #19. (See Chapter 1 for the full text.)

The following activities could also be considered as Exempted Categories of Undertakings that would be established with the exemption process outlined in 36 CFR 800.14(c):

- Maintenance of railroad structures within a historic district when those structures:

⁵² Three of the seven new CEs would be good candidates for Exempted Categories of Undertakings, as follows:
 #23) Acquisition (including purchase or lease), rehabilitation, or maintenance of vehicles and equipment that does not cause a substantial increase in the use of infrastructure within the existing right-of-way or other previously disturbed locations, including locomotives, passenger coaches, freight cars, trainsets, and construction, maintenance or inspection equipment.
 #24) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair, or replacement of surface treatments or pavement markings, small passenger shelters, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, and security equipment, including surveillance and detection cameras.
 #27) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, improving or replacing interlockings, or the installation or maintenance of ancillary equipment.
 77 Fed. Reg. 35471 (Jun. 13, 2012,);Docket No. FRA-2012-0016.

- a. Are not individually eligible for or listed in the NRHP, or
- b. Have not been specifically found to be a contributing element of a historic district.
- c. Replacement of any component of a structure in a “like-for-like” manner that matches the material, details and appearance of the original.
- d. Changes to or replacement of any component of a structure when the component in question is not a historically significant element of the structure.
- e. Changes to or maintenance of portions of a structure that are not visible or accessible to the public, presuming those portions are not significant character defining features.
- f. Additions to or changes to a property that do not require significant contact with a structure and are reversible.
- g. Some types of rail line abandonments that are not likely to affect historic properties (e.g., where the rail right-of-way will likely be converted to use as an interim trail or sold to a preservation group, park, or recreation area.)
- h. Changes to certain types of historic railroads or property types when the railroad has already been documented, interpreted, and recorded in HABS, HAER, or HALS, depending on whether the changes would result in an adverse effect.

Benefits, Costs, and Implementation Considerations

The benefit of establishing *Exempted Categories of Undertakings* is that the proposal, process, content, public/agency outreach, and timing are largely under the direct control of the federal agency. When that effort is complete, the federal agency then would submit the proposed exemptions for a 30-day review by ACHP and their approval or rejection. The federal agency would publish notice of the approved exemptions in the Federal Register. In theory, this whole sequence could be completed in less than six months, and the effects of streamlining could be realized immediately after publication in the Federal Register. Cost would be nominal, largely confined to the labor involved in performing the public outreach and preparing publication in the Federal Register. Except in special circumstances, any undertaking that falls within an approved exempted category requires no further review pursuant to the section 106 regulation, thereby saving the costs typically associated with:

- Developing an Area of Potential Effects.
- Consulting with SHPO, Tribes, and parties with knowledge or concerns about historic properties.
- Conducting public outreach.
- Contracting with qualified professionals to conduct field surveys and research, and evaluate properties for NRHP eligibility and ineligibility.
- Analyzing effects and gaining SHPO concurrence with finding of “no historic properties affected” or “no adverse effect on historic properties.”
- Coordinating with NEPA.

Cost data for section 106 activities has not been specifically tracked or calculated by FRA, FHWA, or FTA. A survey of railroad carriers for cost data was not undertaken for this study. Amtrak informed this study that its consultant fees for section 106 studies were approximately \$1 million from 2008 to 2011, an average cost of \$250,000 per year for just one carrier. That does not include carrier or

agency labor costs, or the added construction costs for schedule delays or for avoidance, minimization or mitigation of effects on historic properties. Amtrak estimates an extra six months are added to its project approval schedule when section 106 studies are required. Undertakings that fall within an approved Exempted Category of Undertaking would require no section 106 studies, consultant fees, or the six month delay of schedule, thereby saving some fraction of the estimated fees expended on section 106 every year. This fraction would be dependent on the number of these smaller scale undertakings that generate section 106 studies. This fraction would be less than non-exempt larger-scale undertakings because they are more likely to have extensive APEs, detailed technical reports, the presence of historic properties, adverse effects, agreement documents, and measures to avoid, minimize or mitigate adverse effects, all of which increase section 106 review costs.

Considerations include the possibility of rejection by the ACHP pursuant to 36 CFR 800.14(c)(5) or approval and subsequent termination by the ACHP pursuant to 800.14(c)(8).

Programmatic Agreements

Two types of PAs are reviewed in this chapter:

- **Prototype PAs** are first drafted by the federal agency and ACHP, and then developed by the federal agency for adaptation and use in different states, in agreement with the appropriate SHPO/THPO but without further need for ACHP consultation. According to 36 CFR 800.14(b)(4) a Prototype PA “may be used for the same type of program or undertaking in more than one case or area.”

A Prototype PA may be used in lieu of, to supplement, or to supersede a nationwide PA with specific procedures or requirements that may vary among the states. Examples include:

- Specific federal agency/SHPO requirements.
 - Railroad projects on Tribal lands with specific measures developed for consultation with the Tribes or THPO.
 - Compliance coordination with state environmental or historic preservation laws.
 - Compliance coordination with existing state PAs that may include railroad properties (e.g., bridges, abandoned grades, etc.) or standard treatments for historic properties that may apply to rail-related historic properties (e.g., buildings, bridges, historic districts, etc.).
- A **Nationwide PA** is negotiated between the federal agency and ACHP, and involves consultation with NCSHPO, SHPO/THPOs, Tribes, other federal agencies, and members of the public. It takes effect upon execution by the federal agency(s), ACHP, NCSHPO and affected THPOs and Tribes. According to 36 CFR 800.14(b)(1)(i) a PA may be used “[w]hen effects on historic properties are similar and repetitive or are multi-state or regional in scope.” A nationwide PA could be developed among all U.S. DOT agencies that provide funding to railroad repair and improvement projects or authorization of abandonments (i.e., FRA, FTA, FHWA, and STB), the ACHP and NCSHPO. Other federal agencies may also benefit from the provisions in a Nationwide PA by participating in the agreement as consulting parties. Participation of agencies that provide funding during disasters (i.e., FEMA) and those who may manage federal lands crossed by railroads (i.e., NPS, BLM, and USFS) may contribute to the efficacy of the PA.

A Nationwide PA may be used in those states not planning to adopt or not yet executing a Prototype PA, or for multi-state consistency in the identification, assessment of effects, and treatment of historic properties. Examples include:

- Consistent historic properties identification level of effort.
- Guidance for consistent application of NRHP Criteria.
- Replacement or repair and maintenance of tracks, bridges, and operating equipment.
- Abandonments.
- Technological improvements or safety upgrades of rail corridors necessary to maintain the historic railroad use in the modern era.
- Railroad repair and improvement projects or programs that cross state lines.
- Emergency situations when railroad properties are damaged by natural disasters.

In the following discussion, “PA” refers to either a Prototype PA or a Nationwide PA, because either would provide whatever benefit is being described. When “Prototype PA” or “Nationwide PA” is specified, the benefit only accrues when using that specific type of PA.

Content and Efficiency Benefits of Programmatic Agreements

Based on precedents set by PAs or MOAs already in effect, and the views of the focus group and stakeholder group, the examples below may form the basis for stipulations within a Nationwide or Prototype PA:

- NPS: Nationwide PA for the Section 106 Compliance Process (2008)
- BLM: Nationwide PA for the Section 106 Compliance Process (1997)
- DOE: Prototype PA for the Weatherization Assistance Program (2010)
- FRA: Alaska Railroad Timber Bridges MOA (2007)
- FRA: California High Speed Train PA (2011)
- FTA: Chicago Transit Authority Capital Improvement Program PA (1989)
- FRA/FTA: Connecticut/Massachusetts High-Speed Intercity Passenger Rail Project PA (2012)
- FRA: Delaware Wilmington Shops PA (2007)
- FHWA: Indiana Historic Bridges PA (2006)
- FHWA/FTA: Maine Federal Aid Highway and Transit Programs PA (2004)
- FHWA: Montana Historic Roads and Bridges PA (2007)
- FHWA: Montana Abandoned Railroad Grades PA (2011)
- FTA: New Jersey and Pennsylvania Lackawanna Cutoff Restoration of Passenger Service PA (2008)
- FHWA: Ohio Federal Aid Highway Program PA (2006)
- FHWA: Pennsylvania Federal Aid Highway Program PA (2010)
- FTA: Vermont Federal Transit Program PA (2005)

The following components could be implemented immediately upon execution of a section 106 nationwide PA, thereby streamlining reviews and facilitating project delivery at the outset.

Area(s) of Potential Effects

The PA would be used to develop procedures to determine and document the APE for each of the rail-related undertakings defined by the U.S. DOT and DOI agencies. For most categories of undertakings, the APE may be limited to the existing rail right-of-way; however, there may be some cases where rail-related projects might affect historic buildings outside the right-of-way. The APE for indirect effects may vary based on the sensitivity of the types of historic properties and the scope of the proposed work. Potential effects stemming from a change in rail-related traffic should be considered in relation to the level of rail-related traffic during the properties' period of significance, not just the change from current levels. Examples of PAs that have developed guidance for limiting APEs for railroad infrastructure and improvement projects are the FRA California High Speed Train PA (2011) and the FRA/FTA Connecticut/Massachusetts High-Speed Intercity Passenger Rail Project PA (2012). (See pages 4-8 and 4-10.)

Consistent APE(s) for different categories of undertakings would reduce the cost and time to review and approve APE(s) at the start of the typical section 106 process. Consistent procedures to include indirect effects in the APE for different types of activities would reduce the cost and time at project initiation and ensure predictability in the identification level of effort. In undertakings where the APE is limited to the railroad right-of-way, it has the potential to facilitate project delivery.

Consultation Guidance, Protocol, and Procedures

The PA would coordinate compliance with other federal laws, such as NEPA and Section 4(f), to streamline efforts for public outreach, document submission, consultation time frames, and mitigation, including the following:

- Develop formal interagency procedures for considering historic preservation factors during planning or early project development.
 - Develop consistent consultation guidance to accommodate staff changes at federal and state government agencies, the railroad industry, and transit agencies.
 - Establish procedures to partner with applicants in the railroad industry and rail transit to make the process go more smoothly.
- Establish timing and procedures for consulting with SHPO(s)/THPO(s) and other consulting parties early and often in the section 106 process.
 - Develop a standardized process for conducting reviews among all states with set consultation timeframes and documentation standards.
 - Provide guidance in the form of training for SHPO staff about railroads.
 - Establish consulting parties including Tribes, NPS, NTHP, Rails-to-Trails Conservancy, local governments, heritage areas, non-profits, neighborhood organizations, etc.
 - Establish sunset dates for consideration of comments from consulting parties.

A consistent framework for consultation, including guidance, documentation requirements, and time frames, would reduce the cost and time to review, initiate, and comply with the

section 106 process, and would add predictability to the schedule and extent of analyses/studies.

Identification Level of Effort

Prototype PAs would reference existing historic context statements for railroads, if they have been developed in a particular state (e.g., Colorado MPDF, Delaware, Minnesota MPDF, North Dakota MPDF, and South Dakota) or for a particular rail system, subdivision, or property type. These may provide valuable information for a nationwide railroad context and would identify states where further context needs to be developed. Historic context would provide a necessary and improved basis for evaluating railroad properties under NRHP criteria.

Some states may have been engaged in a proactive identification and evaluation of railroad resources (e.g., Alaska, Arkansas (depots), Colorado, Delaware (bridges), Indiana (bridges), Maryland, Minnesota (four railroad corridors), New York (bridges), North Dakota (seven railroad property types), and Pennsylvania (bridges)). Prototype PAs may have stipulations to continue or complete this inventory effort that would facilitate the section 106 review process for future projects involving these resources. Implementation would require the identification of funding sources and better communication and cooperation among SHPOs and the railroads, and may require access to private railroad records and property. A potential cost saving measure would be to utilize the good historic documentation that exists with railroads and transit agencies to date and research the construction history of their original elements and subsequent alterations.

PAs would establish methodologies for undertakings that may adversely affect archaeological sites, including the use of archeological predictive modeling to characterize and analyze project alternatives and to map areas of high archaeological sensitivity within proposed alternatives. This may eliminate the need for field survey in many locations.

PAs would clarify those railroad properties that would not be considered historic (e.g., any sections of track replaced or had major repairs within the past 50 years and any structures on the rail right-of-way that consist of common resource types) and therefore not afforded further consideration under section 106.

PAs would exempt those railroad properties from further section 106 review if historic review objectives have already been met.

By making the identification effort and methodology consistent, some undertakings that fall within specific measures in the PA could be delivered in less time and at less cost with a greater level of predictability. Undertakings that don't easily fall within specific measures in the PA would have to go through the consultation process for the identification effort and methodology, and immediate streamlining for such undertakings may not be realized. For such undertakings, the process would revert to the typical four step section 106 process.

Guidance for the Application of NRHP Criteria to Rail-Related Properties

Some summary guidance would be included in PAs that might help streamline some of the decisions on NRHP eligibility, and therefore save cost and time. This would include requirements for qualified staff and professionals, conceptual guidance for applying NRHP criteria specifically for rail-related properties, and dispute resolution of NRHP eligibility findings.

Historic Context

PAs would stipulate preparation of an advanced study to identify a historic context for rail-related properties and develop a methodology for their evaluation. PAs would develop and utilize historic context, establish a period of significance based on historic research, demonstrate the strength of association necessary to evaluate under NRHP Criterion A for events and NRHP Criterion B for persons, and to understand how re-grading, re-alignment, and regular replacement of materials affect various aspects of integrity.

A Nationwide PA would develop the historic context broadly enough to cover large multi-state railroad systems. A nationwide historic context could be developed as a framework, and then subsequent specific contexts could be developed for rail carrier systems or be developed further in Prototype PAs to address particular states.

Multiple Property Nominations

PAs would develop the historic context for rail-related properties using the NRHP Multiple Property Documentation Form (MPDF), which is used to establish the historic context, property types, and registration requirements. The MPDF would use precedents and set parameters for defining rail-related property types and evaluating their historic significance.

Guidance for All Aspects of NRHP Criteria

PAs would stipulate the development of guidance to ensure the “quality of significance in American history, architecture, archeology, engineering, and culture is present” for a property to be eligible.⁵³ The guidance would develop a philosophy that does not presuppose that all railroad lines are historic but rather evaluates each on its own merits.

The guidance would ensure properties possess “integrity of location, design, setting, materials, workmanship, feeling and association” to be eligible for the NRHP.⁵⁴ For example, the guidance would provide integrity considerations to ensure that entire rail lines are not found eligible for the NRHP when there are few contributing elements left. It would consider that most of the rails, ballast, structures, etc. have been upgraded many times since original construction. It would consider that many buildings and structures that were present when important rail activities occurred are no longer extant, and this loss affects integrity.

PAs would stipulate guidance be developed for applying NRHP Criteria A, B, C, and D specifically to rail related properties and property types. PAs would stipulate guidance to establish the closing date of the “period of significance” for a property.⁵⁵ It would be based on sound research about when railroad activities *continued to have importance* and not assume fifty years ago as the closing date just because railroad activities of lesser importance continued.

⁵³ Section V of NRHP Bulletin 15 *How to Apply the National Register Criteria for Evaluation* provides guidance for evaluating the significance of a property within its historic context, available at <http://www.nps.gov/nr/publications/bulletins/nrb15/>.

⁵⁴ Section VIII of NRHP Bulletin 15 *How to Apply the National Register Criteria for Evaluation* provides guidance for evaluating the integrity of a property.

⁵⁵ NRHP Bulletin 16A *How to Complete the National Register Registration Form* provides guidance for evaluating the period of significance of a property on page 42, available at <http://www.nps.gov/nr/publications/bulletins/nrb16a/>.

Levels of Significance

PAs would stipulate guidance be developed to establish national, state, and local levels of significance specific to rail related properties and property types. Guidance would be provided for distinguishing if a rail-related property is individually eligible for the NRHP, is a contributing element of a historic district (i.e., a rail-related corridor, or complex interrelated series of rail-related properties), or is a non-contributing element of a historic district.

Dispute of NRHP Eligibility

PAs would develop standard procedures for reviewing disputed claims as to the historic significance of a rail-related property (e.g., development of historic context, collection of new research about the construction history, information on alterations, and elevation to a federal agency representative with expertise in evaluating claims of historic significance for review.) If the federal agency representative cannot resolve the dispute, it would go to the Keeper of the NRHP, who is given this responsibility under 36 CFR Part 63. The PA would establish a mechanism to re-evaluate previous NRHP determinations of eligibility.

Detailed guidance would likely not be developed before the PA is executed. As a result, potential streamlining benefits from developing historic contexts, multiple property nominations, and detailed guidance for applying NRHP criteria would not be realized until that guidance is funded and developed further in the future.

Consideration of Adverse Effects

A PA would develop consistent application of the Criteria of Adverse Effect. It would ensure consideration of the historic importance and continued operations of the railroad system overall, not just focus attention on the effects to common materials such as ties, rails, bridges, and individual buildings which must be changed to keep it operational. Maintaining the historic railroad use into the modern era is a beneficial effect, even if there are some physical changes.

The PA would establish certain classes of “no adverse effect findings” that do not require further review, including: routine maintenance of or repairs to a structure that will not change the structure in any significant way; and repairs to rails and ties that have been replaced many times and no longer retain historic integrity.

The Prototype PA would streamline the review of adverse effects on certain types of historic railroads when the railroad or type has already been documented and interpreted in a particular state.

The provisions for considering adverse effects in the context of rail-related properties and activities are likely to reduce the cost and time and facilitate project delivery for some types of undertakings. For example, if all parties agree that routine maintenance and repairs, and replacement of previously replaced materials such as rails and ties are not adverse effects, that would have a substantial streamlining benefit because these undertakings would not have to go through the standard four-step section 106 consultation process.

Another opportunity for substantial streamlining would be agreement that if a railroad or railroad property type has already been documented, interpreted and recorded in HABS, HAER, or HALS, then the adverse effect has already been resolved, and there is no need for further consultation or mitigation in that state.

Standard Approaches to Resolve Adverse Effects

The PA would develop standard treatments of tracks and rails, railroad bridges, etc. that could be treated in a routine and systemic way. Standard treatments are used to avoid adverse effects and thus, allow agencies to conclude reviews with no adverse effect findings. The PA would develop standard approaches to avoid adverse effects through context sensitive designs, materials, and landscaping (e.g., various Amtrak railroad surveillance, security and lighting projects).

Standard treatments to resolve adverse effects would allow agencies to conclude reviews with findings of “no adverse effect,” and no need to enter into an MOA to develop appropriate mitigation measures. When applicable, this would result in a substantial streamlining benefit and facilitate project delivery because these undertakings would not have to go through the section 106 consultation process for resolving adverse effects and developing mitigation.

Preservation and Mitigation

PAs could establish preservation goals and mitigation standards. They would recognize that, in order to retain their economic edge, railroads must be able to readily change with the times, whether from design changes due to Congressional mandates (e.g., installation of positive train control), to adapt to market conditions (e.g., to accommodate larger vehicles), or to retrofit structures to protect against perils unanticipated when constructed (e.g., seismic activity or terroristic risk). PAs would be used to prioritize preservation of resource types that are increasingly rare, such as round houses and interlocking towers. PAs would be used to protect significant archaeological sites within a rail right-of-way that may not have been disturbed since the construction of a rail line.

Where preservation is not possible, PAs would pursue reasonable and adequate mitigation in response to consulting party and public input, such as donating or loaning of a railroad’s extensive archives of photographs and drawings; digitization of their records for hosting by a rail museum or library, or incorporation of material into HABS, HAER, or HALS. They would establish standardized mitigation (e.g., recordation) for types of structures to reduce lengthy negotiations on mitigation.

Standardized preservation goals and mitigation requirements have the potential for streamlining compliance by resolving adverse effects and mitigation more quickly, saving time and perhaps facilitating project delivery.

Benefits, Costs, and Implementation Considerations

The benefits of using PAs as a section 106 Program Alternative are discussed above under each component sub-section. While the costs to draft and execute PAs are generally limited to staff time, development of extensive historic context and guidance could require consultant costs and take several years. While the comparative costs of developing Nationwide and Prototype PAs have not been quantified, a Nationwide PA would be less costly to the federal agency, because the federal agency is only developing one document and primarily negotiating with the ACHP, NCSHPO and NATHPO, and not each individual SHPO, which would be negotiating, revising and signing individual state PAs based on the Prototype.

A Nationwide PA could be implemented within the existing section 106 regulatory framework, with a relatively small number of participants involved for its execution. Some of the streamlining measures, including exempt categories of undertakings, would be available for implementation as

soon as the PA is executed. Historic context and guidance stipulated in a Nationwide PA, however, probably wouldn't begin until after the Nationwide PA was executed. An additional benefit is a Nationwide PA would provide for consistent streamlining measures in every state, saving costs to federal agencies and applicants who have undertakings in multiple states. The following seven parties would likely be involved in drafting and executing a Nationwide PA: FRA, FTA, STB, FHWA, ACHP, NCSHPO, and NATHPO.

A Prototype PA could be developed with all of the section 106 streamlining measures discussed in the Nationwide PA. The measures could be implemented in each state individually as they execute a PA based upon the Prototype PA and after SHPO/THPO and Tribal consultation. In theory, this would take fifty times more effort than entering into a Nationwide PA. Some states could enter into a state-specific PA soon after the Prototype PA, but others might not enter into a state-specific PA in the near future, or at all. This could complicate undertakings occurring in multiple states. Prototype PAs would be a less attractive option for FTA because, unlike FRA and FHWA, which work primarily with state DOTs, FTA works with hundreds of cities, Metropolitan Planning Organizations (MPO), and transit agencies across the country. It would be very time consuming for FTA to engage all of these agencies on a state by state basis. There could be substantial benefits for FRA and FHWA for this approach, but it would not streamline all U.S. DOT projects that involve historic rail corridors.

Some streamlining opportunities exist in those states that already have developed a historic railroad context, inventory of significant railroad properties, state historic preservation laws, or have experience and a good working relationship between the agency and SHPO reviewing section 106 for rail-related projects. The state-specific PA modeled after the Prototype PA would take advantage of what has been developed and worked in that state, and simplify future consultation by streamlining the typical four-step section 106 process.

PAs would save cost and time for the vast majority of undertakings not included in the Exempted Categories of Undertakings discussed earlier in this Chapter by eliminating, facilitating, or reducing the level of consultation associated with each of the following areas:

- Developing an Area of Potential Effects.
- Consulting with SHPO, Tribes, and parties with knowledge or concerns about historic properties.
- Conducting public outreach.
- Reducing the level of effort and cost, through guidance, of qualified professionals to conduct field surveys and research, and evaluate properties for NRHP eligibility and ineligibility.
- Analyzing effects and gaining SHPO concurrence with finding of “no historic properties affected,” “no adverse effect on historic properties, or “conditional no adverse effect.”
- Coordinating with NEPA.
- Standardizing treatments for reducing adverse effects on historic properties.
- Eliminating the need for many individual Memoranda of Agreement.

The cost and time saved by successful implementation of PAs would be additive to the cost and time saved by Exempted Categories of Undertakings discussed earlier in the Chapter because it would be applied to most other non-exempt undertakings. PAs may even reduce the cost and time for large scale undertakings; the applicability of the PA would depend on the nature, scale and complexity of the undertaking. Implementation of PAs would cumulatively increase savings of cost and time already saved by Exempted Categories of Undertakings and make budgets and schedules more

predictable. An effective PA would significantly reduce the costs of section 106 consultant fees and agency staff time, roughly estimated by 50% to 75%. Using Amtrak's figures for one carrier, PAs and Exempted Categories of Undertakings would combine to reduce consultant fees from \$250,000 per year down to an estimated range of \$62,500-\$125,000 per year. Of course, there are always exceptions where complex projects or unusual circumstances may lead to consultant fees and staff time for studies and mitigation that may skew these numbers in any given year.

Standard Treatments

Section 800.14(d) of the ACHP's regulations allows standard treatments as a program alternative to the section 106 process. Under 800.14(d), the ACHP, on its own, or at the request of another party (including a federal agency) may assist federal agencies in satisfying the requirements of the section 106 process by establishing standard methods for:

1. The **treatment of a category of historic properties** (e.g., depots, bridges, segments, engine terminals, warehouses, etc.). As discussed in Chapter 4, the FHWA-PennDot PA provides standard treatments for archaeological sites using protective geotextile fabric and fill in temporary construction areas. The FHWA-INDOT PA provides standard treatments for bridges including standards for rehabilitation of bridges on low volume roads for the INDOT Design Manual and standard treatment approach for all "Select Bridges." Standard treatments for archaeological sites and bridges would be useful to all freight and passenger rail carriers and transit agencies.
2. A **category of undertakings** (e.g., abandonment, no physical improvements, increased railroad traffic, repair, replacement, routine maintenance, accessibility, etc.). PAs may be used to eliminate or streamline consultation for types of undertakings not included or approved in the Exempted Categories of Undertakings discussed earlier in this Chapter. Standard methods for architectural changes to provide Americans with Disabilities Act (ADA) accessibility to historic railroad buildings such as passenger depots would be useful to Amtrak, passenger rail carriers and transit agencies. ADA accessibility undertakings that are designed in accordance with the NPS' Preservation Brief 32 *Making Historic Properties Accessible* would exemplify a standard treatment.⁵⁶
3. A **category of effects on historic properties** (e.g., no potential to affect historic properties, no adverse effect with standard conditions, etc.). PAs may be used to itemize types of effects that have no potential to affect historic properties, and therefore require no section 106 consultation. PAs may also be used to itemize effects and standard conditions to ensure they are not adverse. This last effect determination, no adverse effect with standard conditions, may apply to railroad buildings, structures, and objects under 36 CFR 800.5(b) when "conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary [of the Interior's] Standards for the treatment of historic properties (36 CFR Part 68) and applicable guidelines, to avoid adverse effects." This provision could apply to ADA compliance, which may be categorically excluded under NEPA, but not exempt from section 106. Standard conditions to ensure no adverse

⁵⁶ Thomas C. Jester and Sharon C. Park, AIA. #32 *Preservation Briefs: Making Historic Properties Accessible*. National Park Service. U.S. Department of the Interior. Online at <http://www.nps.gov/hps/tps/briefs/brief32.htm>.

effect findings would be useful to all U.S. DOT Operating Administrations freight and passenger rail carriers and transit agencies, because it would reduce or eliminate the need for further SHPO consultation, and the cost and time associated with that consultation.

In addition, under 36 CFR 800.6(b)(1)(ii), adverse effects on historic properties may be resolved without the ACHP using standard treatments established under 800.14(d) as a basis for an MOA.

Benefits, Costs, and Implementation Considerations

The benefits of using Standard Treatments as a section 106 Program Alternative have the potential to streamline and simplify how some types of historic properties are treated (e.g., archaeological sites and bridges), how certain undertakings are implemented (e.g., ADA accessibility), establish provisions that ensure no adverse effect findings through standardized conditions, and simplify execution of MOAs to resolve adverse effects on historic properties. They would save time and consultation costs because there is pre-existing agreement upon the appropriate treatment of the type of historic property. Existing PAs with *Standard Treatments* for types of historic properties include: the FRA/Delaware SHPO/Amtrak PA with design guidelines for alterations and new construction within a historic district of railroad buildings; the FHWA PennDOT PA for archaeological sites and historic bridges; the FHWA Indiana DOT for historic bridges; and the FHWA Montana PA for abandoned railroad grades. (See page 4-19.) The implementation consideration, however, is that the ACHP and not the federal agency is responsible for the development, timing, and content of *Standard Treatments*. All of the *Standard Treatments* mentioned above could also be stipulations in PAs and some may even be *exempted categories of undertakings*, yet in these latter two section 106 Program Alternatives the development and implementation are controlled by the federal agency. As a result, this study does not recommend *Standard Treatments* be pursued further as a section 106 Program Alternative for federally funded railroad infrastructure repair and improvement projects. Instead, *Exempted Categories of Undertakings* and PAs are recommended to accomplish similar streamlining measures. If PAs cannot be developed and implemented on a broad national level, or if such PAs do not include *Standard Treatments*, then this section 106 Program Alternative should be reconsidered.

NEPA Guidance and Regulations

An important goal of NEPA is coordination among federal agencies in order to promote efficiencies in the environmental review process. The Council on Environmental Quality (CEQ) is charged with implementing NEPA. The CEQ regulations and guidance include several provisions intended to reduce delays and paperwork. For example, the regulations state that agencies shall reduce delay by “[e]liminating duplication . . . with other federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (Section 1506.3)”⁵⁷ and by “[c]ombining environmental documents with other documents (Section 1506.4).”⁵⁸

Several Operating Administrations in the U.S. DOT, including FRA, FHWA, and FTA have guidance and regulations that are used to comply with historic preservation laws or related environmental

⁵⁷ 40 CFR 1500.4(n).

⁵⁸ 40 CFR 1500.4(o).

laws. That guidance and those regulations are described in Chapter 1, and could be amended with procedures to streamline section 106 for rail related repair and improvement projects, as follows:

- In accordance with 36 CFR 800.8, coordinate section 106 compliance with NEPA, to harmonize public outreach, document submission, and consultation on effects, reviews, and mitigation.
- The NEPA categorical exclusions not previously listed under Exempted Categories of Undertakings earlier in this Chapter could be linked to equivalent section 106 exempt categories of undertakings if specific conditions are imposed or criteria are met. For example, , four of FRA’s seven new Categorical Exclusions (#21, #22, #25, and #26) would have no potential to adversely affect historic properties if conditioned with some simple design guidelines for alterations to stations, bridges, small buildings and structures, and slope or surface disturbance.⁵⁹ Similarly, for example, FHWA’s and FTA’s Environmental Impact and Related Procedures includes additional actions listed at 23 CFR 771.117(d) that may become CEs only after specific conditions or criteria are satisfied and environmental effects will not result, including: #3, #4, #6, #9, #11, #12 and #13. (See Chapter 1 for the full text).
- In situations where an Environmental Impact Statement is prepared, using the substitution process under 800.8(c) will allow, the NEPA Record of Decision to be used to fulfill the federal agency’s commitment to mitigation of historic properties instead of entering into a separate section 106 MOA.
- U.S. DOT guidance on section 106 and rail corridors could be developed through NEPA procedures, and may accomplish many of the goals of a PA.

⁵⁹ As currently proposed, the actions covered by four of the seven additional CEs would have no potential to affect historic properties if some simple but specific standard conditions are imposed or criteria are met, as follows: “(21) Alterations to existing facilities, locomotives, stations and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or modifying lifts, constructing access ramps and railings, modifying restrooms, and constructing accessible platforms.” [Many existing facilities and stations are historic properties, and the conditions may require the alterations be consistent with Secretary’s Standards and Guidelines.]

“(22) Bridge rehabilitation, reconstruction or replacement, and the construction of bridges, culverts, and grade separation projects, predominantly within existing right-of-way and that do not involve extensive in-water construction activities, such as projects replacing bridge components including stringers, caps, piles, or decks, the construction of roadway overpasses to replace at-grade crossings, or construction or replacement of short span bridges.” The criteria may be that bridges or culverts being replaced do not represent an important historic context or are a type previously found not to be NRHP eligible. If they are historic properties, conditions may require rehabilitation be consistent with the Secretary’s Standards and Guidelines.

“(25) Environmental restoration, remediation, and pollution prevention activities in or proximate to existing and former railroad track, infrastructure, stations and facilities, including activities such as noise mitigation, landscaping, natural resource management activities, replacement or improvement to storm water systems, installation of pollution containment systems, slope stabilization, and contaminated soil removal in conformance with applicable regulations and permitting requirements.”

“(26) Assembly and construction of facilities and stations that are consistent with existing land use and zoning requirements, do no result in a major change in traffic density on existing rail or highway facilities and result in approximately less than 10 acres of surface disturbance, such as storage and maintenance facilities, freight or passenger loading and unloading facilities or stations, parking facilities, passenger platforms, canopies, shelters, pedestrian overpasses or underpasses, paving, or landscaping.” The criteria may be that the surface disturbance would occur only where natural soils were previously disturbed such that there would be no potential to adversely affect archaeological sites.

77 Fed. Reg. 35471 (Jun. 13, 2012,); Docket No. FRA-2012-0016.

Benefits, Costs, and Implementation Considerations

Better coordination of section 106 consultation, timing, findings and agreement documentation with the NEPA process may result in savings of time and therefore cost, because duplicative effort would be minimized and the risk in the section 106 process delaying the NEPA Decision document would be reduced or eliminated. The cost of consultant fees and time associated with section 106 studies being developed independently from the NEPA process would be eliminated or minimized in certain cases, including the following:

- Linking NEPA CEs to specific section 106 findings that the federal agency may make with no or with minimal SHPO consultation, including of “no effect on historic properties,” “no adverse effect on historic properties,” or “no adverse effect” if certain conditions are imposed or criteria are met.
- In situations where an Environmental Impact Statement is prepared, using the substitution process under 800.8(c) may allow using the NEPA Record of Decision for mitigating effects on historic properties in lieu of a section 106 MOA.

U.S. DOT guidance on section 106 and rail corridors developed would improve implementation and consistency for transit agencies on how to approach section 106 nationally. U.S. DOT would be in more control of the process and it can be implemented after a public comment period and appropriate outreach to SHPOs and other stakeholders.

Legislative Changes

A section 106 legislative exemption could be implemented to expedite federally funded railroad infrastructure repair and improvement projects. A section 106 exemption of U.S. railroads might be accomplished by an amendment to the United States Code or other legislation, although no section 106 exemption has been enacted, to date.

A Legislative exemption was discussed at the June 5, 2008, Congressional hearing and a version of an exemption included in HR-7, that was introduced January 31, 2012 in the 112th Congress to authorize funds for federal-aid transportation purposes entitled the “American Energy and Infrastructure Jobs Act of 2012.” Section 8201 of H.R. 7 proposed to amend Part B (Assistance) of subtitle V of title 49, United States Code (Rail Programs), by adding at the end the following new chapter:

CHAPTER 229—PROJECT DEVELOPMENT AND REVIEW

§22907. Treatment of Railroads for Historic Preservation

Except for a railroad operated as a historic site with the purpose of preserving the railroad for listing in the National Register of Historic Places, a railroad subject to the safety regulation jurisdiction of the Federal Railroad Administration, or any portion of such railroad, or any property in current or former use by a railroad and intended to be restored to use by a railroad, shall not be considered a historic site, district, object, structure, or property of national, state, or local significance for purposes of Section 4(f) of this title or section 106 or 110 of the National Historic Preservation Act (16 U.S.C. 470f or 470h-2) by virtue of being listed as a resource in, or eligible for listing in, the National Register of Historic Places. At the discretion of the Secretary, with the advice of the Department of the Interior, significant individual elements of a railroad such as depots and major bridges would be subject to such section 106 or 110.

While HR-7 has not advanced to become law, the concept it raises for exempting all railroad properties from section 106 (and Section 4(f)) except for a list of significant individual elements follows the general precedent set for the Interstate Highway System.

For the Interstate Highway System, ACHP issued an administrative exemption pursuant to 36 CFR 800.14(c) that resulted in guidance and criteria recognizing the significance of the most exceptional elements, while leaving standard and common design features exempt from section 106 review. This approach is also consistent with the Natural Gas Pipeline Administrative Exemption because it recognizes the uniform construction character of long linear resources, the need for continued operation, and relieves federal agencies from the section 106 requirements except when NRHP-eligible pipelines are abandoned.

The United States Code (railroads title) could be amended to exempt most of the U.S. railroads from section 106 except for the most significant elements that would be established by the Office of the Secretary of Transportation. Pursuant to 36 CFR 800.14(c), the ACHP would publish the section 106 administrative exemption in the Federal Register.

Depending on the language included in the legislation, the exemption could release federal agencies from the section 106 requirement of having to consider the effects of federal undertakings for the repair and improvement of the nation's railroad system as defined by 49 U.S.C. § 20102 (U.S. railroads), except (following the Interstate Highway System approach) for the most significant railroad properties associated with that system. The exemption would embody the view that U.S. railroads are historically important, but only the most significant railroad properties, as noted below, warrant consideration. Such historically important properties would still be considered under section 106. The exemption would apply unconditionally for all undertakings related to U.S. railroads except for those that entail abandonments not subject to the Rails-To-Trails Act 16 U.S.C. 1247(d).

The U.S. railroads' properties that would still be considered under section 106 would be limited to certain defined or identified properties, such as historic buildings, structures, objects, and districts that were built within the period of significance of a specific railroad carrier and meet the NRHP eligibility criteria (36 CFR Part 63) at the state or national level of significance. Again following the interstate model, FRA, at the headquarters level, in consultation with the NPS, NCSHPO, representatives of the railroad industry, and stakeholders in each state, would make the determination of which elements of U.S. railroads meet these criteria.

Benefits, Costs, and Implementation Considerations

The historic preservation benefit of this section 106 legislative exemption would be that rail carriers and transit agencies would participate in the identification effort, would become aware of which of the properties they own are most important to our nation's heritage, and would have the opportunity to repair, maintain, and operate those properties with a renewed commitment of stewardship, even when section 106 of the NHPA does not apply.

The benefit of this legislative exemption to the railroad industry and transit agencies would be consistency and certainty about which of the properties they own or control are subject or not subject to section 106 of the NHPA when there is a federal undertaking. Project delivery for exempt undertakings would be effectively streamlined by eliminating the cost and time needed for the production of historic property studies and regulatory agency reviews and processes.

The cost and resources needed to implement the section 106 legislative exemption have not been determined. The effort to develop a nationwide historic context, evaluation criteria, and determine which elements of U.S. railroads meet the criteria would likely cost considerable funds to complete. Costs could range from \$500,000 to \$2,500,000 depending on the level of participation of NPS to help develop historic context and guidance for evaluation, level of effort by over 50 SHPOs to provide lists of significant elements in their states, and cooperation from railroad carriers to provide lists of significant elements from their corporate histories and records. Factors affecting the range of cost include level of SHPO participation, level of stakeholder outreach efforts, level of specificity of the context, guidance and research, and overall schedule for completion of the task. The history of U.S. railroads is much longer, more complex, and includes many more property types than the Interstate Highway System, so the cost and resources needed to implement the Interstate model would not be equivalent. In terms of funding sources, rail does not have access to the highway trust fund that FHWA and FTA do. As a result, there is no steady stream of funds available nor are ancillary programs such as enhancements available to develop historic context, criteria, and to conduct research and surveys necessary to identify significant elements of the U.S. railroads.

Summary of Chapter 6

Administrative Measures

Possible administrative measures include development of Program Alternatives already described in ACHP's section 106 regulations at 36 CFR 800.14. **Exempted Categories of Undertakings**, described at § 800.14(c) and **Programmatic Agreements**, described at § 800.14(b) offer the most effective streamlining solutions for federally funded railroad infrastructure repair and improvement projects.

Exempted Categories of Undertakings are recommended for routine work that has little-to-no potential to affect historic properties, and could include actions that are already Categorically Excluded under NEPA. The proposal, process, content, public/agency outreach, and timing are largely under the direct control of the federal agency. In theory, this whole sequence could be completed in less than six months, costs would be limited to staff time for consultation, and the effects of streamlining could be realized immediately after publication in the Federal Register. Undertakings that fall within this Program Alternative would save the federal agencies, rail carriers and transit agencies much of the typical cost for section 106 review and consultation.

Programmatic Agreements are recommended to facilitate and ensure the consistent implementation of each of the four steps of the standard section 106 process: 1) initiation of the section 106 review, 2) identification of historic properties, 3) assessment of adverse effects; and 4) resolution of adverse effects. While the costs to draft and execute PAs are generally limited to staff time, development of extensive historic context and guidance could require consultant costs and take several years. Generally Prototype PAs can be executed within a year, and would be most effective for states that already have PAs or guidance for implementing railroad projects, or where section 106 consultation could benefit from consistency and streamlining. A Nationwide PA may take four to six years and would be most effective for railroad undertakings occurring in multiple states or in states where Prototype PAs have not been executed. There are challenges inherent in consultation on a national scale, including tribal consultation, and the streamlining benefits would

not be realized for several years. In a meeting regarding this study, ACHP and NCSHPO expressed some hesitation about moving forward with a Nationwide PA because of the consultation challenges, and favor the Prototype PA approach. PAs are consistent with current ACHP regulations and are unlikely to raise controversy in the historic preservation community.

U.S. DOT agency **NEPA procedures** could be amended with procedures to streamline and better coordinate section 106 for rail related repair and improvement projects, and their development and adoption are under the control of the federal agency.

Legislative Changes

Possible legislative changes include an **exemption of the U.S. railroads** from section 106. To date, such a legislative exemption has been proposed but not been enacted. In lieu of the legislative change, the ACHP may adopt a section 106 administrative exemption similar to the one it adopted for the Interstate Highway System. Legislative changes are likely to raise controversy in the historic preservation community.

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Chapter 7

Streamlining Solutions—Section 4(f)

Based on information developed in previous chapters, Chapter 7 provides a comparative analysis of the streamlining options for Section 4(f), qualitatively outlining benefits, costs, and implementation considerations for each of the examined streamlining measures.

Before discussing Section 4(f) Streamlining Solutions, it is important to consider the original intent of the law when it was passed in 1966. Section 4(f) of title 49 was enacted as a means of protecting publicly-owned parks, recreation areas, and wildlife/waterfowl refuges as well as historic sites of local, state, or national significance, from conversion to transportation uses. By their very nature, rail-related properties were constructed, historically used, and often are still used for transportation. Continuing rail transportation “use” continues the original transportation purpose while also helping to convey the quality of significance and characteristics that qualify a property for inclusion in the NRHP. In addition, many rail-related properties were privately constructed and are privately owned, and Section 4(f) was enacted to restrict public transportation projects from using protected lands. This background establishes the basis for the administrative measures and legislative changes proposed below.

Administrative Measures

Section 4(f) Programmatic Evaluations

Section 4(f) programmatic evaluations can be developed by FTA or FHWA, and can, on request, determine their applicability to joint FHWA/FRA actions on a case-by-case basis. FRA could consider adopting its own Section 4(f) programmatic evaluations. As described in Chapter 1, to date, five Section 4(f) programmatic evaluations have been approved by FHWA for use nationwide:

1. Section 4(f) Statement and Determination for Independent Bikeway or Walkway Construction Projects,
2. Historic Bridges,
3. Minor Involvements with Historic Sites,
4. Minor Involvements with Parks, Recreation Areas and Waterfowl and Wildlife Refuges, and
5. Net Benefits to a Section 4(f) Property.

Numbers 2, 3, and 5 are most relevant to railroad projects when Section 4(f) applies, and may serve as examples for the development of programmatic evaluations for rail-related repair and improvement projects. Some examples of Section 4(f) programmatic evaluations that may streamline approval and project delivery for rail-related repair and improvement projects may include:

1. **Continuing transportation use:** Section 4(f) was first created to avoid using non-transportation protected lands for a new transportation “use,” including historic sites. But when that “historic site” has always been used for transportation (like a bridge or rail corridor),

“continuing” historic use could be considered beneficial because it preserves the qualities and association that convey its significance, and need not be avoided like introduction of a “new” use as originally envisioned by Section 4(f).

2. **Feasible & prudent alternatives:** Since the “historic site” was always used for transportation, then perhaps there is no need to consider prudent and feasible alternatives. A standard series of treatments/resolutions could be adopted. The current exemption requires that the federal agency make a section 106 no adverse effect finding for the historic transportation property.
3. **De minimis:** Consider a case where a several hundred mile rail corridor has been found eligible for the NRHP. It consists of many similar standard components that are “contributing elements of a historic district” but only a few of those components are individually eligible for the National Register. If replacement of one or few of the standard components is necessary for safety or technological improvements, but the individually eligible and vast majority of similar standard components are left in place, the replacement of the one or few standard components could be determined by the U.S. DOT agency to be *de minimis* impact. This would be consistent with a determination of *de minimis* impact used when a sliver of land is taken from a large parcel, because only minor elements of a large historic property would be taken and it would not adversely affect the activities, features, and attributes of the historic district overall. This could be done under the current exemption but there would need to be a section 106 no adverse effect finding on the entire railroad corridor.
4. **Net benefit:** Repair/restoration to ensure long term viability and continued transportation use of an individually eligible component could be considered a net benefit that offsets the replacement of a standard contributing component.
5. **Restoration of historic use:** Consider a case where an NRHP eligible rail corridor was historically double or triple tracked, but extra lines have been removed, and now there is only one active track. If new track and service were restored to 2nd or 3rd track, even if it would be rail transit instead of freight/passenger service, then restoration of historic use could be considered not to be a Section 4(f) use.

Benefits, Costs, and Implementation Considerations

Section 4(f) Programmatic Evaluations would be an effective tool to streamline federally funded railroad infrastructure repair and improvement projects. Programmatic evaluations for rail-related repair and improvement projects may be modeled on several already adopted by FHWA, including: Historic Bridges, Minor Involvements with Historic Sites, and Net Benefits to a Section 4(f) Property. FRA and/or FTA should adopt similar Section 4(f) programmatic evaluations for federally funded railroad or rail transit improvement and repair projects.

Pursuant to 23 CFR 774.3(d), Section 4(f) programmatic evaluations can be developed by FTA (or FHWA) based on experience with a specific set of conditions that includes project type, degree of use and impact, and evaluation of avoidance alternatives. Proposed new or revised programmatic Section 4(f) evaluations are coordinated with the Department of the Interior, Department of Agriculture, and Department of Housing and Urban Development, and published in the Federal Register for comment prior to being finalized. New or revised programmatic Section 4(f) evaluations are then reviewed for legal sufficiency and approved by the Headquarters Office of FHWA or FTA.

FRA is not covered by 23 CFR Part 774, which is a joint FHWA and FTA regulation, and FRA has not to date adopted its own Section 4(f) programmatic evaluations. However, FRA may develop its own Section 4(f) programmatic evaluations. In addition, for specific cases, FRA may request that FHWA determine the applicability of its programmatic Section 4(f) evaluations to joint FHWA/FRA actions.

Section 4(f) Exemption for Rail-Related Properties

Section 4(f) of title 49 was enacted as a means of protecting publicly-valued lands including historic sites from conversion to transportation uses. Proving there are no “prudent and feasible” alternatives to converting a transportation facility for transportation use is unnecessarily burdensome. The following conditions would streamline Section 4(f) for rail-related historic sites if a Section 4(f) exemption is adopted:

- Because rail-related historic sites were and/or are used for transportation, there is a presumption that no feasible and prudent alternatives exist to using that land for transportation, and such properties shall be exempt from that provision of Section 4(f). This would relieve the burden of preparing an alternatives analysis for Section 4(f).
- If a rail-related property is found eligible for the NRHP, and it goes through the section 106 process to resolve adverse effects, then that process evidences that all possible planning has been done to minimize harm to the Section 4(f) property. This would relieve the burden of demonstrating the level of consultation, design refinements, and planning efforts were adequate to minimize harm to historic properties for Section 4(f).
- If the section 106 review concludes there is no effect or no adverse effect on a rail-related historic property, then the Section 4(f) use shall be considered *de minimis*. Once the determination of *de minimis* impact is made, no Section 4(f) studies or analyses would be required for the historic property.
- If a contributing element of a historic district comprised of rail-related properties is adversely affected, but there are many similar contributing elements within that historic district that would not be adversely affected, then the Section 4(f) use shall be considered *de minimis*. Once the determination of *de minimis* impact is made, no Section 4(f) studies or analyses would be required for the historic property, in this case, the historic district. This would not apply to contributing elements that have been determined individually eligible for the NRHP.

A number of exemptions to Section 4(f) have already been created by FHWA and are described in 23 CFR 774.13 as “exceptions” to the requirement for Section 4(f) approval. FHWA’s existing Section 4(f) exceptions may serve as examples that may apply to rail-related repair and improvement projects. They include, but are not limited to:

- 774.13(a)—Restoration, rehabilitation, or maintenance of transportation facilities listed on or eligible for the NRHP
 - “No Adverse Effect” to historic qualities
 - No objection from official(s) with jurisdiction
- 774.13(b)—Archaeological sites listed or eligible for the NRHP for information value; but has minimal value for preservation-in-place
 - No objection from official(s) with jurisdiction

- 774.13(d)—Temporary occupancies of land that are so minimal that they do not constitute a “use” of 4(f) property
 - Commonly referred as Temporary “No Use”
 - Short duration and no change in ownership
 - Minor scope of work
 - No anticipated permanent adverse physical impacts and no interference with protected activities, features, or attributes of the property on a temporary or permanent basis
 - Property fully restored to a condition as good or better than existing prior to construction
 - Documented agreement from official(s) with jurisdiction
- 774.13(f)—Certain trails, paths, bikeways, and sidewalks, in the following circumstances:
 - Trail projects funded under the Recreational Trails Program, 23 U.S.C. 206(h)(2)
 - National Historic Trails and the Continental Divide National Scenic Trail, with the exception of those trail segments that are historic sites
 - Occupies a transportation facility right-of-way without limitation to any specific location within that right-of-way, as long as continuity is maintained
 - Part of the local transportation system and function primarily for transportation
- 774.13(g)—Improvement to an existing 4(f) property by a Transportation Enhancement Activity (TEA)
 - A “use” of a 4(f) property does not occur when the sole purpose is for preservation or enhancement

Section 4(f) does not apply to trails that are designated as part of the local transportation system.

Benefits, Costs, and Implementation Considerations

A Section 4(f) exemption based on the concept that rail-related historic sites were and/or are used for transportation can lead to substantial reductions in cost of analysis, time for approval, and project delivery for the following reasons:

- Expensive and time consuming studies to consider feasible and prudent alternatives would be eliminated. Avoidance of this 4(f) requirement could also lead to a more limited range of reasonable alternatives for analysis under NEPA, thereby resulting in cost and time savings in the NEPA process
- Linking the section 106 process to resolve adverse effects on rail-related historic properties as evidence that all possible planning has been done to minimize harm to the equivalent Section 4(f) historic sites would eliminate the time and cost needed to prove that all possible planning was done.
- Linking a section 106 finding of no effect or no adverse effect on rail-related historic properties to a Section 4(f) *de minimis* use would facilitate project delivery
- Allowing adverse effects on contributing elements to historic districts comprised of rail-related properties to be a Section 4(f) *de minimis* use would facilitate project delivery. This is provided there are many similar contributing elements that would not be adversely affected and it would not apply to contributing elements that have also been determined individually eligible for the NRHP.

Legislative Changes

Section 4(f)

Section 4(f) was enacted as a means of protecting publicly-valued lands including historic sites from conversion to transportation uses. Proving there are no “prudent and feasible” alternatives to improved use of a transportation facility for transportation use seems unnecessarily burdensome.

The definitions of “use” and “historic site” in Section 4(f) could be modified through legislation as follows:

- The term **use** shall not apply for rail-transportation use of existing or former railroad or rail-transit property.
- The term **historic site** shall not include railroad and rail transit lines or corridors that were historically used for transportation of goods or passengers.

The amendments to these two terms would effectively remove most facilities used by railroads for transportation from Section 4(f) consideration, but would not affect the original intent of section 4(f) to avoid conversion of other historic sites to transportation use. In addition, Section 106 would continue to apply, thereby protecting historic sites that are historic properties and are being used for transportation.

Exemption Based on Interstate Highway System

Section 6007 of SAFETEA-LU (23 U.S.C. 103(c)(5)) exempts most of the Interstate Highway System from being considered as a section 4(f) property. The section 4(f) legislative exemption applies to the entire Interstate Highway System, except for specific facilities designated by FHWA as having national and/or exceptional significance.

If similar legislation was passed that exempted the nation’s entire railroad system from section 4(f), except for specific significant facilities designated by a specified federal agency as having national and/or exceptional significance, then no changes to the section 4(f) definitions of use or historic site described above would be necessary. The threshold of significance for railroad facilities may be expanded beyond national and/or exceptional to include state or rail carrier level. A section 4(f) exemption of U.S. railroads might be accomplished by an amendment to the United States Code.

Benefits, Costs, and Implementation Considerations

If the Section 4(f) legislative exemption for the nation’s railroads was coupled with a Section 106 ACHP administrative exemption, similar to that adopted for the Interstate Highway System, very effective streamlining for federally funded railroad infrastructure repair and improvement projects would be realized because the pool of historically significant railroad facilities would be known and finite, and agency consultation would be necessary only for those properties found to be significant. Typical Section 4(f) studies for demonstrating there are no prudent and feasible alternatives to using historic railroad property for transportation and that all planning, design refinements, and consultation efforts were adequate to minimize harm to historic railroad properties would no longer be required, because the bulk of railroad properties would no longer be subject to Section 4(f).

Summary of Chapter 7

Possible administrative measures would be effective in expediting Section 4(f) compliance, including the development of Section 4(f) programmatic evaluations and Section 4(f) exemptions. These measures are consistent with current FRA, FTA, and FHWA regulations and are unlikely to raise controversy in the historic preservation community.

Possible legislative changes include changing the definitions of “use” and “historic site” in Section 4(f) of the U.S. DOT Act (49 U.S.C. Section 303 and 23 U.S.C. Section 138) to exclude railroad and rail transit facilities that were historically used for transportation of goods or passengers. A Section 4(f) legislative exemption of the U.S. railroads similar to that enacted under SAFETEA-LU for the Interstate Highway System could be implemented by amending the railroads section of the United States Code (Part E of Subtitle V of title 49, United States Code).

If the Section 4(f) legislative exemption for the nation’s railroads was coupled with a Section 106 ACHP administrative exemption, similar to that adopted for the Interstate Highway System, very effective streamlining for federally funded railroad infrastructure repair and improvement projects would be realized because the pool of historically significant railroad facilities would be known and finite, and agency consultation would be necessary only for those properties found to be significant. These legislative changes are likely to raise controversy in the historic preservation community.

Chapter 8 presents U.S. DOT's and FRA's recommended options for consideration in streamlining compliance with section 106 and Section 4(f) for federally funded railroad infrastructure repair and improvement projects. These options address the issues of historic railroad resource preservation compliance and the eligibility of railroad corridors as historic properties, based on comparative analysis and considering implementation effectiveness.

As discussed in Chapters 4 and 6, the section 106 regulations provide a series of administrative streamlining solutions described as Program Alternatives at 36 CFR 800.14. The following section 106 Program Alternatives offer effective streamlining solutions for federally funded railroad infrastructure repair and improvement projects: Exempted Categories of Undertakings (800.14(c)); Programmatic Agreements (800.14(b)); and Standard Treatments (800.14(d)).

Three administrative options and one legislative option, described in more detail below, can best achieve railroad safety and improvement while meeting the intent of historic preservation laws through streamlining measures, including draft agreements and draft exemptions.

Administrative

Option 1. Exempted Categories of Undertakings

Exempted Categories of Undertakings offer an efficient opportunity to exempt specific programs or categories of undertakings from section 106 review, which would streamline the approval of many minor activities and maintenance associated with railroad historic properties. It could also exempt certain types of historic railroads from section 106 when the railroad or type has already been documented and interpreted. A potentially useful exempt category would be undertakings that involve maintenance or replacement of railroad infrastructure materials in-kind, even if they are located in a railroad right-of-way that is over 50 years of age. Exempted Categories of Undertakings could also be identical to existing Categorical Exclusions, thereby enabling coincidental compliance with section 106 and NEPA.

FRA finds that substantial consultant fees and delays in schedule in approving routine railroad infrastructure repairs, improvements, and safety upgrades can be avoided by creating Exempted Categories of Undertakings that would not be subject to any section 106 review pursuant to the ACHP's regulations at 36 CFR 800.14(c). Proposed Exempted Categories of Undertakings could include, but not be limited to, those listed on pages 6-2 to 6-3. The proposal, process, content, public/agency outreach, and timing is largely under the direct control of FRA, and the benefits would be realized immediately after ACHP's approval of the Exempted Categories of Undertakings. Examples can be found on pages 8-15 through 8-20.

Process: FRA would arrange for public participation, and consult with SHPOs, THPOs and Tribes. FRA then would submit the proposed exemptions for a 30-day review by ACHP and their approval, rejection, or request for additional information. FRA would publish notice of the exemptions in the

Federal Register. If approved, it is estimated that the entire process could be completed in less than six months at nominal cost, with the streamlining benefit realized immediately after publication in the Federal Register.

This recommendation addresses the need to streamline the maintenance and repair of railroads for safety and technological improvements. It should be implemented regardless of the recommendations 2, 3, and 4 because of its effectiveness, low cost, and short time frame to execute.

Option 2. NRHP Eligibility and Level of Significance

FRA finds that guidance should be prepared to make the evaluation of NRHP eligibility of railroad properties consistent across the entire nation and to ensure that the most significant railroad properties are identified and protected under preservation law. This guidance is necessary to support consistent evaluations for railroad properties that do not represent an important historic context, do not have strong associations with important historic events or persons, or do not possess integrity from an accurately researched period of significance. Such consistent reviews would reduce the number of railroad corridors and other railroad properties found eligible for the NRHP. There are two options for implementing this guidance.

Option 2A. NRHP Guidance for Railroads or Linear Transportation Facilities

U.S. DOT or FRA and the other U.S. DOT agencies would work with the staff of the NRHP section of NPS and other parties knowledgeable in railroad property types and history to develop an authoritative NRHP bulletin. The bulletin would provide the necessary guidance for consultants and SHPOs to evaluate or re-evaluate railroad properties for NRHP eligibility.

Option 2B. Section 106 Nationwide Programmatic Agreement

FRA could use a Nationwide Programmatic Agreement (PA) to develop NRHP eligibility guidance. It would have the added benefit of establishing interim streamlining measures while the NRHP guidance for evaluating railroad properties is being developed. A Nationwide PA could be structured to involve more public outreach, comment, and input than would the NRHP Bulletin.

See Figure 8-1: Draft Section 106 Nationwide PA, pages 8-4 through 8-24.

Option 3. Section 106 Exemption for Railroad Properties

U.S. DOT or FRA would pursue a section 106 administrative exemption for railroad properties that would ensure that the most significant railroad properties are identified and protected under preservation law, but all others would be exempt. Pursuant to 36 CFR 800.14(c), the ACHP would publish the section 106 exemption in the Federal Register. A precedent was set in 2005 by ACHP's section 106 exemption for the Interstate Highway System. In that precedent, the section 106 administrative exemption was coupled with a Section 4(f) legislative exemption enacted under SAFETEA-LU. (See Option 4B.)

See Figure 8-2: Draft ACHP Administrative Section 106 Exemption pursuant to 36 CFR 800.14(c), pages 8-25 through 8-28.

These administrative measures are not mutually exclusive and may be implemented independently or collectively to achieve the greatest level of streamlining in the most cost effective manner.

Legislative

Option 4. Legislative Exemptions

Option 4A. Section 4(f) Legislative Exemption for “Use” and “Historic Site”

Effective reviews would be achieved by legislatively modifying the definitions of “use” and “historic site” in section 4(f) as follows:

- The term *use* shall not apply for rail-transportation use of existing or former railroad or rail-transit property.
- The term *historic site* shall not include railroad and rail transit lines or corridors that were historically used for transportation of goods or passengers.

The modifications would effectively remove most facilities used by railroads for transportation from Section 4(f) consideration, but would not affect the original intent of Section 4(f) to avoid conversion of historic sites to transportation use. Congress could alternatively direct U.S. DOT to define these terms in regulation. These terms could also be amended with broader language that would apply to property and infrastructure used by all modes of transportation (railroad, transit, highway, aviation, maritime, and pipeline). In addition, section 106 would continue to apply, thereby protecting historic sites that are historic properties and are being used for transportation.

See Figure 8-3: Draft Section 4(f) Legislative Exemption (49 U.S.C. §303), page 8-29.

Option 4B. Legislative exemption of Railroad System from Section 4(f)

At the same time as U.S. DOT or FRA would pursue an administrative section 106 exemption (see Option 3), U.S. DOT or FRA could follow the SAFETEA-LU precedent for the exemption of the majority of the Interstate Highway System from Section 4(f), by pursuing an exemption of the U.S. railroad system from Section 4(f). The most significant railroad elements would be established by the Office of the Secretary of Transportation and would remain subject to historic preservation laws.

See Figure 8-4: Draft Amendment to the Railroads Title of the United States Code, page 8-30. This would amend 49 U.S.C. 303(c) and could be accomplished by amending the railroads section of the United States Code (title 49, subtitle V).

Figure 8-1: Draft Section 106 Nationwide Programmatic Agreement

The following represents a concept for a section 106 Nationwide PA that FRA has developed to identify issues and approaches that might be considered and to provide a document that could serve as the foundation for discussions among the participants. It does not reflect any agreement from the possible signatories and thus would likely be revised through the review and consultation process. It does highlight important issues and offers possible approaches for addressing them.

Draft Section 106 Nationwide PA

**PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL RAILROAD ADMINISTRATION,
THE FEDERAL TRANSIT ADMINISTRATION,
THE SURFACE TRANSPORTATION BOARD,
THE FEDERAL HIGHWAY ADMINISTRATION,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS
REGARDING
FEDERALLY FUNDED RAILROAD AND RAIL TRANSIT INFRASTRUCTURE REPAIR AND
IMPROVEMENT PROJECTS AND
THE ABANDONMENT OF RAILROAD RIGHTS-OF-WAY SUBJECT TO THE RAILS-TO-TRAILS ACT**

WHEREAS, the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432 (hereafter PRIIA), mandated that the Secretary of Transportation conduct a study on ways to streamline compliance with the requirements of section 106 of the National Historic Preservation Act, 16 U.S.C. 470f (hereafter section 106) for federally funded railroad infrastructure repair and improvement projects and in a manner consistent with the policies and purposes of section 106 and the Rails-to-Trails Act amendment, 16 U.S.C. 1247(d), of the National Trails System Act, 16 U.S.C. 1241-1251;

WHEREAS, the federal agencies within the U.S. Department of Transportation (USDOT) responsible for funding railroad infrastructure repair and improvement projects include the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA), and the Federal Highway Administration (FHWA);

WHEREAS, the Surface Transportation Board (STB) is the independent federal agency administratively affiliated with the USDOT that has jurisdiction over proposed abandonments of railroad rights-of-way. Under section 8(d) of the Rails-to-Trails Act, 16 U.S.C. 1247(d), and the Board's regulation at 49 CFR 1152.29, interested parties have the opportunity to negotiate voluntary agreements to use railroad rights-of-way that otherwise would be abandoned for recreational trails;

WHEREAS, FRA, FTA, FHWA, and STB (collectively hereafter, the Agencies) have determined that these undertakings may adversely affect properties that are listed in or eligible for listing in the National Register of Historic Places (NRHP) and are subject to the requirements of section 106;

WHEREAS, the PRIIA mandated study concluded that a nationwide programmatic agreement (PA) would be an effective streamlining tool for railroad and rail transit undertakings subject to review under section 106 and its implementing regulations at 36 CFR Part 800;

WHEREAS, the Agencies, the Advisory Council on Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) have determined that the requirements of section 106 can be more effectively and efficiently fulfilled if a programmatic approach is used to exempt categories of undertakings from section 106 review, facilitate identification and evaluation of historic properties, establish treatment and mitigation measures, and streamline the resolution of adverse effects;

WHEREAS, the Department of the Interior (DOI), National Park Service (NPS), Bureau of Land Management (BLM), Forest Service (USFS), and Department of Agriculture (USDA) are concurring parties to this PA because railroads may cross federal lands they are responsible for;

WHEREAS, in accordance with 36 CFR 800.14(b)(1), the ACHP and the Agencies have negotiated this Agreement because the effects on historic properties are similar and repetitive and are multi-state in scope;

NOW, THEREFORE, to satisfy their section 106 responsibilities, the Agencies, ACHP, and NCSHPO agree that undertakings that are federally funded railroad infrastructure repair and improvement projects or that are the abandonment of railroad rights-of-way subject to the Rails-to-Trails Act shall be administered in accordance with the following stipulations:

STIPULATIONS

The Agencies, ACHP, and NCSHPO shall ensure that the following stipulations are carried out:

I. Applicability

- A. This PA shall apply to all federally funded railroad infrastructure repair and improvement projects within former or existing railroad right-of-way and to the abandonment of railroad rights-of-way subject to the Rails-to-Trails Act. For the purposes of this PA, "railroad right-of-way" means a strip or parcel of real property in which a railroad or rail transit agency has acquired an interest for use as a part of its transportation corridor.
- B. This PA shall not apply to undertakings that occur on or affect tribal lands as defined in section 301(14) of the NHPA. While no use of tribal land is anticipated, if such undertakings occur, the Agencies shall follow the procedures in 36 CFR Part 800.

- C. This PA shall not apply to those portions of individual undertakings that involve substantial grading or trenching of previously undisturbed soil because these areas have the potential to contain historic properties including pre-historic archaeological resources and areas with traditional religious and cultural significance to an Indian tribe or Native Hawaiian organization (TCPs).
- D. The Agencies remain responsible for considering the effects of its undertakings on other non-railroad historic properties (e.g., historic properties outside former or existing the railroad right-of-way, prehistoric archaeological sites that may lie under the railroad or within undisturbed areas of the railroad right of way, historic properties in proposed new railroad right-of-way) in accordance with subpart B of 36 CFR Part 800 or according to an applicable program alternative executed pursuant to 36 CFR 800.14.
- E. Each of the Agencies remains responsible for considering the effects of its undertakings on current and former railroad property outside the railroad right-of-way (e.g., railroad office buildings in downtown areas, buildings and structures transferred out of railroad ownership, etc.)
- F. STB remains responsible for considering the effects of its undertakings on rail line abandonments not subject to the Rails-to-Trails Act.

II. **Roles and Responsibilities**

- A. FRA shall be responsible for oversight of this PA, facilitating consultation among all parties of the PA, leading the preparation of nationwide guidance and studies required by the PA, and making such studies available to the general public on its website.
- B. For individual undertakings, one of The Agencies shall be designated as the “Lead Agency” depending on the source of federal funding or approval authority for an individual undertaking, and shall assume responsibility for the application of the stipulations in this PA for that individual undertaking.
- C. NCSHPO shall be responsible for reviewing nationwide guidance and studies required by this PA and participation in consultation as set forth in this PA.
- D. ACHP shall be responsible for providing technical guidance, participating in dispute resolutions if appropriate, and monitoring the effectiveness of this PA.

III. **Tribal Consultation**

- A. Execution of this PA presumes that the Lead Agency will conduct its government-to-government responsibilities with federally recognized Indian tribes or its section 106 consultation requirements with Native Hawaiian Organizations (NHO) consistent with federal laws and regulations.

IV. Exempt Categories of Undertakings

[Note: Stipulation IV and Attachment A are intended to supplement, and not duplicate, any Exempted Categories of Undertakings established by the Agencies in accordance with 36 CFR 800.14(c)]

- A. Attachment A establishes categories of undertakings that are exempt from individual review by State Historic Preservation Officer (SHPO), NCSHPO, and ACHP. These undertakings are not on Tribal lands and are primarily smaller-scale, routine railroad infrastructure repair and improvement projects without the potential for adversely affecting historic properties, rather than complex undertakings with a greater potential to adversely affect historic properties. The Lead Agency shall perform the following review to determine whether a particular undertaking qualifies for a review exemption under Attachment A.
 - 1. The Lead Agency shall review documentation from applicants for federal funding to verify that individual undertakings qualify for review exemption under Attachment A, post that information to a secure website or file repository that can be reviewed by the appropriate SHPO and NCSHPO, and retain that documentation for three (3) years.
- B. The Exempt Categories of Undertakings established in Attachment A are effective immediately upon execution of this Agreement, and Attachment A can be amended in accordance with Stipulation IX below.

V. Interim Non-Exempt Categories of Undertakings

- A. This interim Stipulation applies to undertakings that do not qualify for a review exemption under Attachment A. It is effective immediately upon execution of this Agreement and shall stay in effect until Stipulation VI is completed for the state(s) within which the undertaking is located or until this Agreement is superseded by another agreement executed by the Lead Agency and the appropriate state(s).
- B. The Lead Agency shall follow subpart B of 36 CFR Part 800 with the following exceptions intended to streamline the section 106 process until the procedures in Stipulation VII go into effect:
 - 1. Under 36 CFR 800.4(a)(1), if the undertaking is limited to repair or improvements within the existing railroad right-of-way, then the Area of Potential Effects (APE) shall not extend outside the railroad right-of-way. However, there may some cases where the APE might include historic buildings outside the right-of-way and the following considerations may be applied.
 - a. The APE for indirect effects may vary based on the sensitivity of the types of historic properties.
 - b. The APE for indirect effects should be based on the projected change from historic-era levels of rail-related traffic, noise and vibration and not just be based on the projected change from existing levels.

2. Under 36 CFR 800.4(a)(2), if the Lead Agency, its designee, or applicant reviews existing information and finds historic properties are in the APE that were included in or determined eligible for inclusion in the NRHP before the date this Agreement was executed, those properties significant at the local level shall be re-evaluated. If the Lead Agency determines a re-evaluated property is significant at the national or state level of significance and the SHPO agrees, the property shall continue to be considered a historic property.
 - a. The Lead Agency shall evaluate a property at the national, state, or local levels of significance by using the guidance provided by the NPS including, but not limited to, the NRHP Bulletins entitled *How to Apply the Criteria for Evaluation* (Section V) and *How to Complete the National Register Registration Form* (Section III.8, page 51).
3. Under 36 CFR 800.4(a)(3), if the Lead Agency, its designee, or applicant seeks information from consulting parties, other individuals, and organizations and receives no response within 30 days, the Lead Agency has completed its responsibility under this subpart, and is not required to reconsider its findings or determinations if responses are received after 30 days.
4. Under 36 CFR 800.4(b)(1), the level of effort to identify rail-related historic properties shall be limited to past planning, research and studies related to or encompassing the APE and the following:
 - a. Review of documents in the rail carrier's possession such as valuation maps, engineering drawings, maintenance logs, track charts and bridge inventories.
 - b. Review of FRA's secure file repository or website to determine if historic context has been completed for the applicable state or rail carrier system and approved by the appropriate SHPO(s). If not, then historic context shall be prepared at the national and state levels and developed in accordance with section V of NRHP Bulletin 15, entitled *How to Apply the National Register Criteria for Evaluation*.
 - c. The content of the historic context and level of effort for NRHP evaluation and documentation shall follow Attachment B.
5. Under 36 CFR 800.4(c)(1), an agency shall evaluate or may re-evaluate properties for NRHP eligibility within the APE. Under this Agreement, when a Lead Agency evaluates or re-evaluates a rail-related property for the NRHP, it must be found eligible at the national or state levels of significance in order to be considered a historic property. Non rail-related properties within the APE may be found eligible at the national, state, or local level of significance to be considered historic properties.

6. Under 36 CFR 800.4(c)(2), if the Lead Agency, its designee, or applicant submits its determinations for NRHP eligibility to SHPO for concurrence, and no response is received within 30 days, the Lead Agency has completed its responsibility under this subpart, and is not required to reconsider its findings or determinations if responses are received from SHPO after 30 days.
7. Under 36 CFR 800.5, the Lead Agency may apply the criteria of adverse effect to a rail-related historic district (e.g., rail corridor or rail yard) differently to components that are individually eligible for the NRHP at the national or state level of significance compared to those that are not individually eligible but contribute to the significance of the historic district. For example, demolition, alteration, or removal of a common standard contributing element (e.g., culvert or short span bridge) may not result in an adverse effect if it ensures the safety or technological improvements necessary to maintain and continue the railroad use of the historic district as a whole.
8. The Lead Agency shall report historic contexts developed and NRHP eligibility determinations made under this interim Stipulation in accordance with Stipulation VIII.A.

VI. **U.S. Railroads – Identification of Historic Properties**

- A. To the extent of available resources, FRA shall consult with the NRHP Program staff of the NPS to develop an NRHP Bulletin for evaluating railroads or linear transportation facilities for NRHP eligibility, or FRA shall prepare the study described in Stipulation VI.B.
- B. If the NRHP Bulletin described in Stipulation VI.A is not developed, FRA shall seek appropriations to fund an advanced study to identify a historic context for rail-related properties subject to Lead Agency undertakings in the United States and develop a methodology for their evaluation under NRHP criteria at the national and state level of significance.
 1. The FRA shall develop a Multiple Property Documentation Form (MPDF) for evaluating U.S. railroads subject to Lead Agency undertakings according to the NPS's instructions for preparing NRHP nominations in NRHP Bulletin 16A entitled How to Complete the National Register Nomination Form. The U.S. Railroads MPDF shall include a nationwide historic context statement that can be supplemented at the state or railroad carrier level. The U.S. Railroads MPDF shall identify significant railroad property types and, for each property type, include registration requirements that follow the NPS guidance for applying the National Register criteria for evaluation, with specific procedures and rules that establish:
 - a. Associations with significant events under Criterion A;
 - b. Associations with significant persons under Criterion B;
 - c. Quality of significance in engineering and architecture under Criterion C;

- d. Information potential under Criterion D;
 - e. National and state levels of significance;
 - f. The opening and closing years of the period of significance;
 - g. Retention of integrity from the period of significance; and
 - h. Guidance for distinguishing if a rail-related property is:
 - i. Individually eligible for the NRHP,
 - ii. A contributing element of a historic district (i.e., a rail-related corridor, or complex interrelated series of rail-related properties), or
 - iii. A non-contributing element of a historic district.
- C. FRA shall review and take into account existing historic context statements for railroads that have been developed in a particular state (e.g., Colorado MPDF, Delaware, Minnesota MPDF, North Dakota MPDF, and South Dakota) or for a particular rail system, subdivision, or property type.
- D. FRA shall review and take into account existing NRHP evaluations of railroad resources in states that have initiated the process, including but not limited to: Alaska, Arkansas (depots), Colorado, Delaware (bridges), Indiana (bridges), Maryland, Minnesota (four railroad corridors), New York (bridges), and Pennsylvania (bridges).
- C. FRA shall make the NRHP designations at the national and state levels of significance, following consultation with the staff of the NRHP Program of the NPS, FTA, STB, NCSHPO, ACHP, representatives of the railroad industry, rail transit agencies, and SHPOs in each of the 50 states.
- D. FRA may, as needed, consult the Keeper of the NRHP to resolve questions or disagreements about the NRHP eligibility of certain elements.
- E. FRA shall report the findings in accordance with Stipulation VIII.B.
- VII. Procedures after the Identification of U.S. Railroads Historic Properties**
- A. After implementation of Stipulation VI, only those rail-related properties with national or state significance shall be considered historic properties.
- [Note: Stipulations VII.B/C do not apply to portions of projects with substantial grading that is likely to adversely affect TCPs or significant archaeological sites per Stipulation I.C.]*
- B. Undertakings that meet either of the following conditions shall be reviewed in accordance with 36 CFR 800.3–800.6, with strict adherence to the timeframes set therein:
- 1. The APE is not limited to railroad right-of-way and other railroad property; or
 - 2. Rail-related historic properties found significant at the national or state level of significance are located in the APE.

[Note: Stipulation VII.B. in this draft Agreement could be negotiated, modified, or amended to further streamline the steps described at Sections 800.3-800.6.]

- C. The Lead Agency may make a finding of “no historic properties affected” and fulfill its responsibilities under section 106 without further review by the SHPO/THPO or notification of consulting parties when an undertaking meets both of the following conditions:

1. The APE is limited to railroad right-of-way and other railroad property; and
2. No rail-related historic properties are located in the APE.

D. Treatment of Historic Properties

[Note: Stipulation VII.D. could be negotiated and modified to delegate design review and SHPO consultation directly to the railroads/rail transit agencies. Guidance could also be developed specifically for rail-related properties such as bridges or passenger depots. For example, NPS’ Preservation Brief 32 provides guidance for American Disabilities Act (ADA) accessibility that may be useful for public buildings such as passenger depots.]

1. When the Lead Agency and the appropriate SHPO(s) concur that an undertaking is designed and planned in accordance with the *Secretary of the Interior’s Standards for the Treatment of Historic Properties*, 36 CFR Part 68, (Standards), that undertaking will not be subject to further section 106 review.
2. The Lead Agency and the appropriate SHPO(s) will make best efforts to expedite reviews through a finding of “No Adverse Effect with conditions” when the Lead Agency and the SHPO concur that plans and specifications or scopes of work can be modified to ensure adherence to the Standards. If the undertaking cannot meet the Standards or would otherwise result in an adverse effect to historic properties, the Lead Agency will proceed in accordance with 36 CFR 800.5–800.6.

E. Resolution of Adverse Effects

1. The Lead Agency shall consult with the SHPO/THPO and Tribes as appropriate, to resolve adverse effects.
2. The Lead Agency may use standard stipulations included in Attachment C of this Agreement, or as negotiated as part of this Agreement between the SHPO and the Recipient, or if the project warrants, use of an alternate Agreement due to the complexity of the project activity.
3. Consultation shall be expedited to conclude in 45-days or less. In the event the consultation extends beyond this period, the Lead Agency shall formally invite the ACHP to participate in consultation. The ACHP will consult with the Lead Agency regarding the issues and the opportunity to negotiate a Memorandum of Agreement (MOA). Within fourteen (14) days after notification, the ACHP will enter consultation and provide its recommendation for either concluding the section 106

review through an MOA or comment from the ACHP to the Lead Agency Administrator within twenty-one (21) days.

4. In the case of an ACHP comment, the Lead Agency may proceed once the Lead Agency provides its response to the ACHP.

F. Emergency Situation Undertakings

1. When an emergency undertaking is required for historic properties associated with the undertaking, the Lead Agency shall allow the appropriate SHPO(s) five (5) business days to respond, if feasible. Emergencies exist when there is an interruption of rail service that has serious economic, health or safety implications or there is a need to eliminate an imminent threat to health and safety of residents as identified by federal, state or local inspectors, fire department officials, or other government officials.
 - a. The Lead Agency shall forward documentation to the SHPO for review immediately upon notification that an emergency exists. Documentation should include:
 - i. The nature of the emergency;
 - ii. The address of the historic property involved;
 - iii. Photographs showing the current condition of the historic property; and
 - iv. The time-frame allowed by local officials to respond to, or correct, the emergency situation.
 - b. The Lead Agency shall consider mitigation measures recommended by the SHPOs and implement them, if reasonable and feasible.

VIII. Reporting

A. Exempted Categories of Undertakings

1. Each Lead Agency, on an annual basis, shall provide FRA a list of individual undertakings, organized by their state location that qualified for a review exemption under Stipulation IV.
2. FRA will compile, on an annual basis, the list of undertakings received from all the Agencies and post it to a secure file repository or website for reference by ACHP, NCSHPO, and SHPO(s)/THPO(s).

B. Interim Reports

1. As they are completed, the Lead Agency shall report historic contexts and NRHP eligibility determinations made under Stipulation V to FRA, which shall organize them by their state location, post them to a secure file repository or website available to SHPOs and NCSHPO, and incorporate them into the studies being developed under Stipulation VI.

2. Via e-mail, FRA shall notify NCSHPO and the appropriate SHPO(s) as completed historic contexts and NRHP eligibility determinations are posted to their website and request their comments within 30 days.
3. If no objection by NCSHPO and the appropriate SHPO(s) is received within 30 days of notification, FRA shall post completed historic contexts and eligibility determinations as they become available, to a website accessible to the public.

C. Final List

1. FRA shall publish the final list of NRHP designations at the national and state levels of significance on its publically accessible website (<http://www.fra.dot.gov/>).
2. FRA shall maintain the final list of NRHP designations on its website throughout the duration of this agreement or until it is terminated.
3. FRA shall submit electronic copies of the historic contexts and final list of NRHP designations to the Agencies, and as appropriate to affected SHPOs, rail carriers, and transit agencies.

IX. **Amendments**

- A. Any signatory to this PA may request that it be amended, whereupon the parties will consult with each other. No amendment to this PA will become effective without the written concurrence of the signatories.
- B. It is contemplated that Attachments A, B, and C of the PA may be revised from time to time to better clarify their content. The parties agree that Attachments A, B and C may be revised without having to formally amend the PA. All such revisions to Attachments A, B, and C shall be approved in writing by the signatories and shall take effect upon approval.

X. **Dispute Resolution**

- A. Should any signatory to this PA object within 30 days to any action proposed or any document provided for review pursuant to this PA, FRA shall consult with the objecting signatory to resolve the objection. If FRA determines that the objection cannot be resolved within 15 days, FRA shall forward all documentation relevant to the dispute, including FRA's proposed resolution, to the ACHP. FRA will also provide a copy to all signatories and consulting parties for the Undertaking. ACHP shall provide FRA with its advice on the resolution of the objection within 30 days of receiving adequate documentation. Prior to reaching a final decision on the dispute, FRA shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the signatories and consulting parties, including Native American tribes, and provide them with a copy of this written response. FRA will then implement any action determined by this dispute resolution process and proceed according to its final decision.

- B. If ACHP does not provide its advice regarding the dispute within 30 days, FRA may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FRA shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and consulting parties for the Undertaking, and provide them and ACHP with a copy of such written response.

XI. **Termination**

- A. ACHP and NCSHPO together, or all of The Agencies together may terminate the PA by providing thirty (30) days' notice to the other signatories, provided that the signatories consult during the period prior to the termination to seek agreement on amendments or other actions that would avoid termination.
- B. In the event of termination, the Lead Agency will ensure compliance with 36 CFR 800.4–800.6 with respect to individual undertakings covered by this PA that are subject to their respective reviews.

XII. **Duration**

Unless terminated pursuant to Stipulation X, or superseded by an amended PA pursuant to Stipulation IX, this PA will be in effect following execution by the signatory parties for a period of ten (10) years.

EXECUTION of this PA pursuant to 36 CFR 800.14(b)(3) shall evidence that the Agencies have taken into account the effects of their undertakings covered under this PA on historic properties to comply with section 106 of the NHPA in a streamlined manner as mandated by PRIIA and shall further evidence that the Agencies have afforded ACHP an opportunity to comment.

SIGNATORIES**Federal Railroad Administration**

By: _____ Date: _____
[Name]
[Title]

Federal Transit Administration

By: _____ Date: _____
[Name]
[Title]

Federal Highway Administration

By: _____ Date: _____
[Name]
[Title]

Surface Transportation Board

By: _____ Date: _____
[Name]
[Title]

Advisory Council on Historic Preservation

By: _____ Date: _____
[Name]
[Title]

National Conference of State Historic Preservation Officers

By: _____ Date: _____
[Name]
[Title]

Draft Section 106 Nationwide PA Attachment A

Exempted Categories of Undertakings

[Note: Stipulation IV and Attachment A are intended to supplement, and not duplicate, any Exempted Categories of Undertakings established by the Agencies in accordance with 36 CFR 800.14(c)]

36 CFR 800.14(c) allows the ACHP or federal agency official to propose a program or category of undertakings that may be exempted from section 106 review if the program or category meets the following criteria:

- The actions within the program or category would otherwise qualify as “undertakings” as defined in 800.16(y);
- The potential effects of the undertakings upon historic properties are foreseeable and likely to be minimal or not adverse; and
- Exemption of the program or category is consistent with the NHPA.

The following categories of undertakings are exempted from section 106 review:

Applicable to all the Agencies

1. Repair, alteration, removal, or replacement of materials or features installed outside the period of significance or within the past 50 years.
2. Maintenance of railroad structures within a historic district when those structures:
 - a. Are not individually eligible for or listed in the NRHP, or
 - b. Have not been specifically found to be a contributing element of a historic district.
3. Replacement of any component of a structure in a “like-for-like” manner that matches the material, details and appearance of the original.
4. Changes to or replacement of any component of a structure when the component in question is not a historically significant element of the structure.
5. Changes to or maintenance of portions of a structure that are not visible or accessible to the public, presuming those portions are not significant character defining features.
6. Additions to or changes to a property that do not require significant contact with a structure and are reversible.
7. Railroad salvage activities that would not disturb materials or resources underlying the track, ties and ballast.
8. Changes to historic railroads or property types when the railroad or property type has already been documented, interpreted, and recorded in HABS, HAER, or HALS.

FRA

A. Actions Categorically Excluded under the National Environmental Policy Act (NEPA)

[Note: Alternative simpler language would be “Undertakings classified as categorically excluded under NEPA are also exempt from section 106 review.” The language below provides more background and lists the CEs most relevant to railroad projects.]

Section 4(c) of FRA’s Procedures for Considering Environmental Impacts, 64 Fed. Reg. 28545, lists “[c]ertain classes of FRA actions [that] have been determined to be categorically excluded from the requirements of [FRA’s NEPA] Procedures as they do not individually or cumulatively have a significant effect on the human environment.” The following relevant classes of actions are categorically excluded under NEPA and are also exempted from section 106 review, provided, in accordance with Section 4(e)(4), they would not adversely affect historic properties.

- (11) Maintenance of: existing railroad equipment; track and bridge structures; electrification, communication, signaling, or security facilities; stations; maintenance-of-way and maintenance-of-equipment bases; and other existing railroad-related facilities. For purposes of this exemption “maintenance” means work, normally provided on a periodic basis, which does not change the existing character of the facility, and may include work characterized by other terms under specific FRA programs.
- (12) Temporary replacement of an essential rail facility if repairs are commenced immediately after the occurrence of a natural disaster or catastrophic failure.
- (15) Financial assistance for the construction of minor loading and unloading facilities, provided that projects included in this category are consistent with local zoning, do not involve the acquisition of a significant amount of land, and do not significantly alter the traffic density characteristics of existing rail or highway facilities.
- (16) Minor rail line additions including construction of side tracks, passing tracks, crossovers, short connections between existing rail lines, and new tracks within existing rail yards provided that such additions are not inconsistent with existing zoning, do not involve acquisition of a significant amount of right of way, and do not significantly alter the traffic density characteristics of the existing rail lines or rail facilities.
- (17) Acquisition of existing railroad equipment, track and bridge structures, electrification, communication, signaling or security facilities, stations, maintenance of way and maintenance of equipment bases, and other existing railroad facilities or the right to use such facilities, for the purpose of conducting operations of a nature and at a level of use similar to those presently or previously existing on the subject properties.
- (18) Research, development and/or demonstration of advances in signal, communication and/or train control systems on existing rail lines provided that such research, development and/or demonstrations do not require the acquisition of a significant amount of right-of-way, and do not significantly alter the traffic density characteristics of the existing rail line.

- (19) Improvements to existing facilities to service, inspect, or maintain rail passenger equipment, including expansion of existing buildings, the construction of new buildings and outdoor facilities, and the reconfiguration of yard tracks.

FRA intends to amend its Procedures, as proposed in 77 Fed. Reg. 35471, with three additional CEs that have no potential to adversely affect historic properties and, therefore, would be good candidates for Exempted Categories of Undertakings, as follows:

- (23) Acquisition (including purchase or lease), rehabilitation, or maintenance of vehicles and equipment that does not cause a substantial increase in the use of infrastructure within the existing right-of-way or other previously disturbed locations, including locomotives, passenger coaches, freight cars, train sets, and construction, maintenance or inspection equipment.
- (24) Installation, repair and replacement of equipment and small structures designed to promote transportation safety, security, accessibility, communication or operational efficiency that take place predominantly within the existing right-of-way and do not result in a major change in traffic density on the existing rail line or facility, such as the installation, repair or replacement of surface treatments or pavement markings, small passenger shelters, railroad warning devices, train control systems, signalization, electric traction equipment and structures, electronics, photonics, and communications systems and equipment, equipment mounts, towers and structures, information processing equipment, or security equipment, including surveillance and detection cameras.
- (27) Track and track structure maintenance and improvements when carried out predominantly within the existing right-of-way that do not cause a substantial increase in rail traffic beyond existing or historic levels, such as stabilizing embankments, installing or reinstalling track, re-grading, replacing rail, ties, slabs and ballast, improving or replacing interlockings, or the installation or maintenance of ancillary equipment.

B. Actions Meeting NEPA CE Criteria

In January 2013, FRA added four new CE's that would have no potential to adversely affect historic properties with some simple design guidelines for alterations to stations, bridges, small buildings and structures, and surface disturbance. If the conditions indicated in the bracketed text below are met, the actions under the following four CEs would also qualify as Exempted Categories of Undertakings.

- (21) Alterations to existing facilities, locomotives, stations and rail cars in order to make them accessible for the elderly and persons with disabilities, such as modifying doorways, adding or modifying lifts, constructing access ramps and railings, modifying restrooms, and constructing accessible platforms. *[Condition: If the existing facilities and stations are historic properties, and the alterations would be consistent with the Secretary's Standards and Guidelines,]*
- (22) Bridge rehabilitation, reconstruction or replacement, and the construction of bridges, culverts, and grade separation projects, predominantly within existing right-of-way and that do not involve extensive in-water construction activities, such as projects replacing bridge components including stringers, caps, piles, or decks, the construction of roadway overpasses to replace at-grade crossings, or construction or replacement of short span

bridges. *[Condition: If the bridges or culverts being replaced do not represent an important historic context or are a type previously found not to be NRHP eligible. If they are historic properties, rehabilitation would be consistent with the Secretary's Standards and Guidelines.]*

- (25) Environmental restoration, remediation and pollution prevention activities in or proximate to existing and former railroad track, infrastructure, stations and facilities, including activities such as noise mitigation, landscaping, natural resource management activities, replacement or improvement to storm water systems, installation of pollution containment systems, slope stabilization, and contaminated soil removal in conformance with applicable regulations and permitting requirements. *[Condition: The surface disturbance would occur only where natural soils were previously disturbed such that there would be no potential to adversely affect archaeological sites. Noise mitigation to historic buildings would be consistent with the Secretary's Standards and Guidelines.]*
- (26) Assembly and construction of facilities and stations that are consistent with existing land use and zoning requirements, do not result in a major change in traffic density on existing rail or highway facilities and result in approximately less than 10 acres of surface disturbance, such as storage and maintenance facilities, freight or passenger loading and unloading facilities or stations, parking facilities, passenger platforms, canopies, shelters, pedestrian overpasses or underpasses, paving, or landscaping. *[Condition: The surface disturbance would occur only where natural soils were previously disturbed such that there would be no potential to adversely affect archaeological sites.]*

FTA and FHWA

A. Actions Categorically Excluded under NEPA

The following relevant actions meet the criteria for Categorical Exclusions in the CEQ Regulations (40 CFR 1508.4) and 23 CFR 771.117(a) of FHWA's and FTA's regulation and normally do not require any NEPA documentation by the FHWA or FTA. To streamline environmental compliance, the following actions, listed with their number in Section 771.117(c), are also exempted from section 106 review:

- (2) Approval of utility installations along or across a transportation facility.
- (5) Transfer of federal lands pursuant to 23 U.S.C. 107(d) and/or 23 U.S.C. 317 when the land transfer is in support of an action that is not otherwise subject to FHWA review under NEPA.
- (6) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
- (8) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- (14) Bus and rail car rehabilitation.
- (15) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.

- (18) Track and rail bed maintenance and improvements when carried out within the existing right-of-way.
- (19) Purchase and installation of operating or maintenance equipment to be located within the transit facility and with no significant impacts off the site.⁶⁰

B. Actions Meeting NEPA CE Criteria

Additional actions that meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and 23 CFR 771.117(a) of FHWA's and FTA's regulation may be designated as CEs only after approval by FTA or FHWA. Documentation must demonstrate that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. To expedite environmental compliance, after actions are deemed to meet criteria for a CE by FTA, FHWA, or delegate, the following actions, listed with their number in Section 771.117(d), are also exempted from section 106 review:

- (3) Bridge rehabilitation, reconstruction or replacement or the construction of grade separation to replace existing at-grade railroad crossings.
- (4) Transportation corridor fringe parking facilities.
- (6) Approvals for disposal of excess right-of-way or for joint or limited use of right-of-way, where the proposed use does not have significant adverse impacts.
- (9) Rehabilitation or reconstruction of existing rail and bus buildings and ancillary facilities where only minor amounts of additional land are required and there is not a substantial increase in the number of users.
- (11) Construction of rail storage and maintenance facilities in areas used predominantly for industrial or transportation purposes where such construction is not inconsistent with existing zoning and where there is no significant noise impact on the surrounding community.
- (12) Acquisition of land for hardship or protective purposes. Hardship and protective buying will be permitted only for a particular parcel or a limited number of parcels. These types of land acquisition qualify for a CE only where the acquisition will not limit the evaluation of alternatives, including shifts in alignment for planned construction projects, which may be required in the NEPA process. No project development on such land may proceed until the NEPA process has been completed.
 - (i) Hardship acquisition is early acquisition of property by the applicant at the property owner's request to alleviate particular hardship to the owner, in contrast to others, because of an inability to sell his property. This is justified when the property owner can document on the basis of health, safety or financial reasons that remaining in the property poses an undue hardship compared to others.

⁶⁰ On March 15, 2012 the USDOT published a notice of proposed rulemaking in the Federal Register, proposing changes to the agency NEPA regulations that would affect actions by FTA and project sponsors. Revisions are intended to streamline the FTA environmental process for transit projects, and include adding 10 new FTA-specific CEs. Note, this rulemaking is now final. Update to reflect.

- (ii) Protective acquisition is done to prevent imminent development of a parcel which may be needed for a proposed transportation corridor or site. Documentation must clearly demonstrate that development of the land would preclude future transportation use and that such development is imminent. Advance acquisition is not permitted for the sole purpose of reducing the cost of property for a proposed project.

STB

Abandonments

1. Some types of rail line abandonments that are not likely to affect historic properties (e.g., where the rail right-of-way will likely be converted to use as an interim trail or sold to a preservation group, park, or recreation area.)

Draft Section 106 Nationwide PA Attachment B

Level of Effort for Historic Context and NRHP Evaluation and Documentation

1. Historic context shall be prepared at the national and state levels and developed in accordance with Section V of NRHP Bulletin 15, entitled *How to Apply the National Register Criteria for Evaluation*. Historic context shall provide a brief narrative of carrier operations in the APE as defined in Stipulation V.B of this PA, establish a period of significance for those operations, and establish the relative significance of the rail related properties in the APE to the applicable state(s) and to the rail carrier system's full extent reached during the period of significance. The period of significance shall be established in accordance with the guidelines in Section 8 of NRHP Bulletin 16A (entitled *How to Complete the National Register Nomination Form*).
2. Documentation of those rail related properties eligible for the NRHP at the national or state level of significance on:
 - a. The appropriate state(s) historic property inventory forms, or
 - b. If available and approved by NCSHPO, the NRHP nomination forms that follow the Multiple Property Documentation Form (MPDF) being developed by FRA in Stipulation VI.
3. Documentation of those rail-related buildings, structures, and objects that were constructed during the period of significance but were not found eligible for the NRHP at the national or state level of significance including:
 - a. Good quality photographs,
 - b. Construction dates,
 - c. Property name or type,
 - d. Geographic location or milepost(s), and
 - e. A statement of significance for eligibility under NRHP Criterion A, B, or C.
4. Documentation of rail-related historic districts (e.g., rail corridors or rail yards) shall distinguish components that are individually eligible for the NRHP at the national or state level of significance from those that are not individually eligible but contribute to the significance of the historic district.

5. Evaluation and documentation of rail-related buildings, structures, objects, and districts under NRHP Criteria A, B, or C shall be performed by an individual who meets the Secretary of the Interior's Professional Qualifications Standards (Secretary's PQS, 36 CFR Part 61) in history, architectural history, or historic preservation planning.
6. Evaluation and documentation of rail-related historic archaeological sites under NRHP Criterion D shall be performed by an individual who meets the Secretary's PQS in archaeology.

Draft Section 106 Nationwide PA Attachment C

Standard Stipulations to Resolve Adverse Effects

A. Standard Treatment Options to Avoid Adverse Effects

1. Accessibility

Architectural changes to provide Americans with Disabilities Act (ADA) accessibility to historic railroad buildings such as passenger depots that are designed in accordance with the NPS' Preservation Brief 32 *Making Historic Properties Accessible*, and are reviewed by SHPO.

2. Rehabilitation or Adaptive Reuse

Alterations to, additions to, and related new construction near rail-related historic properties when rehabilitation or adaptive reuse plans are consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR Part 68) and the proposed plans are reviewed by the SHPO.

3. Activities within or adjacent to historic properties

A standard treatment may be applied for the following activities when historic properties or historic districts are present. The Lead Agency will issue a finding of effect and may apply the standard treatment without further consultation with the SHPO.

- a. Installation of new lighting (in-kind or historic replica).
- b. Replacement of curbs, curbing and sidewalks provided in-kind or compatible modern materials are used.
- c. Installation of new curbing and sidewalks using brick, slate, granite or other stone; or concrete when already present within a historic district.
- d. Others treatments appropriate for historic character defining features that are specific to historic districts that are railroad corridors or rail yards.

4. Temporary Construction near Archaeological Sites

The Lead Agency may approve the use of protective geotextile fabric and fill in temporary construction areas such as bridge runarounds, haul roads, and other work areas when the temporary construction area is located in a high probability area for archaeological sites. The Lead Agency must calculate the level of protection needed based on the characteristics of the existing soils, and the size and weight of vehicles to be used within the temporary construction area. Installation and removal of the fill and geotextile material must ensure that disturbance to the ground surface or soil compaction does not occur. The Lead Agency will issue a finding of no adverse effect. No additional consultation will be required.

B. Standard Treatment Options to Mitigate Adverse Effects

If an adverse effect would occur, the following standard treatment for mitigation may be applied, provided SHPO and consulting parties have an opportunity to provide their views.

1. Historic Bridges

a. Relocating or Marketing Historic Bridges

The Lead Agency shall work with the bridge owner to assure that a historic bridge shall be properly secured and protected from vandalism, fire, and weather damage while the Agency or bridge owner make a reasonable and good faith effort for no longer than six (6) months to relocate and re-use it within the same railroad carrier system, or sell it or donate it to another entity that will move it or otherwise re-use it.

b. Replacement of Bridges Contributing to a Historic District

The Lead Agency shall work with the grant applicant, SHPO and consulting parties, if any, on a replacement design that either mimics the appearance of the historic district-contributing bridge or incorporates design elements which are in keeping with the characteristics that make the historic district eligible for the NRHP (i.e. a context sensitive design). Although the project would have an adverse effect, no other mitigation will be necessary.

c. Demolition

The Lead Agency shall perform the following measure before demolition of a historic bridge:

- i. Consult with the SHPO to determine if photo documentation of the bridge is needed. The SHPO shall specify the photo documentation standards and distribution requirements.
- ii. Complete any required photo documentation in accordance with the specifications provided by the SHPO.
- iii. Ensure the bridge owner salvages elements that are appropriate for storage and future use for the repair of similar historic bridges.

2. Recordation

The Lead Agency shall consult with SHPO to determine the documentation standards and distribution requirements and complete that documentation before demolition of a historic building, structure, or object. Based on the significance and characteristics of the historic property, the following options may be considered:

- a. Documentation may be appropriate for inclusion in a state or local repository.
- b. Donating or loaning of a railroad's extensive archives of photographs and drawings to a state or local repository.
- c. Digitization of railroad records for hosting by a rail museum or library.

- d. Incorporation of material into Historic American Engineering Record (HAER), Historic American Buildings Survey (HABS), and Historic American Landscape Survey (HALS) documentation.

Figure 8-2: Draft ACHP Administrative Section 106 Exemption pursuant to 36 CFR 800.14(c)

The following represents a concept for an ACHP Section 106 Administrative Exemption for the nation's railroads and rail transit infrastructure.

Exemption Regarding Historic Preservation Review Process for Effects to U.S. Railroads

Authority

The National Historic Preservation Act ('NHPA') authorizes the Advisory Council on Historic Preservation (ACHP) to promulgate regulations for exempting undertakings "from any or all of the requirements of" the Act. (16 U.S.C. 470v.) The section 106 regulations, found at 36 CFR Part 800, detail the process for the approval of such exemptions. (36 CFR 800.14(c).) In accordance with the section 106 regulations, the ACHP may approve an exemption for an undertaking if it finds that:

- (i) The actions within the program or category would otherwise qualify as "undertakings" as defined in 36 CFR 800.16;
- (ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and
- (iii) Exemption of the program or category is consistent with the purposes of the NHPA.

Background

This exemption to section 106 of the NHPA is based on several facts that are unique to the history, construction, and technological improvements of the nation's railroad and rail transit infrastructure.

- 1) The nation's railroad system has a long history, dating to the 1820s, and certain components are listed on or were determined eligible for the National Register of Historic Places (NRHP) most frequently in the areas of significance of transportation, architecture, commerce, engineering, community planning and development, industry, social history and exploration/settlement.
- 2) Each railroad carrier had its own unique history of construction, including major periods of economic success, opening of key markets or geographies, improvements, acquisition, and consolidation or abandonment.
- 3) Most railroad buildings and structures followed the common standard plans of a specific carrier, but there were exceptions for individual buildings and structures that may have unique or unusual design characteristics.

- 4) Most railroad corridors followed a simple natural grade and alignment, but there were exceptions made for difficult terrain, climate and topography that may have involved unique or unusual engineering techniques and structures.
- 5) Routine maintenance, alterations, and technological improvements are necessary to maintain the historic use and modern safety of the nation's railroad and rail transit infrastructure, and generally such activities do not affect the characteristics that convey the historic significance of this infrastructure.

Summary

This exemption was developed as a result of a study and report mandated by the Passenger Rail Investment and Improvement Act of 2008, Pub. L. 110-432 (hereafter PRIIA.) This exemption releases all federal agencies from the section 106 requirement of having to consider the effects of federal undertakings for the repair and improvement of the nation's railroad and rail transit system (U.S. Railroads), except for the most significant railroad properties associated with that system. The exemption embodies the view that U.S. Railroads are historically important, but only the most significant railroad properties, as noted below, warrant further consideration under section 106. The exemption applies unconditionally for all undertakings related to U.S. Railroads, including publically-or-privately owned-or-operated railroads and rail transit systems.

The U.S. Railroads' properties that will still be considered under section 106 are limited to certain defined properties, such as historic buildings, structures, objects, and districts that were built within the period of significance of a specific railroad carrier and meet the National Register of Historic Places eligibility criteria (36 CFR Part 63) at the national or state level of significance. FRA, at the headquarters level, in consultation with the National Park Service, National Conference of State Historic Preservation Officers, representatives of the railroad industry, and stakeholders in each state, will make the determination of which elements of U.S. Railroads meet these criteria. The historic preservation benefit of this exemption is that rail carriers will participate in the identification effort, will become aware of which of the properties they own are most important to our nation's heritage, will be able to budget and allocate monetary resources to historically significant properties, and will have the opportunity to repair, maintain, and operate those properties with a renewed commitment of stewardship, even when section 106 of the NHPA does not apply. The exemption will also facilitate an unprecedented systematic and concerted effort to document and evaluate our nation's railroads.

The benefit of this exemption to the railroad industry is that there will be consistency and certainty about which of the properties they own are subject or not subject to section 106 of the NHPA when there is a federal undertaking. Project delivery for exempt undertakings would be effectively streamlined by reducing the cost and time needed for the production of historic property studies and agency reviews.

Text of the Exemption

Effects to U.S. Railroads

I. Exemption from section 106 Requirements

Except as noted in Sections II and III, all federal agencies are exempt from the section 106 requirement of taking into account the effects of their undertakings on the nation's railroads as defined by 49 U.S.C. § 20102 (hereafter, U.S. Railroads). This exemption concerns solely the effects of federal undertakings on U.S. Railroads. Each federal agency remains responsible for considering the effects of its undertakings on other historic properties that are not components of U.S. Railroads (e.g., adjacent historic properties or prehistoric archaeological sites that may lie under the railroad or within undisturbed areas of the railroad right-of-way) in accordance with subpart B of the section 106 regulations or according to an applicable program alternative executed pursuant to 36 CFR 800.14. Each federal agency remains responsible for considering the effects of its undertakings on current and former railroad property outside the railroad right-of-way (e.g., railroad office buildings in downtown areas, buildings and structures transferred out of railroad ownership, etc.)

II. Process for Designating Individual Elements Requiring Section 106 Review

The Federal Railroad Administration (FRA) shall designate significant U.S. Railroads properties that are to be excluded from this exemption. FRA will publish the list of such designated properties on its website (<http://www.fra.dot.gov/>). FRA headquarters shall make the designations, following consultation with the staff of the National Register of Historic Places (NRHP) Program of the National Park Service (NPS), Federal Transit Administration, Surface Transportation Board, National Conference of State Historic Preservation Officers, the Advisory Council on Historic Preservation, representatives of the railroad industry, and stakeholders in each state. The FRA shall develop a Multiple Property Documentation Form (MPDF) for evaluating U.S. Railroads according to the NPS's instructions for preparing NRHP nominations. The U.S. Railroads MPDF shall include a nationwide historic context statement that can be supplemented at the state or railroad carrier level. The U.S. Railroads MPDF shall identify significant railroad property types and, for each property type, include registration requirements that follow the NPS guidance for applying the National Register criteria for evaluation, with specific procedures and rules that establish:

- a. Associations with significant events under Criterion A;
- b. Associations with significant persons under Criterion B;
- c. Quality of significance in engineering and architecture under Criterion C;
- d. Information potential under Criterion D;
- e. National and state levels of significance;
- f. Period of significance; and
- g. Retention of integrity from the period of significance.

FRA may, as needed, consult the Keeper of the NRHP to resolve questions or disagreements about the NRHP eligibility of certain elements.

III. Individual Elements Excluded From Exemption

The following elements of U.S. Railroads shall be excluded from the scope of this exemption, and therefore shall require section 106 review:

- a. Properties that were listed in the NRHP or determined eligible for the NRHP by the Keeper of the NRHP pursuant to 36 CFR Part 63 that are re-evaluated using the criteria developed in Section II and are determined by FRA to possess national or state significance.
- b. Properties that were determined eligible for the NRHP at the national or state level of significance by a federal agency with State Historic Preservation Officer concurrence pursuant to 36 CFR Part 800 prior to the effective date of this exemption and that, after re-evaluation using the criteria developed in Section II, are determined by FRA to meet the registration requirements in the U.S. Railroads MPDF for national or state significance.
- c. Properties that possess national or state significance, and meet the NRHP eligibility criteria (36 CFR part 63), as determined by FRA pursuant to the U.S. Railroads MPDF developed in Section II.

IV. Timing

FRA will publish the list of significant U.S. Railroad properties on its website within three years of the date of this exemption. In the interim, each federal agency remains responsible for considering the effects of its undertakings on federally funded infrastructure repair and improvement projects in accordance with subpart B of the section 106 regulations or according to an applicable program alternative executed pursuant to 36 CFR 800.14.

V. Definitions

Right-of-way

“Right-of-way” means a strip or parcel of real property in which a railroad or rail transit agency has acquired an interest for use as a part of its transportation corridor.

Undertaking

As defined at 36 CFR 800.16(y), “[u]ndertaking 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.”

U.S. Railroads

As defined by 49 U.S.C. § 20102(2), “railroad’ means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including: (i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but [“railroad”] does

not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.”

Figure 8-3: Draft Section 4(f) of title 49 Legislative Exemption

Amendments to existing federal legislation that exempt U.S. railroads from the requirements of section 106 or Section 4(f) can be implemented in two ways: 1) by directly amending the statutes themselves; or 2) by drafting a new statute or amending an existing statute that references either of these statutes. Exemptions for the interstate highway system were implemented through the federal highway SAFETEA-LU provisions that referenced the provisions of Section 4(f) and section 106. Amending the provisions of section 106 and Section 4(f) directly would likely require broader exemption language to incorporate the existing exemptions for interstate highways in addition to those proposed for railroads. Therefore, this approach may be outside the scope of this study.

Draft Section 303 of Title 49, U.S.C., Legislative Exemption

Chapter 281 of Part E of subtitle V of title 49, United States Code is amended by adding at the end the following:

“§ 28105 Exemption of U.S. Railroads.

Except for a railroad operated as a historic site with the purpose of preserving the railroad for listing in the National Register of Historic Places, the term “historic site” shall not include railroad and rail transit lines or corridors that were historically used for transportation of goods or passengers for purposes of section 303 of title 49, regardless of whether the railroad or rail transit line, or portions or elements thereof, are listed on, or eligible for listing on, the National Register of Historic Places. Transportation programs or projects on existing or former railroad or rail transit land shall not be considered a “use” of an historic site of national, state, or local significance, regardless of whether the railroad or rail transit land or portions thereof are listed on, or eligible for listing on, the National Register of Historic Places.”

Figure 8-4: Draft Amendment to the Railroads Title of the United States Code

The following approach of amending legislation by coupling a Section 4(f) Legislative Exemption with statutory direction to create a section 106 Administrative Exemption issued by the ACHP is based on the approach used for the Interstate Highway System.

Draft Amendment to the Railroads Title of the United States Code

Chapter 281 of part E of Subtitle V of title 49, United States Code is amended by adding the new section at the end thereof as follows:

“§ 28104. Historic Preservation and Railroads

[Section 303 Legislative Exemption]

“(a) In general.—Except as provided in subparagraph (b), U.S. Railroads shall not be considered to be a historic site under section 303 of title 49, regardless of whether U.S. Railroads or portions or elements of U.S. Railroads are listed on, or eligible for listing on, the National Register of Historic Places.

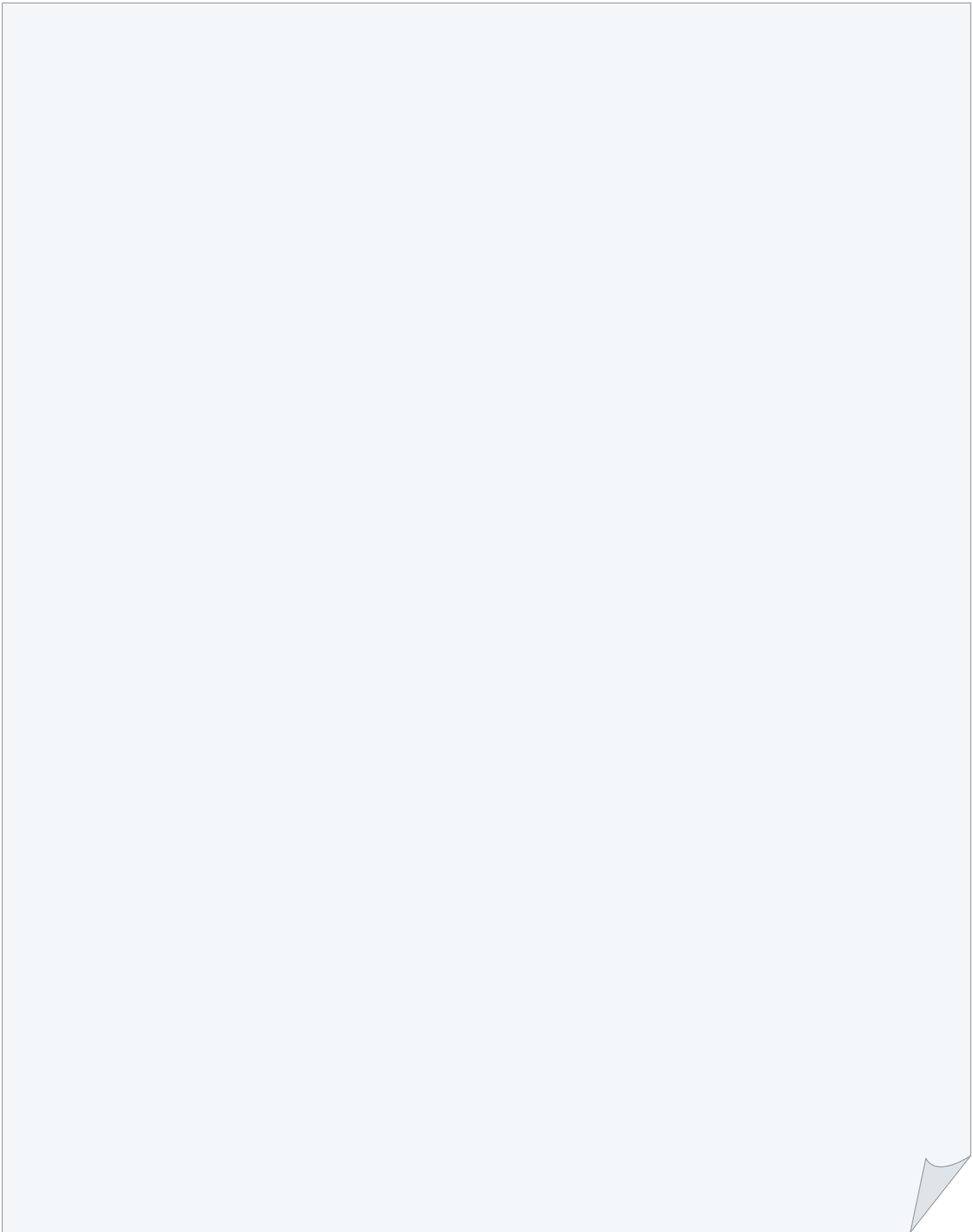
[Section 106 Statutory Direction for an Administrative Exemption by ACHP pursuant to 36 CFR 800.14(c)]

“(b) Individual elements.--Subject to subparagraph (c), the Secretary shall determine, through the administrative process established for exempting U.S. Railroads from section 106 of the National Historic Preservation Act (16 U.S.C. 470f), those individual elements of U.S. Railroads that possess historic significance at the national or state level (such as a historic bridge, building or engineering feature). Such elements shall be considered to be a historic site under section 303 of title 49, as applicable.

“(c) Construction, maintenance, restoration, and rehabilitation activities.--Subparagraph (b) does not prohibit a state from carrying out construction, maintenance, restoration, or rehabilitation activities for a portion of U.S. Railroads referred to in subparagraph (B) upon compliance with section 303 of title 49, as applicable, and section 106 of the National Historic Preservation Act (16 U.S.C. 470f).”

[Definition:]

“(d) U.S. Railroads” for the purpose of this section 28104 refers to the network of railroads and rail transit system operating within the United States and its territories, including public or private ownership or operation.



Section 4(f)

Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), DOT. *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites*. 23 CFR Parts 771 and 774. 49 CFR Part 622. 71 FR 42611 Online via GPO Access (wais.access.gpo.gov). Accessed 11/30/2011.

Federal Highway Administration (FHWA), DOT. *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites (Section 4(F))*. 23 U.S.C. Part 774. 73 FR 13398 (March 12, 2008). Rules and Regulations. 13395. 774.13 Exceptions.

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- Nationwide Programmatic Agreement for Review of Effects on Historic Properties For Certain Undertakings Approved by the Federal Communications Commission. September 2004.
- Programmatic Agreement Among Federal Highway Administration, the Advisory Council on Historic Preservation, the Maine State Historic Preservation Officer, and Maine Department of Transportation, Regarding Implementation of the Federal Aid Highway and Federal Transit Programs in Maine. October 2004.
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- Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, The Alaska Department of Transportation and Public Facilities, and the Alaska State Historic Preservation Officer Regarding Alaska’s Highway System Roads Affected by the Federal-Aid Highway Program in Alaska. January 2010.
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Appendix A

Hearing on the Historic Preservation of Railroad Property and Facilities

Hearing before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the
Committee on Transportation and Infrastructure House of Representatives

110th Congress

June 5, 2008

THE HISTORIC PRESERVATION OF RAILROAD PROPERTY AND FACILITIES

(110-134)

HEARING
BEFORE THE
SUBCOMMITTEE ON
RAILROADS, PIPELINES, AND HAZARDOUS
MATERIALS
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

JUNE 5, 2008

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U.S. House of Representatives
Committee on Transportation and Infrastructure
 Washington, DC 20515

James L. Oberstar
 Chairman

John L. Mica
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David Heymsfeld, Chief of Staff
 Ward W. McCarragher, Chief Counsel

June 4, 2008

James W. Coon II, Republican Chief of Staff

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials
FROM: Subcommittee on Railroads, Pipelines, and Hazardous Materials Majority Staff
SUBJECT: Hearing on the Historic Preservation of Railroads and Facilities

PURPOSE OF HEARING

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet on Thursday, June 5, 2008, at 2:00 p.m., in 2167 Rayburn House Office Building to receive testimony on the effects of Federal historic preservation requirements on the development of rail infrastructure. The hearing will consider whether Federal requirements for preservation of historic sites are creating unnecessary delays and administrative burdens for improvements to rail infrastructure, and whether there is a need for legislation to change the historic preservation process.

BACKGROUND

Existing Federal Requirements for Historic Preservation

The basic Federal historical protection requirements are found in section 106 of the National Historic Preservation Act of 1966; 16 USC 470f.

Section 106 comes into effect when proposed action by a Federal agency (such as a grant or permit) could affect an historic property (see discussion below of what properties are covered). In these cases, the Federal agency is required to consult with the affected State Historic Preservation Office ("SHPO") and others to determine whether the proposed Federal action will adversely affect the protected property. If there is no agreement on adverse effect, a Federal agency, the Advisory Council on Historic Preservation ("ACHP"), determines whether there will be an adverse effect.

In cases where there will be an adverse effect, the law establishes a process for consultation in an effort to develop a Memorandum of Understanding between the agency and the SHPO on

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whether measures will be taken to avoid, minimize or mitigate the adverse effects. There is also a process for the agency and ACHP to reach agreement, if there is no agreement with the SHPO.

Special additional requirements are imposed on projects of the Department of Transportation ("DOT") affecting historic properties. For DOT projects, 49 USC 303, and 23 USC 138 provide that the Secretary shall approve a project requiring use of land of an historic site of national, state or local significance only if the Secretary finds that there is no "prudent and feasible alternative to using that land" and "the program or project includes all possible planning to minimize harm to the . . . historic site." The law also provides an exemption for projects having a "de minimis" impact on an historic site, with detailed requirements for how a finding of "de minimis" impact shall be made.

What Historic Sites are Eligible for Federal Protection

In general, protected sites are those which are listed in the National Register of Historic Places, or sites which are eligible for listing, i.e. sites which are unlisted but meet the criteria for listing.

The National Register is maintained by the National Park Service. Ordinarily, a site must be more than 50 years old to be listed or eligible. The criteria for listing include an association with significant historical events or lives of historically significant persons, embodying "distinctive characteristics of a type, period, architectural style or method of construction, or that represent the work of a master designer, possessing high artistic values, or that representing a significant and distinguishable entity whose components may lack individual distinction". A property less than 50 years old may be listed "if it is of exceptional value or significance".

Exemption of Interstate Systems

The SAFETEA-LU bill of 2005 included special provisions governing how the Interstate Highway System would be handled under the special DOT provisions on historic preservation. 23 USC 103(c)(5) provides that except as otherwise provided in the section, "the Interstate System shall not be considered to be an historic site under section 303 of title 49 or section 138 [of title 23]". Section 103(c)(5) also gives the Secretary authority to determine that individual elements of the Interstate System possess national or exceptional historic significance and should be covered by the DOT historic preservation laws. Acting under this authority, the Secretary has compiled a list of more than 100 portions of the Interstate System that will be given historical protection. Most of the listed portions are bridges and tunnels, but there are also a number of road segments, including 150 miles of the Pennsylvania Turnpike, 60 miles of the Columbia Oregon River Highway, and 30 miles of Alligator Alley in Florida.

Current Protection of Historic Sites for Railroads

A first review of the National Register indicates that about 2,300 rail facilities are listed on the Register. There is no way to determine how many additional facilities would be protected on the basis of a finding that they are eligible for inclusion in cases which if there was a proposed Federal action affecting the facility.

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According to the National Trust, the properties listed in the Register include 19 corridors or entire railroads, including tourist railroads and other scenic corridors. The Trust defends the appropriateness of listing entire corridors. They assert that corridors can have "a historical significance independent of the rail ties, structure, signage and signals that comprise it." They contend that corridors may be "historically significant as well established pathways," between cities.

Rail corridors have been afforded protection. An example is the 66 mile Enola low grade line in Lancaster County, Pennsylvania. In an abandonment proceeding before the Interstate Commerce Commission ("ICC") it was determined by the keeper of the National Register that the corridor had historic significance and was eligible for listing. The ICC required that the corridor not be dismantled and plans are being developed to connect portions of the corridor to trails.

Problems in Historic Preservation for Railroads

At the hearing, witnesses from the Alaska Railroad and the North Carolina Department of Transportation are expected to urge modification of the laws governing historic preservation for railroads. The Alaska Railroad supports the need for legislation by citing cases in which Alaska's SHPO has contended that the entire 450 mile railroad is an historic site, which has required historic protection procedures for individual facilities which do not have historic merit on their own. The railroad contends that this process for these facilities delays projects and imposes unnecessary expenses for consultant's fees.

The Alaska State Historic Preservation Office has submitted a memo on its efforts to prevent unreasonable burdens arising from the designation of the entire railroad. The SHPO asserts that they are trying to negotiate a programmatic agreement for activities that would not have an adverse effect on historic properties. For these activities, the SHPO would not require Section 106 special negotiations and agreements, but only annual reporting. Examples are siding extensions, bridge abutment repairs, construction of new tracks in existing yards, and construction of new set out tracks. They have also reached agreement with the railroad on replacement of 57 wooden bridges.

The Alaska SHPO also asserts that the railroad has not exercised its right to appeal the designation of the entire corridor to the keeper of the National Register.

The North Carolina DOT ("NCDOT") claims that the North Carolina SHPO sought to designate the entire corridor between Raleigh and the state line as a historical site, and that this required new historic protection processes for structures within the corridor which had already been evaluated. The new evaluations added 6 months and \$150,000 of added costs to the project schedule.

Legislative Issues

The National Trust for Historic Preservation argues that there are administrative remedies available to streamline processing of historically insignificant features of large historic sites, such as rail corridors. These include programmatic agreements such as the one described for Alaska SHPO above and administrative exemptions.

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If a decision is made to establish a legislative exemption for railroads from historic preservation protection, similar to the exemption for the Interstate Highway System, there are important subsidiary issues of the scope of the exemption.

The highway exemption provides that “the Interstate System shall not be considered to be an historic site” but that “individual elements” of the system may be. It is not clear what a similar exemption for railroads would cover. An exact parallel would seem to be to exempt the entire national rail system. This would not exempt the entire system of any single rail carrier. With respect to parts of the system that could receive protection, the highway provision allows the Secretary to protect “individual elements” of the system. This provision has been interpreted to allow designation of highway segments up to 150 miles in length. In rail cases, entire corridors have been deemed eligible for listing on the register. If the highway model is followed, the Secretary would be allowed to decide that a rail line of 150 miles should be protected, as the Secretary decided to protect 150 miles of the Pennsylvania Turnpike.

Another issue is whether the 2,300 rail facilities already listed on the National Register, which include 19 railroads and rail corridors, would continue to be protected.

x

WITNESSES

Mr. John M. Fowler
Executive Director
Advisory Council on Historic Preservation

Mr. Thomas E. Brooks
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Senior Vice President of Federal Relations
Rails-to-Trails Conservancy

HISTORIC PRESERVATION OF RAILROAD PROPERTY AND FACILITIES

Thursday, June 5, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS
MATERIALS,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:06 p.m., in Room 2167, Rayburn House Office Building, Hon. Corrine Brown [Chairman of the Subcommittee] presiding.

Ms. BROWN OF FLORIDA. Will the Railroad, Pipelines and Hazardous Material officially come to order.

The Subcommittee is meeting today to hear testimony on the historical preservation of railroad property and facilities. Today's hearing is in response to an amendment offered and withdrawn during Full Committee consideration of the Passenger Rail Investment and Improvement Act of 2008. The amendment would prevent Federal historical protection for an entire railroad line or corridor in response to a claim by the Alaskan Railroad and the North Carolina Department of Transportation that the historical protection process has led to costly delays in capital improvement with no benefits to historical preservation.

I believe the Committee goal should be to ensure that any action it takes respects the valuable process of protecting our Nation's heritage while ensuring a fair process to rail providers that allows them to adapt to future needs without undue costs and delays.

The testimony of the Advisory Council and the national trust points that there are administrative agreements to resolve the problems raised by both parties. This hearing has brought the problem raised by the Alaskan Railroad and the North Carolina to the attention of the Advisory Council. I think there is a willingness to resolve these concerns administratively, and I would encourage all of the parties involved to work toward an equitable solution to any possible disagreements that have arisen.

We must ensure that we are not looking for a solution to a problem that may not exist. Prior to this markup, the issue of historical preservation and its impact on the rail system have never raised with me or the Committee, and I haven't heard from any other rail providers facing similar problems. However, I look forward to learning more about the problems from the witnesses appearing today and pledge to work with my colleagues to ensure that the Alaskan Railroad and the State of North Carolina and all other rail providers are being treated fairly.

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I want to thank our panelists for agreeing to join us today, and I look forward to hearing your testimony.

Before I yield to Mr. Shuster, I ask that Members be given 14 days to revise and extend their remarks and to permit the submission of additional statements and materials by Members and witnesses without a statement by the preservation action. Without objection, so ordered.

I now yield to Mr. Shuster for his opening statement.

Mr. SHUSTER. Thank you, Madam Chairwoman, and I appreciate you holding this hearing today.

As you know, the amendment that I offered concerns historical designations of railroads. I have worked with Mr. Young from Alaska and Mr. Coble on this amendment. We began to hear complaints that historical designations were impeding some of the railroads' ability to maintain tracks in a safe manner.

We know that this issue is particularly important, as I mentioned, to Alaska and to North Carolina and, of course, potentially other rail lines around the country, and again, Mr. Coble and Mr. Young were very involved in crafting this amendment.

In Alaska there are attempts by State historic preservation officials to declare entire stretches of lines as historic. I am not talking about historical train stations, but actual track that trains run on. Even mundane projects have to be reviewed by the Historic Preservation Office, costing the railroad both time and money. If we go too far down this path of historic preservation bogging down necessary improvements and safety modifications with red tape, I believe we could be setting ourselves up for an historic accident. We had a similar situation regarding interstate highways, and we corrected this problem in SAFETEA-LU when we passed it a couple of years ago.

This amendment would give railroads exactly the same treatment as interstate highways for historical purposes and would exempt rail lines from historical designation. I'm open to suggestions as to how to craft this amendment to protect clearly historical stations and possibly bridges and tunnels, but I do not believe that entire mile-long stretches of active track should ever be considered historic.

The provisions will also benefit Amtrak freight and commuter lines.

From a policy standpoint, I think we need to give the Department of Transportation a role in ensuring the protection of rail facilities of true historic interest while at the same time ensuring that rail safety is not compromised. And I hope, Madam Chair, you will work with me on this important issue as we move forward with the Amtrak reauthorization bill. And with that, I yield back.

Ms. BROWN OF FLORIDA. Mr. Oberstar.

Mr. OBERSTAR. Thank you, Madam Chair, and I thank the witnesses for being here, Mr. Shuster for participating, and for the issues that were raised in the course of our markup.

We meet, in fact, pursuant to discussions held during the markup of the Amtrak authorization bill, discussions concerning statements that the Federal historic preservation process has led to costly delays in improvements in infrastructure for railroads, with little or no benefit for historic preservation. Those complaints came

from rail development interests in Alaska and in North Carolina, and the remedy proposed at the time was to limit historical preservation to very specific facilities, terminals, bridges, but not entire lines or corridors for railroads.

Well, we need to explore that issue in the course of today's hearing. Railroads certainly are deserving of historical preservation. They have been at the center of our development as a transcontinental economy, as transcontinental transportation. They are, along with the Interstate Highway System, at the very basis of our prowess, our economic prowess as a Nation.

Certainly one of the most vivid and dramatic examples of that significance of railroading in our history is the pounding of the golden spike that linked the Central Pacific and the Union Pacific and connected the United States coast to coast. It is the subject of many History Channel programs, which I delight in observing.

Many of our rail lines that cross through mountainous terrains are marvels of engineering. Rail stations are marvels and models of outstanding architectural achievement in engineering and construction achievement. But I also at the same time point out that it was the destruction of Pennsylvania Station in New York that was a major factor that led to the enactment of the National Historic Preservation Act of 1966. I remember that very well serving on the staff here.

I think we need to understand how the Federal historic preservation process works. Federal law does not absolutely prohibit Federal actions that permit the impairment of historic properties. Rather, Federal law requires that before the action occurs, there should be consideration of a range of actions to mitigate or to avoid the impact, consideration of alternatives that produce similar benefit without destroying historic properties.

Railroads are covered by a multiplicity of historic preservation laws; 2,300-plus rail properties are listed in the National Register. They are subject to those procedures. And additional rail properties are covered because when there is a proposed Federal action, there will be historic protection for sites that meet the criteria for listing those sites on the National Register. And even if the sites are not listed, there is an issue that comes up.

The rail properties that are covered in the register, and I have a complete list of these here, include bridges, tunnels and viaducts. There are 19 corridors or railroads that are listed now in the National Register. They may be listed for their historical significance as links between important cities. They may be listed for excellence in construction or for their scenic value, such as the Stone Arch Bridge in Minneapolis that goes from Nicollet Island and which James J. Hill, the founder of the Great Northern Railroad, insisted be built on an S curve so that the passengers on his freight train, as they went around the curve, could look back and have something to see of significance and beauty. And it was built with Mankato stone, which is a unique yellowish-colored stone that is very attractive and also very resistant and has survived all these—well, let's see. That was built in 1893, and it is still with us today. But it was on the National Register of Historic Places, so when the Great Northern Railroad became BNSF, and the BNSF decided they no longer needed to move freight through that area, that

bridge wasn't destroyed. It was protected, and it is today a bus, rail, pedestrian and bicycling link, and thousands of people come every year to lunch on Nicollet Island to walk the bridge, to see the beauty that railroad magnate James J. Hill created and that the Empire Builder railroad once traversed.

So we have Rails-to-Trails because we have been able to preserve corridors that once were rail facilities. And just on Sunday I did the Paul Bunyan Trail ride for our 10th year. That, too, was launched in 1893; 90 years later it was terminated. The freight rail service was terminated on that stretch, about 100 miles of rail. And Terry McGaughey, the midwife of the Paul Bunyan Trail, went up like a 20th-century Paul Revere asking the communities to band together to put up funds to preserve that right-of-way and convert it to a bicycle/pedestrian facility. And today we 650,000 users of the Paul Bunyan Trail. We did the 11th annual Ride with Jim bicycle event on the Paul Bunyan Trail. With my new cobalt hip, I did a 25-mile ride on the trail.

So today we are going to hear from interests, from the Advisory Council, the National Trust, but I want the Committee to pay attention to the administrative remedies available to deal with the problems raised.

Historic preservation may be required for individual facilities that in themselves may not be historically significant, but they are part of a corridor that is historically significant. And I know there are problems that were raised on behalf of Alaska and on behalf of North Carolina in our markup of the Amtrak bill. If there are problems with the processing that takes time to do these things, we can deal with the process. But I think that we can speed that process up as we did in SAFETEA-LU under the direction of the Chairman, then-Chairman Young.

A comparison has been made to the Interstate Highway System, and the Interstate Highway System is not 50 years old; the act is 50 years old. There were some interests in the course of our work on SAFETEA-LU said, oh, my goodness, the sky is falling, the interstate is 50 years old, it is going to be subject to historic preservation, and we won't be able to add or change interchanges, or add lanes or delete lanes or whatever. The interstate isn't 50 years old; one or two segments are, but it is an evolving program. And so the exception was for the entire interstate system as a law, as a structure.

So, use that panel, that pattern, for the rail program, well, then, I think there are some distinctions that need to be cited. And I think the request was for a much broader exception than was necessary to meet the needs. And I want to listen carefully to the concerns and to the obstacles and find ways that we can accomplish this without doing harm to the National Trust For Historic Preservation nor doing harm to railroads who need investment for expansion.

Madam Chair, thank you.

Ms. BROWN OF FLORIDA. Thank you.

The gentleman from Alaska.

Mr. YOUNG. Thank you, Madam Chairman.

I thank the Chairman for his comments.

We have a unique situation in Alaska. We have a railroad that is 50 years old and actually older. McKinley came up and drove the golden spike, and it is still the major means of transportation within the State of Alaska. And we are not asking to destroy any historical sites. In fact, a lot of the sites in Alaska already been identified and are protected under my amendment. But we are in the process of trying to replace approximately 50 bridges that need to be replaced, or we are going to lose lives.

We are in the process of straightening out the rail in areas which are extremely dangerous, because in the old days we didn't have the technology nor the equipment. And it is extremely important that this railroad still function on time because we can't do the work we need to do because we have different weather patterns, much like Minnesota, and we have to have the ability to do so. And we have a concern that there are those within the historical preservation group that will utilize this to imperil the ability for the Alaskan Railroad to operate. And that is the purpose of my amendment.

And I truly believe that we ought to expand it like we did in the highway bill to a point where there cannot be an impediment to improve the safety of passengers and freight that are utilizing the railroad. And as I mentioned before, the railroad has been very good under the leadership and the tutelage of the managers, the board itself, of protecting, but it would be very nearly impossible to go through some person under the present act itself on historical preservation who will say they haven't taken consideration the replacement of glass with the original type glass in a certain terminal. That would be, to me, an extension of not logic, but that does happen in our society.

So I am asking you, especially this Committee, to look at the railroad in total that it is declared historical, and it does happen, and the effect upon the economy of Alaska, the ability to move products, the ability to move military to and fro from our port, and the safety of those that ride the train.

And so I do think there is room here to work this out, but I don't want one law to take and impede another agency that is trying to do what they should do for the good of the State of Alaska and this Nation.

I originally intended to have just this Alaska in this program and not all railroads, but I think all railroads do have a problem. But I am not going to go that far if I can have some relief in Alaska for this railroad which is crucial to the economy of the State.

And so I do think there is some room here. I will listen to the testimony from these witnesses, and let's solve a problem that can be very damaging in the State of Alaska. And with that I yield back the balance.

Ms. BROWN OF FLORIDA. Thank you.

I would like to welcome and introduce today's panel. Our first witness is Mr. John Fowler, Executive Director of the Advisory Council of the Historic Preservation. Our second witness is Mr. Thomas Brooks, assistant vice president and project and chief engineer of the Alaska Railroad. The third is Patrick Simmons, director of the rail division of the North Carolina Department of Transportation. And our fourth witness is Ms. Elizabeth Merritt, deputy

general counsel for the National Trust for Historic Preservation. Fifth is Rodney Little, a director of the division of historic and cultural programs for the Maryland Historic Trust.

And our final witness is Mrs. Fowler, senior vice president of Federal relations of the Rail-to-Trail preservation action, has submitted testimony for the record. A copy of the testimony is available to each of the Members' folders.

Let me remind the witnesses, under our Committee rules oral statements must be limited to 5 minutes, but the entire statement will appear in the record. We will also allow the entire panel to testify before the questioning of the witness.

We are pleased to have you all here this afternoon, and I recognize Mr. Fowler for his testimony.

TESTIMONY OF JOHN M. FOWLER, EXECUTIVE DIRECTOR, ADVISORY COUNCIL ON HISTORIC PRESERVATION; THOMAS E. BROOKS, ASSISTANT VICE PRESIDENT FOR PROJECTS AND CHIEF ENGINEER, ALASKA RAILROAD; PATRICK B. SIMMONS, DIRECTOR, RAIL DIVISION, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. RODNEY LITTLE, DIRECTOR, DIVISION OF HISTORICAL AND CULTURAL PROGRAMS, MARYLAND HISTORICAL TRUST; ELIZABETH MERRITT, DEPUTY GENERAL COUNSEL, NATIONAL TRUST FOR HISTORIC PRESERVATION; AND MARIANNE WESLEY FOWLER, SENIOR VICE PRESIDENT OF FEDERAL RELATIONS, RAILS-TO-TRAILS CONSERVANCY

Mr. JOHN M. FOWLER. Thank you, Madam Chairman. It is a pleasure to be here on behalf of the Advisory Council on Historic Preservation. The Council is an independent Federal agency created by the National Historic Preservation Act to advise the President and the Congress and to oversee the section 106 process. It is made up of 23 Presidential appointees, Federal agency heads and leaders of preservation organizations. It includes the Secretary of Transportation in its membership.

Section 106 of the National Historic Preservation Act is the primary Federal protection for historic properties. It sets up a consultative process to evaluate the impacts of Federal activities on historic properties. It has limits. There has to be Federal involvement, and in the end the process is advisory. It can't stop a project.

Over 100,000 cases a year go through section 106 review. All but a few of these are resolved in an expeditious manner. The ACHP's regulations which implement section 106 also offer a variety of tools to deal with special needs. We use them regularly for cases like the one presented today.

The railroad industry's exemption request is not at all unprecedented. Several industries in the past have sought congressional action to avoid historic preservation reviews. In 1989, the National Aeronautics and Space Administration sought a legislative exemption from section 106 claiming that it placed an undue burden on their programs. The Congress rejected it and asked the Advisory Council to develop administrative remedies. The ACHP worked with the National Aeronautics and Space Administration to develop an agreement that still guides section 106 compliance for NASA.

In 2001, the pipeline industry sought a legislative exemption for historic pipelines, pipelines such as World War II's famous Big and Little Inch pipelines. The Congress again rejected the request, and the ACHP worked with the Federal Energy Regulatory Commission to complete an exemption created through the section 106 regulations.

In 2004, the telecommunications industry wanted a legislative exemption for cell tower construction. Congress again refused to grant such an exemption, and the ACHP worked with the Federal Communications Commission to develop a national agreement that streamlines section 106 reviews for cell towers.

And as has been noted, the Federal Highway Administration initially sought a legislative exemption for dealing with the Interstate Highway System, but working cooperatively with the ACHP they developed an administrative exemption that now covers the entire Interstate Highway System.

I think the message is consistent. After examining the issue, the Congress has regularly found that the basic law of section 106 is sound. There are adequate administrative tools that exist, and legislative exemptions are unnecessary. The ACHP is prepared to work with the rail industry, Federal agencies, and stakeholders to reach the same kind of successful conclusion to the present challenge without resort to legislative exemptions.

Thank you.

Ms. BROWN OF FLORIDA. Mr. Brooks.

Mr. BROOKS. Thank you, Chairman Brown, and Chairman Oberstar and Members of the Subcommittee, for holding this hearing and inviting me to speak here today on behalf of the Alaska Railroad.

I would like to thank Representative Shuster for offering the amendment at the markup and Representative Young for his leadership in bringing the issue to the attention of the Committee.

My name is Tom Brooks. I am assistant vice president of projects and chief engineer at the Alaska Railroad. Alaska Railroad has a 500-mile-long mainline running from the Ports of Seward, Whittier and Anchorage to the interior city of Fairbanks. We offer a full-year-round full passenger service and freight. The railroad carried over half a million passengers in 2007, and we have extensive freight operations in interstate commerce. Because of our service to five military bases, we have been designated by the Department of Defense as a Strategic Railroad.

The railroad was built and operated by the U.S. Government from 1914, and it was sold to the State of Alaska in 1985. And we are proud of our history, and we actively support historic preservation in numerous ways. These are detailed in the back of materials.

However, the effect of expansively applied historical laws and regulations imperils our ability to maintain our railroads safely and efficiently and compromises the operational business agility vital to our railroad's mission of stimulating State economic development. We support an amendment along the lines of the Shuster amendment that was offered and then withdrawn at the Full Committee markup pending this hearing.

I would like to start by sharing a current problem that illustrates our dilemma very well. We have a bridge at milepost 432.1 that is

160 foot long and spans a small creek at a remote location. Two separate independent historians determined this bridge has no historic merit on its own; however, it has been, in practical effect, declared historic by our State's Historic Preservation Officer, or SHPO, merely because it is part of the Alaska Railroad. This has triggered an extensive bureaucratic process that is meant to preserve and protect historic structures.

The foundation of this bridge is failing badly, and we want to replace it in 2008. We can't. We are currently passing around documents between the Alaska Railroad the Federal Transportation Administration, the National Park Service and the Alaska SHPO. We expect to obtain the required approval so the replacement can be completed in the fall of 2009. In the meantime we have got to get about 150,000 passengers, quite a bit of freight and military equipment across that bridge safely. We believe we can do this, but it is really expensive and very unnecessary. We would like to replace the bridge this season.

We submit that this is a misapplication of public process and squanders Federal resources and public funds. There is really no reason that we couldn't have replaced this bridge this year. The problem is created by overzealous attempts to identify the railroad as a single historic corridor, and this designation automatically triggers the historic protections for this mundane railroad feature, and it lacks historic merit on its own.

Bridge 432.1 represents the sixth time we have been through this process since 2002. It is expensive and delays our efforts to improve safety and efficiency and to serve our customers.

The Shuster amendment will ensure that the historic preservation standards continue to be applied to railroad features with historic merit in their own right, not because they are merely part of a railroad historic district. This amendment would provide the same relief to railroads that was afforded to the Interstate Highway System through SAFETEA-LU, and like the Interstate Highway System, railroads have been evolving since their inception and continue to do so. They have been constructed, expanded and upgraded to serve our national transportation needs. Their integrity depends on continuing maintenance and upgrades so they continue to operate and move passengers and freight efficiently.

The Alaska Railroad is a critical component of our State's transportation infrastructure and must continue its mission as an economic tool. Without the Shuster amendment there is immediate danger that our entire railroad corridor will in practical effect be treated as an historic district.

Safety improvements and routine maintenance and even mundane features such as bridge 432.1 are incurring undue delay and costs, and the problem will get even worse in the future if the railroad corridor is either officially declared a historic district or, as is currently the case, it is simply treated as if we are. While avenues exist to appeal historic determinations, they are made to bodies like the Advisory Council on Historic Preservation or the keeper of the National Register. These entities are firmly grounded in historic preservation and have a far different mission from running a safe transportation system.

In closing, we will gladly continue to support efforts to preserve Alaska's history and the history of Alaska's railroad, but we must also ensure safe operations. Through the Shuster amendment we will continue our historic preservation efforts, focusing them on truly deserving properties while moving ahead with our mission.

Thank you for opportunity to speak, and I will be happy to answer any questions.

Ms. BROWN OF FLORIDA. Mr. Simmons.

Mr. SIMMONS. Thank you, Chairwoman Brown, and Chairman Oberstar, and Ranking Member Shuster and distinguished Members of the Committee. My name is Patrick Simmons. I am director of the rail division with the North Carolina Department of Transportation.

NCDOT is blessed to have the full-service rail program. Our program is nationally recognized for our work with the intercity passenger rail service, and I am pleased to report that the ridership on the two State-sponsored trains is up 20 percent over the last several months.

Just yesterday Governor Easley announced that we will add another State-sponsored train as soon as it can be done in order to meet the growing demand. We are developing the federally designated Southeast High-Speed Rail Corridor, which we refer to as SEHSR. That will link the Northeast with the Southeastern States.

We administer our State's highway-railroad grade crossing safety program, and we are proud to have partnered with Norfolk Southern Railway and the Federal Railroad Administration to create something called the Sealed Corridor. Later this year USDOT will report to the Congress how the Sealed Corridor has saved lives at highway-railroad crossings.

We partner with Norfolk Southern, CSX Transportation and the North Carolina Railroad in an ongoing program of infrastructure investments that improve safety, add network capacity and reduce travel times. We partner with the FRA to operate a railroad industry safety inspection program. We partner with our railroad community to do economic development projects. We also partner with the Virginia Department of Rail and Public Transportation, and the Federal Highway Administration, and FRA and the community of some 50 State and local agencies to develop the design and environmental evaluation of SEHSR.

I am not here today to offend our historic preservation community, for I am very proud of our achievements in North Carolina to preserve historic train stations, equipment, and our contributions to the North Carolina Transportation Museum. Last year the National Trust recognized our body of work and honored us with the John Chafee Award for Excellence in Public Policy. I am here, however, to point out what I believe to be a significant impediment to our Nation's developing transportation policy: designation of railroad corridors as historic. My concern is that such a designation adds significant process, time and cost to project delivery. The prospect of such a designation also will constrain our ability as a State to work with the freight railroads to add capacity and improve safety.

We are at the beginning of a new era in public-private partnerships in our industry. Both parties wish to leverage funds from

each other to add sorely needed capacity and enhance mobility. Adding process and cost—and again, it impedes project delivery.

I note, Mr. Chairman, or Madam Chairwoman, that the railroads are largely privately owned, while the interstate network is a public asset. SAFETEA-LU included the exemption from designation for the Interstate Highway System. This provision effectively places rail at a competitive disadvantage. It also favors public investment in highways versus the developing public-private partnerships between States and railroads.

By not leveling the playing field, our program of infrastructure investment is further constrained from taking advantage of the enhanced economy, efficiency and productivity that the rail mode can offer. Already our Class 1 railroads are wary of governmental regulation, and rightfully so in this case. A requirement such as the historic designation that can apply broadly across their privately owned network will produce a setting that will make the task of entering into public-private partnerships all the more difficult.

Our State has had experience as well with the facilities. We have had some challenges there that we were able to negotiate and overcome and go forward with those projects in good spirit of working together. However, I believe that designating railroad corridors as separate and apart from the facilities and structures as historic adds significant time and cost to project development. It is an impediment to adding network capacity and enhancing safety. I believe it will hinder our ability to foster these public-private partnerships, and I am not sure that it adds materially to the body of knowledge and protects our historic resources. Therefore, I urge the Committee to reconsider the amendment offered by Congressman Shuster, and I thank you for the opportunity to be here today and will be pleased to respond to any questions.

Thank you, Madam Chairwoman.

Ms. BROWN OF FLORIDA. Thank you.

The bell—we are going to stand in recess for about 25 minutes. We have a series of votes, and we will be reconvening as soon as the votes are over. Thank you.

Will the Committee come back to order, please? And Ms. Merritt will get started, please.

Ms. MERRITT. Good afternoon, Chairwoman Brown and distinguished Members of the Committee. I am Elizabeth Merritt, Deputy General Counsel for National Trust for Historic Preservation.

Ms. BROWN OF FLORIDA. Excuse me. Could you please pull your mike up?

Ms. MERRITT. I appreciate the opportunity to testify before you today to share the National Trust's serious concerns about a proposed major exemption from Federal historic preservation laws. The National Trust was chartered by Congress more than a half century ago to lead the private historic preservation movement in the United States.

During the past 2-1/2 decades in which I have served as in-house counsel at the Trust, the Trust has worked tirelessly to implement and enforce section 106 of the National Historic Preservation Act and section 4(f) of the Department of Transportation Act, the laws from which the railroads are seeking a broad legislative exemption.

The Trust has served not only as a preservation advocate in the context of individual projects, but we have also been actively involved over the years in shaping regulations and programmatic agreements, and occasionally even legislation which is carefully designed to address complex implementation issues and special approaches tailored to specific agency needs.

We have described in our testimony, as has the Advisory Council, a number of examples in which these administrative solutions have been very successful in addressing precisely the kinds of concerns that the railroads have presented here. The examples provided by the railroads simply do not represent the kinds of issues that Congress should be dragged into resolving. We urge you not to get pulled into the weeds here. The Federal and State preservation agencies represented at this table have the expertise and the successful models to address and resolve these concerns without the need to do a hatchet job on our Federal historic preservation laws.

The centrality of America's historic railroad resources to our national heritage is well-documented and summarized in the testimony. Our rail corridors have reflected and defined the spirit of our Nation, its culture, history and economy. As a result, railroad preservation has been a longstanding priority in Federal law and policy.

We have provided for the record a list of all 2,486 railroad resources that are listed in the National Register. This is just a sample of all of the historic properties eligible for the National Register nationwide.

Federal historic preservation laws are designed to achieve a balance between preserving the integrity of our historic resources and providing for their efficient and responsible continued use. The fact that a rail corridor is still in use is not a reason for exempting it from consideration for preservation. On the contrary, when these corridors have legitimate historic significance, they deserve to be included within the scope of our Federal preservation laws.

Other active transportation facilities such as airports and historic parkways are managed in a way that respects their historic character and complies with Federal law. The railroads should live up to the same standard.

Of course, Federal preservation laws only apply when the railroads receive Federal funds or permits. In the absence of such Federal benefits, these preservation laws pose no barrier at all for the railroads to do whatever they want with their historic property, even destroying it. But it is not appropriate for private corporations or State agencies to use Federal taxpayer dollars to destroy historic resources without at least participating in the review process like other industries and agencies.

There is no showing that the railroads are unduly or disproportionately burdened by preservation laws that all other industries follow when they receive Federal funds and permits. The section 106 regulations include a number of flexible tools that could be used to address the railroad's concerns. Our testimony mentions three in particular.

The first is programmatic agreements which are often used to streamline or eliminate review from minor actions. For example, the North Carolina DOT recently signed a PA to streamline review

for minor transportation projects throughout the State. According to the North Carolina SHPO, well over 100 projects per year are reviewed under this PA and all have been resolved quickly and successfully. Why couldn't such a PA be developed for rail projects?

As another example, the Alaska Railroad has a PA in place that allows for the replacement of all of its 57 historic timber bridges, further evidence that section 106 is not an obstacle to necessary upgrades.

The second tool under section 106 is known as program comments, issued by the HCHP, which comment on an entire category of undertakings in lieu of individual reviews. These have been used extensively by the Defense Department to accomplish section 106 compliance for literally tens of thousands of historic properties.

The third tool is that the ACHP can exempt certain categories of undertakings from section 106. This is the model used for the interstate system. However, consultation is required with the ACHP to develop and craft such an approach to ensure that it doesn't sweep too broadly. And the DOT has not yet initiated such consultation. The devil is in the details. And it should be the ACHP and the DOT rather than Congress undertaking the complex task of attempting to define the scope of an exemption.

In addition to these administrative tools under section 106, section 4(f) also has streamlining mechanisms which have not been brought to bear here. This is important because section 4(f) is a more stringent law. First, section 6009 of SAFETEA-LU included a new exemption for de minimis impacts on historic properties and other resources protected by section 4(f). This was a carefully crafted, consensus-based amendment which the National Trust was actively involved in developing. We believe the de minimis exemption could be used to address many of the railroad's concerns regarding section 4(f). As far as we could tell, this has not been evaluated. In addition, FHWA has adopted detailed regulations and guidance and a number of programmatic section 4(f) evaluations which have also been used to streamline review under section 4(f). All of these tools should be fully evaluated before a legislative exemption is considered.

In conclusion, there are proven administrative tools available and we are confident that all of the railroad's concerns can be addressed through consultation using these administrative tools. We respectfully ask Congress for the opportunity to show that those administrative solutions can work. The National Trust stands ready and willing to participate in that process. Thank you.

Ms. BROWN OF FLORIDA. Mr. Little.

Mr. LITTLE. Thank you, Madam Chairwoman. My name is Rodney Little. I am a member of the National Conference of State Historic Preservation Officers and I currently serve as the State Historic Preservation Officer for the State of Maryland.

Madam Chairwoman, thank you and Ranking Member Shuster and Members of the Subcommittee for this opportunity to present our views of the National Conference of State Historic Preservation Officers.

I have served as the State Historic Preservation Officer for Maryland for almost 30 years. In that time we have dealt in Maryland with a great many types of historic properties. We have our share

of the signers of the Declaration of Independence, but we also have many sites that are in contemporary daily use and with high technological needs.

For example, the oldest airport in the United States is in the State of Maryland. It was started in 1909. It is in continuous use today. And it has been on the National Register since about 1980. We have several other airports that are on the National Register.

In the field of railroads, we deal every day with very historic railroad features. The first regular—the regular carrier passengers and freight in the United States, the B&O Railroad, started in Maryland and we deal with facilities of that railroad that date from the 1930s—or, I am sorry, the 1830s.

We have a very good working relationship with our transportation agencies regardless of modal form, and that certainly includes our rail authorities. I would note with pride that in the 30 years that I have been doing the work, while we have reviewed hundreds of railroad projects, including railroad projects and designated corridors, that there has never been a piece of litigation involving those railroad projects.

Ms. Merritt and Mr. Fowler before me mentioned that there are a number of administrative remedies that perhaps have not been fully investigated here. And I certainly can testify to that from the State of Maryland.

In Maryland we use what has been referred to as programmatic agreements or programmatic approaches. Let me cut through the bureaucratic jargon and talk a little bit about what those are. Over the years, the historic preservation review processes have evolved and are very effective in dealing with a wide variety and diversity of types of projects.

However, every agency has different planning processes. The planning process for highway is very different than the planning process for a railroad, is very different than the planning process for a housing development. What we do in our State is we try to take a programmatic approach to those kinds of problems as opposed to a project-by-project review. That has worked very well, and as far as I have been able to see in this case, that programmatic approach has not been applied to some of these problems that we are talking about.

In order for that to work, the State Historic Preservation Office has to be willing to enter into such programmatic approaches. It has to be willing to make compromises and trade-offs up front. And likewise, the State or Federal agencies on the other side need to be willing and capable of carrying out those kind of sophisticated programmatic approaches. They work.

In my long career I have, unfortunately, had to deal with quite a number of public projects that were subject to litigation on preservation issues. The first question that the courts always ask is, Are there administrative remedies that will take care of this issue? Have those administrative remedies been utilized? And have they been exhausted? Were this particular issue before the courts right now, I think they would send us all back to the drawing board and say, You have not exhausted the administrative remedies.

Thank you very much.

Ms. BROWN OF FLORIDA. Ms. Fowler.

Ms. WESLEY FOWLER. Madam Chair, Ms. Brown, Chairman Oberstar, Congressman Shuster, Congressman Young, other distinguished Committee Members, thank you for the privilege of addressing you today on this most important topic. I am Marianne Fowler, Senior Vice President of the Rails-to-Trails Conservancy.

Let me draw your attention to the wall monitors, and I invite you to focus on the pictorial representations of historic railroad features. They are, after all, what this hearing is about. Many of them have been preserved through the auspices of the National Historic Preservation Act. Let me assure you, I will not be offended if you divide your attention between these pictures of America's railroad heritage and my words.

RTC speaks today in opposition to any attempt to exempt railroad corridors and facilities from Federal historic preservation laws. Here is why: Congress has mandated that it is our, quote, national policy to preserve established railroad rights of way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy-efficient transportation use.

It is RTC's mission to aid in this process by identifying rail corridors that are not currently needed for rail transportation and work with communities to facilitate the conversion of these corridors into public trails and nonmotorized transportation corridors.

Congress has given us three tools with which to accomplish this goal.

First, the rail banking statute which allows for the transfer of a corridor on which a rail company no longer wants to conduct service to a willing trail manager. This process, however, depends upon not only the willingness of the interim trail manager, but also the willingness of the railroads. And the railroads are not always willing.

It is in this context in which section 106 provides a critical constraint to the ability of private railroads to dismantle historic transportation corridors. To carry out its section 106 obligations, the Surface Transportation Board imposes conditions that temporarily bar railroads seeking abandonment authorization from removing any historic bridges, features, other features that require railroads to engage in historic preservation consultation. These preservation conditions give public agencies and potential trail managers the time necessary to undertake the due diligence and reviews necessary to proceed with public land acquisitions, and ensures that important historic structures and features that will allow for trail use and enhance the trail experience are not removed until these consultations are complete.

It is the synergy between these two provisions of Federal law that have now given us over 15,000 miles of active, open, rail trail and have also given us many more miles of rail trail, rail corridor that is in project stage. And so we oppose this exemption.

Last night I had occasion to speak to the president of one of America's railroads. And he said to me, Marianne, you can't expect railroads to care, railroad companies to care about the history, about the history of the railroads. Their obligation is to care about the economics of their company and the functionality of the system. And I thought for a moment. And I responded to him, no, I do expect you to care. I expect you to care the very most because you

own our history, a history that so infuses the American sense of ourselves. It informs our literature. It informs our art. It informs our music. In some communities I am told it is even so much a part of that community that they have named their basketball team the Altoona Curves after a marvelous feat of railroad engineering that comes through the mountains and curves into Altoona. So gentlemen, I would ask you to rise to your higher responsibility of protecting our railroad heritage. Thank you very much.

Ms. BROWN OF FLORIDA. Thank you.

And I thank all of you for your testimony. We will start with Mr. Oberstar for questioning.

Mr. OBERSTAR. Thank you, Madam Chair. And I thank all the witnesses for their splendid testimony. I think that the frosting on the cake, the icing, if you will, is the show of railroad history captured in those slides. A wonderful representation. You finished with the project I started with in Minneapolis, the St. Anthony Falls Nicollet Island project.

I want to come to the Alaska Railroad issue. And I have a timeline. Chairman Young provided Member high-priority project designation for replacement of this bridge 432.1 in SAFETEA-LU bill. And the Alaska Railroad undertook engineering analyses in the summer of 2007, showed the bridges in need of replacement. And the railroad submitted all the environmental requirements under NEPA to Federal Transit Administration in January of this year. Right?

In March FTA determined the bridge was not eligible for National Register because it wasn't historic. In April the State SHPO, not the Federal Government, not an agency of the U.S. Government, not the Congress, your own State agency disagreed and determine the project would have an adverse effect because of the bridge association with the Alaska Railroad.

Then the Alaska Railroad began a process of showing that there is no feasible or prudent alternative to replacing the bridge. And it completed that work in April. And FTA and the Alaska Railroad submitted that information to the National Park Service under the 4(f) provision for review, and FTA is expected to get a response in July from the Department of Interior. Is that correct?

Mr. BROOKS. That is our best guess, yes.

Mr. OBERSTAR. That is not a horribly long process.

Mr. BROOKS. The problem we have is it causes us to meet the windows that we need for construction. We can't proceed with the project under Federal guidelines until all the approvals are in place. We basically have been unable to commit to ordering the steel for the bridge and nailing down some of those lead items.

Mr. OBERSTAR. But from March through July, to get a process completed, is not an undue burden. If you had started the process last summer, you would be under construction now.

Mr. BROOKS. Well, I think the process is a fairly long process. We did start last summer with the second evaluation of the bridge history.

Mr. OBERSTAR. That wasn't impeded by the historic preservation.

Mr. BROOKS. Well it is part of the historic preservation process. I mean, it takes a while to put all that together, use a historic—we were using a historical consultant to do it, so that we weren't

able to have a historic evaluation to put before the FTA until December. We put that before them in early February—or early January, excuse me.

Mr. OBERSTAR. Well, I really don't see the historic preservation provision—it caused the railroad to stop, take stock, make an assessment, evaluate the situation, go through a process that was beneficial for you, beneficial for the historic preservation process, and may well—I mean, there is the designation that there is no feasible prudent alternative. That is your own. Why do you need an exemption? Do you simply want not to go through a process at all?

Mr. BROOKS. I am sorry. The crux of the matter relates to whether it is prudent to do that. You know, it is always feasible to do something. If the Park Service were to determine that it is prudent to replace that bridge, we would have a very difficult time figuring out what to do with it. That process is very—you know, basically we are appealing what we do with our railroad to historians at the National Park Service.

Mr. OBERSTAR. Well, and last year, according to documents that I have requested, the Alaska State Historic Preservations Office and the Federal Railroad Administration and your railroad signed a memorandum of agreement for replacement of timber bridges in the corridor of the railroad. Fifty-seven bridges are included in the agreement. The railroad agreed to retain two of them. Is that correct?

Mr. BROOKS. That is correct.

Mr. OBERSTAR. Is that a burden on the railroad?

Mr. BROOKS. It is a minor burden on the railroad. We do have a programmatic agreement in place to govern our timber bridges. We have agreed that over a third of the bridges in our system are historic.

Mr. OBERSTAR. The agreement gives you an out, to the extent possible.

Mr. BROOKS. I think that is a pretty strong obligation from our point of view.

Mr. OBERSTAR. Mitigation measures include digitization of the documents, preparation of an annotated bibliography, creation of a timber bridge booklet. A lot of people consider timber bridges to be very significant structures, very important to our past and to our future.

Railroading evokes the most sympathetic response from any transportation activity—I don't find people getting fired up about highways, but I do find they fight over a railroad bridge, a covered bridge, a railroad station. About a third of the cities in my district have a caboose or one of those old cow catcher locomotives on display at the entrance to the city or as you depart from the city on the other end. These are historic parts of our history, of our past. If it takes just a couple of months, or 3 months or 4 months, to go through a process and evaluate it, I don't see how we are creating a burden for you.

Now, both Mr. Brooks, Mr. Simmons, are you opposed to having rail corridors designated in a historic preservation document?

Mr. SIMMONS. Yes, sir. And I draw the distinction between a corridor and the facilities. As we have carried out our responsibilities,

we have had many opportunities to work with historic facilities, historic structures, and to work through the issues that are relevant there. So we are okay there.

With respect to rail corridors, I note that the corridor listing provided to the Committee, the handout included in Ms. Merritt's testimony, most of those railroads are either tourism railroads or abandoned. And the issue I am trying to bring before the Committee is, as we develop private-public partnerships in this country to make investments that add capacity and safety to active main-line major railroads, that that is a distinction. Those railroads do need to function.

We honor our past in many different ways. But as we have these major transportation facilities, there will be a need to expand their capacity and to add—or to go down a pathway that adds this responsibility to the private sector and to the public sector in working with the private sector, will add process, will add cost. And, Mr. Chairman, it will make our task in the public arena all the more difficult.

Mr. OBERSTAR. Well, there is another responsibility, and that is to the public and to the past. And in the years 1850 to 1871, the Federal Government granted to the railroads 173 million acres of public lands. That at the time, and today, represented in the lower 48, 9 percent of the total land surface of the United States for the public use, convenience and necessity; and the right to own the minerals below the surface and the timber above the surface and to sell that land.

That was an enormous gift bestowed upon the railroads in the public interest to be managed by the private sector. And so now the public sector says, there is a historic value. We just want you to consider it.

If we were to accept the language of the amendment proposed by Mr. Shuster, taking the language from SAFETEA-LU, corridors can be protected under that language, and are protected: 150 miles of the Pennsylvania Turnpike under that language are protected; 60 miles of the Columbia, Oregon River Highway are protected; 30 miles of Alligator Alley in Florida are protected.

So I leave you there for the moment to think about that language. Thank you, Madam Chair.

Ms. BROWN OF FLORIDA. Mr. Shuster.

Mr. SHUSTER. Thank you, Madam Chairman. My question—well first, just in response to the Chairman, the railroads were deeded public lands in the 1850s through the 1870s. And I believe everything I have seen is that there has been a tremendous repayment to the public good and to the Federal Government by many various ways from shipping our troops for free on the rail system to—by the railroad putting those rail lines where they went through, the value of the Federal lands that were retained by the government increased in value, and then the government sold them or did various things. I don't know if we can continue to make that argument that there hasn't been a significant payback to the Federal Government, to America over the years. So I would make sure we put that on the record, and we need to consider that as we move forward with this.

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I don't think anybody is—and in the amendment, it does have protections for railroad stations and significant engineering structures. And my question to Mr. Fowler: Isn't it true section 106 of the process would remain in effect under my amendment? And doesn't that alleviate any of your concerns regarding protecting historic bridges, tunnels and stations?

Mr. JOHN M. FOWLER. As I understand your amendment, that is correct. It would not affect the application of section 106. The 4(f) process of the Department of Transportation Act is a very important historic preservation law in the Federal establishment. And we are supportive of retaining its protections as appropriate.

It is more inflexible than section 106 is, and I would certainly not advocate or support changing that without a very careful examination of what kind of flexibility does exist under the current law to meet the needs that the railroads are putting forward.

Mr. SHUSTER. I think the idea behind the amendment that myself and Mr. Young are putting forward is not to necessarily eliminate the ability to identify corridors, but to limit it and to make it so that it is not on a State-by-State or local-community-by-local-community. Allowing DOT to have that say is, I think, extremely important to the national transportation system and to the safety of that system.

Mr. SIMMONS, could you talk a little bit about more—or, more specifically, public-private partnerships being hindered? Can you speak—are there specifically things moving forward now or just over the horizon that you are concerned about that this may cause a significant problem?

Mr. SIMMONS. Yes, sir, Mr. Shuster. One of the challenges that we have taken up in our State is to develop a future high-speed rail network. Our role has been to bring forward the environmental documentation, the environmental and preliminary engineering, on a corridor that stretches today from Washington, D.C. through Richmond, Virginia, to Raleigh down to Charlotte, North Carolina. There are other legs of that corridor that extend south to Savannah to Atlanta, east to Hampton Roads.

For us to be able to actually construct on a date, sir, we will need an agreement with freight railroads; in this case, BCSX and Norfolk Southern as well as our own State-owned railroad, the North Carolina Railroad. And that is a challenging group to work with. They are very interested in their business interests, not to the exclusion of history, because each in their own way they celebrate that and work with that.

But to apply designation to the corridor today, we are on the cusp of the designation from Petersburg to Raleigh, and I don't know how far that would extend. And I don't know that I am in a position to provide assurance to our Class I railroads that it wouldn't extend further.

And I think that, while there may be a process in place, an appeals mechanism, it still makes the issue of bringing that to bear fruit, to actually be able to make the investments, to add capacity to those mainline railroads that provide for passengers and freight will be all the more challenging and all the more difficult. I will stop right there.

Mr. SHUSTER. And just one final point that I would like to make, just to point out here that the national historic landmark or the National Register, which the horseshoe curve is on, which of course is in my district, which the ball team, AA Baseball Team, is named after. Norfolk Southern has done a fantastic job of making sure that they have upkept and there has been a facility built there so that railroaders, railroad buffs from around the world, can come see it.

And as I have said, for as long as I know, the Norfolk Southern Railroad has done—and prior to that, Conrail did a great job on preserving that and making sure. And it is part of their mainline. So they have a vested interest in seeing that that part of their system is in good working order and a pleasant experience for all those who go to visit it.

And if the Chairwoman would indulge me for one last comment, today is the final hearing that we are going to be joined by John Brennan who is departing us. He is becoming senior counsel at the Union Pacific Railroad. And it is a loss for the Committee and a great pickup for the UP. And I know that his wife, Maureen, and his two sons, John and James, which I guess they are not departing yet, but they will be moving to Omaha shortly, and I just want to thank John for his knowledge, for his guidance, his support and especially his friendship over the past couple of months.

I became the Rail Subcommittee Chairman and knew something, but didn't have the kind of knowledge that John had. So he gave me a quick education on the nooks and crannies and the details of it. So he has been with the Committee 5 years, and he will be greatly missed. But I am sure we will be hearing from him from time to time when Union Pacific has issues that come before this Committee.

So John, again, thanks so much for your knowledge and your experience.

Mr. OBERSTAR. Would the gentleman yield?

Mr. SHUSTER. Yes.

Mr. OBERSTAR. I would like to join the gentleman, again, in complimenting John on his service to the Committee and his departure for new fields, but fields still within his area of expertise in railroading. He has a very keen understanding of the issues, an in-depth knowledge of railroad matters. And Union Pacific will benefit immensely. And he will join another former Committee staffer over there in the pursuit of the railroad's needs and in an operating capacity. And I compliment you on that. Thank you.

Mr. SHUSTER. And I want to say to the Chairwoman, thanks again for this hearing. I have to excuse myself. But I am going to leave it in the able hands of the former Chairman and someone who has a real interest in this situation. So I yield back to the Chairwoman.

Ms. BROWN OF FLORIDA. Mr. Young.

Mr. YOUNG. Thank you, Madam Chairman. Did I hear myself or did I hear someone else say that they would support the TEA-LU provisions for historical definition that is in the bill; is that correct? Did I hear that?

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Mr. OBERSTAR. If the gentleman would yield. I simply cited that the language of SAFETEA-LU on historic preservation gives the— provides the authority to protect corridors. So—

Mr. YOUNG. I think I am hearing correctly. I just have to talk to the gentleman a little later. I appreciate it.

Mr. OBERSTAR. Yes, please.

Mr. YOUNG. Again, Madam Chairman, my interest here is we have the only railroad in the State of Alaska. And there was no alternatives. We don't have a great highway system. It is the main carrier, and we want to improve it and upgrade it and make sure it is safe.

Now, my information is we have had three bridges identified totally unsafe; in fact, should not be used. One is in Indiana and the other one is I believe in Denali; is that correct? Where is the other one? There was three of them. And then the rest of them are under question, if I am not mistaken, of the 50 bridges.

Mr. Brooks, your testimony indicates that designating the Alaska Railroad a historic district adds significantly to project schedules and costs, and hinders safety and advancements and operational improvement. But protection of historic resources is important and is required by law. How do you propose that the amendment ensures the historic resource will continue to be protected that is being offered by Mr. Shuster and myself?

Mr. BROOKS. Well, what we propose is that historic resources, in and of their own right, that have historic value would be protected under the 106 process. The amendment essentially proposes that if there is an adverse effect on a historic resource, it wouldn't have to go through 106—or excuse me 4(f). In addition, the railroad corridor issue, you cast a pretty wide net when you talk about a railroad corridor and you end up bringing a lot of bridges and other infrastructure into play in the 106 process and the 4(f) process that really have little or no historic merit.

Mr. YOUNG. The other thing is, Madam Chairman, this is one of the things that has concerned me. Let's say the railroad, you know, North Carolina or wherever it may be, and you go through this process and the SHPO or one of the historical groups says no. Who do you appeal to?

Mr. BROOKS. Actually, I don't know for sure. I know that our appeal processes have always ended up in the hands of historians, either at the Park Service or our SHPO—

Mr. YOUNG. So you really don't have an appeal to an outside source to say, this is meritorious or is not meritorious?

Mr. BROOKS. Not normally, no.

Mr. YOUNG. The second thing is, it appears to me—and the Chairman's question was—it seems to me the Alaskan SHPO just causes more problems than the national definition. Are they living off of the national definition? Or are they doing this on their own?

Mr. BROOKS. Well, I think the standards under the national historic preservation effort are being expanded widely and applied much more vigorously. For example, although we have had Federal funding for a number of years, we didn't have any need to exercise the 4(f) process before 2002. Since then we have been through it six times. And talking to the timber bridge MOU, which covers the 106 process, you can only have an MOU in place there. Whenever

we do impact the timber bridge adversely, we do have to then follow it up with the 4(f) process. So we are still not out of that for whatever structures we have.

Mr. YOUNG. Madam Chair, I am a little concerned here because we have an individual on the SHPO board that—we have another historical barrier in the State that is being proposed to be adversely affected. And it would seem to me that there was an indication that there had been some transfer of dollars into the State program. There may be not as much of an objection. That goes back to my—there should be, somewhere along the line, people have a right to appeal outside of those interested in that issue. See, I want to believe in protecting historical things. But when I have a railroad that has to move all my troops and move my gravel and move my fossil fuels and move my food and move everything, the only real form of rail transportation, I don't want to see another agency within the Federal Government has been codified by the Congress to say, oh, no, you can't do that, but maybe we will help you out.

I don't think that is fair. I think there ought to be a way that there is an outside source to say, all right, this really is not going to hurt the historical aspects of it. It is not going to change the railroad adversely, historically, and maybe we ought to go forth with it. I don't see who they appeal to.

I am going to ask my counsel to look into this because I think that is crucially important in this process, that we know that there is somebody who could make that decision outside of historians. Why should the historians, when you want to do something, have the right to say no and stop the process of your rail from running? That is the thing I don't quite understand.

Any one of the historians want to comment on that? Mr. Fowler, can you do that?

Mr. JOHN M. FOWLER. No, sir.

Mr. YOUNG. You can't do that. You have not done that and no one else has done it.

Mr. JOHN M. FOWLER. If I am reading your question correctly, the question of what is or is not historic is a decision that is made by the people that have the authority and the responsibility and the expertise to determine historic significance. So in the section 106 process, it is the State Historic Preservation Officer and then the keeper of the National Register.

Mr. YOUNG. May I interrupt? Having said that, we want to make an improvement. We want to replace a bridge, and that State Historical Officer says, no, you can't do it. Where does the railroad go?

Mr. JOHN M. FOWLER. First of all, the State Historical Officer cannot say no, you cannot replace the bridge. Under section 106 if the State Historic Preservation Officer says this property is eligible for the National Register, that then requires the Federal agency that is providing the money—if the railroad is doing it, but with its own funds, there is no—there is no Federal law involved. There is no application of section 106 because there has to be some Federal permission or Federal assistance.

Mr. YOUNG. But again, going back to the Alaska Railroad—Madam Chair, my time has run out. Alaska Railroad is difficult to change that, because it was a Federal railroad, but it still was transferred to the State.

Mr. JOHN M. FOWLER. Correct.

Mr. YOUNG. Now, who has the responsibility? Because there were Federal dollars involved, so that puts it under the jurisdiction of historical definition. And it goes back to, again, Mr. Brooks wants to put a bridge in. The State historical or the the Federal historical people say no. What recourse do they have?

Mr. JOHN M. FOWLER. Well, again, as I understand it, the current Federal interest in the Alaska Railroad is only if the Federal Transit Administration or the Federal Railroad Administration provides funding, or if perhaps they need a Corps of Engineers' permit in order to replace a bridge.

Mr. YOUNG. See, then they are covered, because they are the Corps of Engineers. That means they are under the Federal jurisdiction. And Mr. Brooks's railroad can't build a bridge if you say no.

Mr. JOHN M. FOWLER. Well, no, because the Corps of Engineers has to consider the impact of giving the permit on the historic property. But in the end, the Corps of Engineers can say, it is more important to give this permit to replace the bridge, and there is nobody—the Advisory Council, the State Historic Preservation Officer, the Secretary of Interior, or the National Park Service, no one can say no to that. That is a decision of the Corps of Engineers.

Mr. YOUNG. Now we go through this process and we have a building season in Alaska of 90 days. We are set off more than 90 days. The Chairman brought this up. We are set off a year, and the train bridge collapses. Who has a responsibility? Is it Mr. Brooks, Alaska Railroad, Historical Society, Corps of Engineers? Who has the responsibility for the 150 people at the bottom of that canyon because the bridge wasn't fixed because it could possibly be historical? Who is responsible?

Mr. JOHN M. FOWLER. I don't quite feel equipped to answer that question, sir.

Mr. YOUNG. Well, you mean you are not responsible, then, and you held it up.

Mr. JOHN M. FOWLER. No, because——

Mr. YOUNG. Or SHPO held it up.

Mr. JOHN M. FOWLER. First of all, I would suggest if one spends all their time debating whether or not the property is significant, that that often is the major reason that the process is protracted.

Mr. YOUNG. We don't disagree with the idea of it being historical. We disagree with the ability not to improve it so it is safe. That is all we are trying to do. My wife just walked in and told me to be quiet. So go right ahead.

Mr. JOHN M. FOWLER. The process, sir, can work efficiently if people sit down and say, okay, this is a historic property, and now let's see what we can do with it. And the Federal agency that is funding or approving the project is in control of the time. If the Federal agency says we don't want to talk anymore about this, the SHPO is being obstructionist, they can terminate the process, they can get advisory comments from the Council, and then they can go forward and approve the project.

Mr. YOUNG. That is a dream world. If one person, one individual in SHPO says no, the railroad cannot fix that bridge. And that is what we are trying to address in my amendment. You know that.

That is exactly what we are trying to do. It is what we did in the highway bill. We are going to try to apply that, because if we don't do it, then you have impeded the process of safety, ability to expand the railroad. Not destroying historical things. And that is not you personally. But just keep in mind, our goal is to make sure the railroad runs right, and on time. Yield back.

Ms. BROWN OF FLORIDA. Thank you. Mr. Fowler—and I guess anyone who wants to answer this question—over the next 10 years, there is going to be a large increase in freight rail, shipment, passenger. How do you suggest we balance preserving our national heritage and preparing the future needs of this Nation?

Mr. JOHN M. FOWLER. Well, Madam Chairman, we have already started to address that in case-by-case situations with regard to lines that require tunnel enlargement for clearances for modern freight equipment and so on. I would suggest that the Federal agencies that are responsible for funding and overseeing this, the Federal Rail Administration, the Federal Transit Administration, work with the Advisory council, the National Conference of State Historic Preservation Officers and the railroad industry and deal with this in a programmatic way, much the way we have dealt with the Interstate Highway System.

We are concerned as much as anybody else is in having an efficient transportation system and we don't want preservation to be an impediment to that.

Ms. BROWN OF FLORIDA. You did not answer Mr. Young's question, or I didn't understand the answer to the question. He is indicating that what procedure is in place when one person is blocking—I mean to me, safety is number one.

So the question is, what procedure is in place? If you have a facility that is structurally, physically, not safe and you are running trains on it, and then you have a process that is holding up the construction—you know, I know that on another Committee I am on, VA, we can completely fund a facility, and it takes the private sector 16 months to build it, and it would take us 5 years because of the different agencies.

How can we have a one-stop process to expedite the time? I guess that is what we are asking here.

Mr. JOHN M. FOWLER. All right. Well, first, in emergency situations there are exemptions from section 106 in order to meet an emergency situation, such as the imminent threat to safety for a bridge that is substandard. But as I was saying, under the section 106 process, the Federal agency—and there has to be a Federal agency involved—if it is a funding agency, such as FTA in the situations that I understand, they are in complete control of the process. They can say—the SHPO's role is purely advisory. The SHPO says it is historic, and the FTA says it is not. The FTA can move forward based on that.

If the SHPO says, I don't want you to tear the bridge down and the FTA says, we don't agree with you, they can terminate this consultative process. They can get advisory comments from my agency that have to be delivered within 45 days of a request. And then it is up to the Secretary of Transportation to decide what to do with it. And the Secretary can say, rail safety is more important. It would be nice to save this bridge, but we are not going to

do it. It. Thank you very much, ACHP, for your comments. We are moving forward.

Ms. BROWN OF FLORIDA. Mr. Little, you want to comment on that, the question?

Mr. LITTLE. I am sorry.

Ms. BROWN OF FLORIDA. Did you hear the question?

Mr. LITTLE. No, I did not, ma'am.

Ms. BROWN OF FLORIDA. Did you hear my question?

Mr. LITTLE. No, I did not.

Ms. BROWN OF FLORIDA. Okay. What I said was, over the next 10 years it is going to be a real conflict between the passenger rail and freight rail as far as the increase in ridership. And how do we balance the two, preserving historic and moving the system forward?

Mr. LITTLE. The best solution to that in my opinion is the one that we have used in my State and around the country for several decades. And that is the administrative programmatic approach. Under the programmatic approach, you try to avoid project-by-project review and instead look at entire programs. Those entire programs may involve large geographic areas, like a corridor, or they may involve multiple projects that are highly repetitive and highly predictable in terms of what the nature of the project is and what the nature of the solution to the historic preservation problems are.

What that programmatic approach does is to essentially allow the railroad agency and railroads in this case to self-monitor and carry out the preservation planning processes itself. Now, they have got to do it according to decent standards. But the agency, the railroad agency does the work itself and only comes to the State Historic Preservation Officer or the Advisory Council and historic preservation for problems that cannot be resolved in accordance with an agreement.

Those agreements—in my State we probably have right now 50 such programmatic agreements with things from our housing agency to our transportation agency. They work. But the agency implementing them has to take the process seriously and has to own the preservation planning process. We don't want to be the preservation police. We don't have the time or the money to look over agencies' shoulders. And if we can get them to do it themselves, that is what we want.

Ms. BROWN OF FLORIDA. Ms. Fowler, what impact would the Shuster amendment have on the Rail-to-Trails program? It is a very popular program in my State of Florida.

Ms. WESLEY FOWLER. I think the impact would be that because of the way railroads under Federal law are allowed to abandon corridors, they can move corridors through—they can put a system diagram map and say they plan to abandon it 2 years into it or what have you, or they can discontinue service on it and not provide any service and then abandon in a 30-day period, seeking what they call an exemption.

And our way of slowing down that process enough so that public agencies have an opportunity to put together funding packages, build community support, turn to Congress or their states for TE money, whatever, it prevents the dismantling of those key features.

We talk about a trestle as if it were just a historic preservation facility. It is also the way you get from one part of the corridor to another part of the corridor. The tunnel is how you get from one part of the corridor to the other part of the corridor. If those facilities fall into disrepair or are allowed to be dismantled, if that stone, for instance, on the Stone Arch Bridge was allowed to be sold off to private sector because the railroad owned it and so they had a good market for it, those features, you can't separate the facilities on the corridor from the corridor itself. They are a part of the corridor. So you need to keep them intact long enough for public agencies to make a decision as to whether they want to acquire that corridor or not.

Ms. BROWN OF FLORIDA. Is this a coincidence about the two Fowlers here today?

Ms. WESLEY FOWLER. Well, we are not sure.

Ms. BROWN OF FLORIDA. Okay. I am going to have to check with the staff on this one.

Mr. Brooks and Mr. Fowler, would you all be willing to sit down and discuss how we can solve this problem before this bill comes to the floor?

Mr. JOHN M. FOWLER. On behalf of the ACHP, we would be delighted to, Madam Chairman.

Ms. BROWN OF FLORIDA. How about you, Mr. Brooks?

Mr. BROOKS. Yes, we are very interested in getting the problem solved, but we also feel like we have an immediate issue.

Ms. BROWN OF FLORIDA. Mr. Young. Did he leave? Mr. Oberstar.

Mr. OBERSTAR. I didn't understand the last part of your response to Ms. Brown, Mr. Brooks. You said we would, but—what?

Mr. BROOKS. We feel like we have an immediate issue. We do have a number of bridges that are out there in need of replacement. And although we have an agreement on timber bridges for the 106 process, we do not have anything in place for 4(f), and that is an impediment to our work.

Mr. OBERSTAR. Well, whether you want to sit down and talk about a solution or not is up to you. But the Alaska Railroad can ask the keeper of the National Register to determine whether or not the railroad is, in fact, historic. And the railroad has not asked for this determination as far as I have been able to determine. So are you aware of that authority?

Mr. BROOKS. Yeah. We are aware that we can ask the keeper if the railroad is a historic entity. There is a process involved. The de facto position of our SHPO is that we are historic, and that is the way we have been treated. When we got to the example today of bridge 432.1, we had the opportunity to pursue that. Assuming the determination of adverse effect would have been upheld, we would have had to pursue section 4(f) anyway, so because we need to repair our bridge, we simply went directly to 4(f).

Mr. OBERSTAR. Well, you are really not answering the question whether you want to talk further, so you have got an immediate problem; but your immediate problem is about to be resolved one way or another. I can't imagine that the Interior Department will reject the claim of no feasible prudent alternative, as your filing proposes, to replacing the bridge. And you will be able to go ahead

with it. So it is up to you whether you want to sit down and talk about things and specifics.

But let me—there are appeals. There are opportunities. And, Ms. Merritt, I would like you to expand upon that. There is a claim on the part of the Alaska Railroad, and implicitly by North Carolina, that there is no appeal from the decision of one person. But there is an appeal process throughout the whole historic preservation. Describe this for us.

Ms. MERRITT. To elaborate on what Mr. Fowler said, when the question is whether a resource is eligible for the National Register of Historic Places, there is an appeal to the keeper of the National Register in the National Park Service. When the question is whether the bridge should be replaced under section 4(f), the final decision belongs to the Federal agency in the Transportation Department, Federal Transit Administration, or Federal Railroad Administration, whoever is providing the funding. And the fact that a resource is determined eligible for the National Register does not determine whether it can be replaced or altered.

As Mr. Fowler said, that just requires consideration of alternatives but it doesn't prohibit replacement or alteration. And the programmatic agreement for replacing the 57 timber bridges on the Alaska Railroad is a perfect example of that, of how section 106, even when resources are determined to be historic, does allow for upgrades and needed improvements.

Mr. OBERSTAR. Mr. Brooks, do you disagree with that?

Mr. BROOKS. No.

Mr. OBERSTAR. Mr. Simmons?

Mr. SIMMONS. Mr. Chairman, I do not agree that there is process. There is, in fact, process.

My point is, as applied to a corridor as opposed to a distinct resource, such as a bridge or a facility or a structure, that that then can readily—in our case, it transcends two States. I think that because our corridor transcends six or seven States as it goes from Washington to across the South and Southeast, that we are on the cusp of a Federal issue. It is one that goes beyond the issue of whether the State Department or Transportation is in conversation and working hand in glove with the State SHPO office. I think we are, and we have demonstrated that.

But when you look at the broader application of this, that is the challenge that I foresee and would appreciate some guidance and facility to make that happen so we can construct—

Mr. OBERSTAR. I gather from your statement, not from Mr. Brooks, you are not opposed to—in principle—to having portions or specific items, aspects, facilities considered historic. You are concerned about the process you have to go through that takes so long to get there. Is that largely right?

Mr. SIMMONS. That is very close, Mr. Chairman. I will make the distinction. I will use the example that we have between Raleigh and Petersburg or Raleigh and Richmond where we are doing work today. We are studying, analyzing a corridor that is about 1,000 feet wide. We have identified every structure in it, we have documented all of that. In addition to that, we have been asked to document and we have documented the corridor.

But it is the corridor aspect that I find most challenging, and I think potentially could be an additional difficulty for us to ever build something.

Mr. OBERSTAR. In the current law, and then-Chairman Young and I spent a great deal of time on this—and, particularly, I undertook to negotiate over a period of 6 or 7 months with all the various parties on project streamlining to simplify the process. And one of these was with respect to historic sites. And the language of the current law says quote, with respect to historic sites, the Secretary may make—Secretary of Transportation may make a finding of de minimis impact.

I think this is very important for your purposes. Only if the Secretary has determined, in accordance with the consultation process required under the National Historic Preservation Act, that the transportation program or project will have no adverse effect on the historic site, or there will be no historic properties affected by the program or project.

The finding of the Secretary has received written concurrence from the applicable State Historic Preservation Office or Tribal Historic Preservation Officer, et cetera, et cetera, participating, and the finding of the Secretary has been developed in consultation with parties consulting as part of the process. That is current law. Do you have a problem with that?

Mr. SIMMONS. No, sir.

Mr. OBERSTAR. Mr. Brooks?

Mr. BROOKS. Could you put the first part of that question together again?

Mr. OBERSTAR. The first part of the question is, I read all the current language of the law. And the question is, do you have a problem with applying current law to your current project?

Mr. BROOKS. And I am sorry. Could you read the first couple of lines again, please?

Mr. OBERSTAR. Oh, my goodness. It is a long section here. The Secretary may make a finding of de minimis impact if the Secretary has determined, in accordance with the consultation process required under the National Historic Preservation Act, that the transportation program or project will have no adverse on the historic site, or there will be no historic properties affected by the transportation program or project.

Mr. BROOKS. The problem we have with that is the effect of the Historic District gathers in features of the railroad, bridges, tunnels, buildings that wouldn't—that have no historic merit on their own. Their merit is because they are part of the Alaska Railroad Historic District. The de minimis finding, if we do something that impacts one of those contributing elements, then there is a finding of adverse effect, and it does trigger the 4(f) process.

Mr. BROOKS. That is the problem that we have.

Mr. OBERSTAR. We are not going to overturn current law, I will tell you that. We are not going to go back and rewrite the Federal Highway Act. So you need to find something that speeds up; sit down and talk to each other, talk to us, talk to Mr. Fowler, talk to Ms. Merritt and find something that speeds up this process, and do it fast because we are going to bring this bill to the House floor next week.

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Mr. BROOKS. We would be happy to do that.

Mr. YOUNG. Mr. Chairman.

Mr. OBERSTAR. I yield to the gentleman.

Mr. YOUNG. I think we are on the right road here, and hopefully you and I will be able to sit down with the Chairman, Madam Chairman, because you brought up a good point about where we are going to be. And it appears to me that SHPOs caused us the most problems, and they are nicely recognized. It is a State person that has been the biggest challenge. And somehow we have to work around that so that we can upgrade the railroad wherever we possibly can for safety purposes, because it will expand if we are allowed to do that, because I think we would be doing a disservice.

My amendment is very simple, as you know. All it does is adopt the highway safety bill is all it does, and the TEA-LU bill. It doesn't add anything else to it. And I want to make sure that we do protect the historical sites, but when it comes to a wooden bridge that is not safe, that goes back to—and has been decided that not by the railroad, by other people, and we have got to go through the Corps, and we have got to go through da, da, da, and I have one accident, I again ask the question, who is liable? Are we liable because we didn't do something? Is Mr. Fowler liable? Mr. Brooks? I can tell you there is going to be a lawyer making sure someone pays.

Mr. OBERSTAR. We don't want to let it go to that.

Mr. YOUNG. We don't want it to go there, so I am going to make the suggestion that the three of us sit down and see if we can't arrive at a solution to make sure the railroads have the ability to keep growing and protect the historical sites. That is our main goal. And we can do that if we do it. And I have worked with the Chairman and the Chairman of the Full Committee and the Chairman of the Subcommittee for the last 6 years, and I think we can solve this problem.

I yield back.

Mr. OBERSTAR. I think that we are on the right course here, and I know that preservation groups are concerned about getting the Secretary of Transportation to be the final authority on this matter. But we do have existing law, and we do have language that was thrashed out at great length and with great effort and in great good will on both sides. So let's see if we can work out something between now and Monday morning. Monday noon is when we have to file whatever documents you have to file with the Rules Committee in order to bring the bill to the floor. So you talk, we will talk, and we will get this done.

Madam Chair, thank you.

Ms. BROWN OF FLORIDA. Yes, sir. Let us add into this discussion Mr. Brooks, Mr. Fowler, Mr. Simmons and whoever else need to be in the room. My recommendation, go in the room, lock the door and don't come out. Failure is not an option, and we will all be happy if we can move forward and we can just work it out and not have to have a problem on the bill on Monday when it is time to file our bill.

I hope I have the commitment of all the parties that we are going to work it out, and we want to make Mr. Young happy and Mr. Oberstar; then I will automatically be happy.

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I want to thank the witnesses for their testimony and the Members for their questions. Again, the Members of this Subcommittee may have additional questions for the witnesses, and we ask you to respond to these in writing. The hearing record will be held open for 14 days for Members wishing to make additional statements or to ask further questions.

Unless there is further business, this Subcommittee is adjourned. Thank you, very much. Thank you.

[Whereupon, at 4:50 p.m., the Subcommittee was adjourned.]

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**Statement of the Honorable Corrine Brown, Chairwoman
Subcommittee on Railroads, Pipelines, and Hazardous Materials
Hearing on the Historical Preservation of Railroads Property and Facilities
June 5, 2008**

The Subcommittee on Railroads, Pipelines, and Hazardous Materials will come to order.

The Subcommittee is meeting today to hear testimony on the Historical Preservation of Railroad Property and Facilities.

Today's hearing is in response to an amendment offered and withdrawn during Full Committee consideration of the Passenger Rail Investment and Improvement Act of 2008. The amendment would prevent Federal historical protection for an entire railroad line or corridor in response to claims by the Alaska Railroad and the North

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Carolina Department of Transportation that the historical protection process has led to costly delays in capital improvements with no benefits to historical preservation.

I believe the committee's goal should be to ensure that any action it takes respects the valuable process of protecting our Nations heritage while ensuring a fair process to rail providers that allows them to adapt to future needs without undue costs and delays.

The testimony of the Advisory Council and the National Trust points out that there are administrative remedies to resolve the problems raised by both parties. This hearing has brought the problems raised by the Alaska Railroad and

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North Carolina to the attention of the Advisory Council. I think there is a willingness to resolve these concerns administratively, and I would encourage all the parties involved to work towards an equitable solution to any policy disagreements that are raised.

We must ensure that we are not looking for a solution to a problem that may not exist. Prior to the markup, the issue of historical preservation and its impact on the rail system was never raised with me or the committee, and we haven't heard from other rail providers facing similar problems.

However, I look forward to learning more about these problems from the witnesses appearing

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today, and pledge to work with my colleagues to ensure that the Alaska Railroad, the state of North Carolina and all other rail providers are being treated fairly.

I want to thank our panelists for agreeing to join us today. I look forward to hearing your testimony.

Before I yield to Mr. Shuster, I ask that Members be given 14 days to revise and extend their remarks and to permit the submission of additional statements and materials by Members and witnesses, including a statement by the Preservation Action.

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Without objection, so ordered. I now yield to
Mr. Shuster for his opening statement.

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Statement by Congressman Jerry F. Costello
Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines, and Hazardous Materials
Hearing on the Historic Preservation of Railroads and Facilities
June 5, 2008

Thank you, Madame Chairwoman, for calling this hearing on historic preservation of railroads and facilities. I would like to welcome today's witnesses.

Historic Preservation designations are important to preserving significant historical events or lives of historically significant people. Currently, the National Register indicates that roughly 2300 rail facilities are listed on the Register, many in my home state of Illinois. That number could grow – however, there is no way to determine how many additional facilities would be protected unless there was a proposed Federal action affecting the facility.

I understand changes were made in SAFETEA-LU to include special provisions governing how the Interstate Highway System would be handled in historic preservation designations and now others wish to do something similar for railroads and facilities. I am interested in learning more about the

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legislative changes being proposed by our witnesses and the possible affects of such action.

Again, I look forward to the testimony of today's witnesses.

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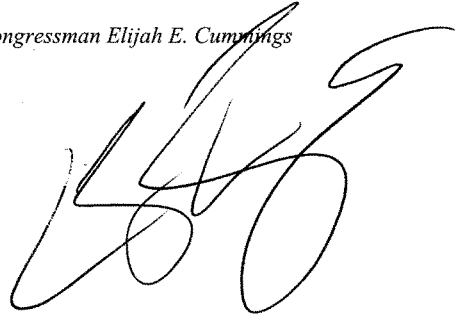
**COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE
Subcommittee on Railroads**

“Historic Preservation of Railroads and Facilities”

**June 5, 2008 – 2:00 p.m.
Room 2167, Rayburn House Office Building**

Opening Statement of Congressman Elijah E. Cummings

Madam Chair:



I thank you for calling today’s hearing to enable us to
examine the historic preservation of railroad infrastructure.

I believe that it is imperative that Congress approach the
issues before it by seeking balance – and the need for
balance applies very aptly to the issue we are considering
today.

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A unique balancing act must be performed to ensure adequate preservation of historic railroad properties while not impeding the ability of railroads that are still active and growing transportation systems to upgrade and modernize infrastructure as needed.

Of particular concern is ensuring that when entire rail corridors are designated as “historic,” such designation is broad enough to ensure that the unique structures and features of the corridor are preserved without imposing undue financial burdens and time constraints on corridor operators – particularly for portions of the corridor that are not necessarily historic sites.

I look forward to the testimony of all of the witnesses before us today – and particularly that of Mr. J. Rodney

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Little, the Historic Preservation Officer for my State of Maryland, who will be testifying on behalf of the National Conference of State Historic Preservation Officers.

The State of Maryland – and the 7th Congressional District, which it is my honor to represent – are home to some of the oldest railroad infrastructure in the nation.

The Port of Baltimore was the eastern terminus of the B&O Railroad – which was chartered by the State of Maryland in 1827 and became the first common carrier railroad in the United States.

The oldest railroad station still in existence in the United States, the B&O station in Ellicott City, Maryland, is also located in the 7th District.

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The railroad has played a critical role in the development of Baltimore, the State of Maryland, and indeed the entire United States – and its unique structures, such as the thousands of depots that were once the gateways to towns across the country – are immediately recognizable features of our distinctive American landscape.

However, we must ensure that as we preserve infrastructure, we also create space to allow the modernization of infrastructure still in-use. I believe that if all parties keep an eye toward the balance of which I spoke earlier, these are mutually compatible and achievable goals.

Thank you – and I yield back.

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**Testimony of Mr. Thomas E. Brooks
Assistant Vice President for Projects and Chief Engineer
Alaska Railroad Corporation
327 West Ship Creek Avenue
Anchorage, Alaska 99501
(907) 265-2456**

**Before the House Subcommittee on Railroads, Pipelines and
Hazardous Materials
House Transportation & Infrastructure Committee
2167 House Rayburn Building**

**Hearing:
Historic Preservation of Railroad Property and Facilities**

**June 5, 2008
2:00 pm**

Testimony of Thomas E. Brooks
Alaska Railroad Corporation

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Statement of Mr. Thomas E. Brooks
Assistant Vice President for Projects and Chief Engineer, Alaska Railroad
Subcommittee on Railroads, Pipelines and Hazardous Materials
U.S. House Transportation & Infrastructure Committee
June 5, 2008

Thank you Chairman Brown, Chairman Oberstar, and members of the subcommittee for holding this hearing and inviting me speak with you today on behalf of the Alaska Railroad Corporation. I also would like to thank Rep. Shuster for offering the amendment at the markup, and Rep. Young for his leadership on bringing the issue to the attention of the committee.

My name is Tom Brooks, and I am Assistant Vice President of Projects and Chief Engineer at the Alaska Railroad. The Alaska Railroad has a 500-mile-long mainline running from the ports of Seward, Whittier and Anchorage to the interior city of Fairbanks. We operate a year-round full service passenger and freight railroad. The Alaska Railroad carried over a half-million passengers in 2007, and has extensive freight operations in interstate commerce. Because of our service to five military bases, we have been designated by the Department of Defense as a Strategic Railroad.

The Alaska Railroad was built and operated by the U.S. government from 1914 until it was sold to the State of Alaska in 1985. We are proud of its history and we actively support historic preservation in numerous ways that are detailed in the backup materials. However, the effect of expansively applied historical laws and regulations imperils our ability to maintain safety. It also compromises the operational and business agility vital to our railroad's mission of stimulating state economic development. We support an amendment along the lines of the Shuster Amendment that was offered and then withdrawn at the full committee markup pending this hearing.

Testimony of Thomas E. Brooks
Alaska Railroad Corporation

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Let me start by sharing a current problem that illustrates the dilemma very well-- our bridge "432.1". This 160-foot-long bridge spans a small creek in a remote location; it is ten miles from the nearest road. Two separate independent historians have determined this bridge has no historic merit on its own. However, it has been, in practical effect, declared historic by Alaska's State Historic Preservation Officer, or SHPO, merely because it is part of the Alaska Railroad. This has triggered the extensive bureaucratic process meant to preserve and protect historic structures.

The foundation of this bridge is failing badly and we want to replace it this year. We can't. We are currently passing around documents between the Alaska Railroad, the Federal Transit Administration, the National Park Service, and the Alaska SHPO. We expect to obtain the required approvals so that the replacement can be completed in fall 2009. In the meantime, we've got to get 150,000 passengers, a bunch of freight including 700 million gallons of fuel oil, and critical military equipment safely over that bridge. We believe we can do it, but it is expensive and so unnecessary. While we are a year-round railroad, Alaska has a short construction season, from May through September because of winter freeze-up, which emphasizes the importance making timely decisions.

We submit that this is a misapplication of public process that squanders federal resources and public funds. There is no reason for this delay. This problem is created by overzealous attempts to identify the Railroad as a single "historic district". This designation automatically triggers historical protections for mundane railroad features that lack historic merit on their own. Bridge 432.1 represents the sixth time we have been through this process since 2002. It is expensive and delays our efforts to improve safety and efficiency, and to serve our customers.

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The Shuster Amendment will ensure that historic preservation standards continue to be applied to railroad features with historical merit in their own right – not because they are merely part of a railroad historic district. This amendment would provide the same relief to railroads that was afforded to the Interstate Highway System in 2005 through SAFETEA-LU Section 6007. Like the Interstate System, railroads have been evolving since their inception and continue to do so, having been constructed, expanded, and upgraded to serve national transportation needs. Their integrity depends on continuing maintenance and upgrades so that they can continue to operate and move passengers and/or freight efficiently.

The Alaska Railroad is a critical component of our state's transportation infrastructure and must continue its mission as an economic tool for development as mandated by Congress in the Alaska Railroad Transfer Act (Public Law 97-468). Without the Shuster Amendment, there is an immediate danger that our entire railroad corridor will, in practical effect, be treated as a historic district, as detailed in one of the exhibits being submitted with my testimony. Safety improvements and routine maintenance of even mundane features such as Bridge 432.1 are incurring undue delay and costs, and the problem will get even worse in the future if the railroad corridor is either officially declared a historic district or, as is currently the case, simply treated as if we are. While avenues exist to appeal historical determinations, they are made to bodies like the Advisory Council on Historic Preservation or the Keeper of the National Register. These entities are firmly grounded in historic preservation and have a far different mission from running a safe transportation system. In addition, project delay is inherent in any appeal process. Delay, in most cases, will equal additional costs and continued deterioration of infrastructure.

In closing, we will gladly continue to support efforts to preserve Alaska's history and that of the Alaska Railroad, but we must also ensure the safe operation of the railroad. Alaska is

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America's last frontier, and it is the Alaska Railroad that provides economical access to a significant portion of that frontier. Through the Shuster Amendment, we will continue our historic preservation efforts, focusing them on truly deserving properties, while moving ahead with our mission of safety and service.

Thank you for the opportunity to speak with you today. I'd be happy to answer any questions.

Testimony of Thomas E. Brooks
Alaska Railroad Corporation

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List of Exhibits

- Exhibit 1** Examples of Alaska SHPO's Intent to Identify the Alaska Railroad as a Historic District
- Exhibit 2** Bridge 432.1 – Example of Alaska Railroad Historic District Problem
- Exhibit 3** Details of the Historic Preservation Issues on the Alaska Railroad
- Exhibit 4** Alaska Railroad Section 4(f) Submittals
- Exhibit 5** Alaska Railroad Historic Initiatives

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Exhibit 1
Examples of Alaska SHPO's Intent to Identify the
Alaska Railroad as a Historic District**SHPO's August 9, 2007 letter (regarding Broad Pass project)**

In order to expedite reviews of railroad undertakings, it is imperative to evaluate the railroad as a potential historic district and to identify the features found throughout the corridor. Please update this office on the progress made to identify cultural resources related to [the] railroad corridor.

SHPO's November 20, 2006 letter (regarding Alaska Railroad Historic Context and Survey)

In April 2006 our offices met and discussed compliance with National and State Historic Preservation laws. At that meeting, Commissioner Michael Menge, Department of Natural Resources, and Pat Gamble, President and CEO of the Alaska Railroad Corporation, decided that the Alaska Railroad Corporation will develop a railroad historic district context and begin the process to list the district in the National Register of Historic Places.

NOTE December 1, 2006 response to that letter from Railroad President Pat Gamble

I see from your letter that I need to set the record straight regarding the meeting you mentioned, which took place on April 20, 2006 between Commissioner Menge and me. Let me be very clear. The Alaska Railroad's purpose going into that meeting was exactly the opposite of your characterization ... we agreed to create an inventory of individual historical items for the express purpose of not having to declare a railroad historic district, an alternative which would most certainly stifle the tempo of safe operations, maintenance and business. . . .

The correct expression of our intent was that we would agree to list key historic railroad elements eligible for inclusion in the National Register of Historic Places if qualified expertise determined that they warranted such special recognition. This solution was acceptable to the Railroad because it better accommodated the operational imperative for the Railroad to continue its broad based 24 hour by 7 day a week operations and maintenance in an unfettered manner on behalf of the State of Alaska.

SHPO's December 1, 2005 letter (regarding Bridge 233.3 replacement)

Bridge 233.3 (TAL-0122) is a contributing feature to a potential historic district.

SHPO's June 19, 2002 letter (regarding repair of two Alaska Railroad bridges)

The Alaska Railroad Corporation previously reported to the Alaska State Historic Preservation Officer that the Alaska Railroad Corporation is in the process of preparing a historic context study and survey of all railroad properties. The survey will evaluate the historical significance of the Alaska Railroad and identify features of the Alaska Railroad that contribute to its significance.

NOTE September 30, 2002 response from Railroad Chief Engineer Tom Brooks

At our meeting in January 2002, it is our recollection that we agreed to conduct an historic survey of the Alaska Railroad, including an inventory of the various types of facilities owned by ARRC, such as bridges, buildings, and possibly other structures. This survey would establish the historic context for the railroad, which is important for evaluation of the various railroad facilities to assess their eligibility for the National Register of Historic Places (NRHP). . . . ARRC representatives did not agree to evaluate the historical significance of the Alaska Railroad, which suggests that we would provide a determination of eligibility of the Alaska Railroad for the NRHP.

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Exhibit 2

Bridge 432.1 – Example of Alaska Railroad Historic District Problem

Summary: The foundation under this bridge is failing. Because it is part of a potential "Alaska Railroad Historic District", replacement has been delayed a year while the historical preservation process is completed. During that period, 150,000 passengers and about 700,000,000 gallons of fuel will pass over the bridge. The bridge will require close monitoring to ensure safety, and a service interruption is possible if interim repairs are needed.



Additional Information: The bridge spans a small creek in a remote area, with the nearest road access about 10 miles away. The bridge was built in 1925 and modified in 1950 using typical railroad construction. Unfortunately, the designers did not properly address the frozen soils, and the foundation is failing. Engineering investigations in 2007 revealed the state of deterioration was worse than expected -- it is in need of immediate replacement.

Rail traffic over the bridge in 2007 included 150,000 passengers and about 700,000,000 gallons of fuel. Proper functioning of this bridge is essential to the State of Alaska, the Alaska Railroad, and the Department of Defense.

- | | |
|-------------|---|
| 2003-5 | Bridge 432.1 had an initial historic evaluation by independent historians working on an Alaska Railroad Historic Bridge Survey. It was not identified as historic, but Alaska SHPO requests additional information. |
| Dec. 2007 | Second historian does separate evaluation, also indicates bridge is not historic. |
| March 2008 | Federal Transit Administration (FTA) determines bridge is not eligible for the National Register, requests Section 106 concurrence from SHPO. Indicates beneficial reuse of the steel spans is part of proposed bridge replacement project. If a suitable railroad purpose for the spans is not identified, they will be offered to other entities for reuse (e.g., pedestrian or vehicular bridge) |
| April 2008 | SHPO does not concur with FTA finding, determines project will have an adverse effect because of the bridge's association with the Alaska Railroad. This effectively eliminates completion of the project in 2008. |
| April 2008 | Railroad/FTA prepare document for "Section 4(f)" of the 1966 Transportation Act. Must show there is "no feasible and prudent" alternative to replacing the bridge. |
| April 2008 | Section 4(f) forwarded to Department of Interior/National Park Service for review. Response is expected in late July. |
| August 2008 | Approval expected from FTA to begin purchase of materials. Delivery expected mid to late winter, 2009. Construction expected to begin in spring, 2009. |

Burdensome delay and higher costs, with no additional public benefit.
Completion of construction for time-critical safety improvement project is now fall 2009. No public benefit to finding bridge eligible for National Register – mitigation requested by SHPO is the same as originally offered by Railroad as part of project.

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**Exhibit 3
Details of the Historic Preservation
Issues on the Alaska Railroad**

When an element of the Alaska Railroad is formally identified as historic, protections are triggered under Federal laws, particularly the National Historic Preservation Act and the Transportation Act of 1966. The issue here, and reason we are seeking protection, is that historic designations are being widely and expansively made. Specifically, historians are attempting to designate the Alaska Railroad corridor as a large historic district, triggering an extensive preservation bureaucracy. This bureaucratic process would apply to many minor and mundane features of the Railroad, inhibiting our ability to respond to change. It is important that we be responsive to change, both to safely maintain the Railroad, and to better serve our customers.

The Alaska Railroad is an important part of Alaska's history. We celebrate our history and actively support historic preservation. We absolutely agree that some components of the Alaska Railroad are truly historic properties. Bridge 264.1 on the Susitna River was listed on the National Register in 1977. We supported the listing of our Anchorage Depot in 1999. Eight other railroad properties formerly owned by the Alaska Railroad are also listed on the National Register. In addition, over 50 other Alaska Railroad properties, including a third of bridges, have been determined to be eligible for listing on the National Register of Historic Places.

To further reinforce our commitment to historic preservation, the Alaska Railroad has sponsored or currently sponsors a number of historic initiatives, as summarized in Exhibit 5 of our materials. To highlight a few of these endeavors -- we sponsor a tour guide program, where Alaska high school students provide historical information to our passengers; we have extensively archived our historical records to the National Archives; and we have made many donations of historical buildings to local governments and historical materials and equipment to local museums for public exhibits on the history of the Railroad.

The National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their actions (including grants, licenses, and permits) on historic properties (Section 106). The Alaska Railroad relies on federal funds, particularly from FRA and FTA, to bring the railroad back to working order after many years of neglect under federal ownership. In accordance with the NHPA implementing regulations (36 CFR 800), consultation with the Alaska State Historic Preservation Officer, or SHPO, is required for these federally-assisted undertakings.

What concerns the Alaska Railroad is that the SHPO considers the entire Alaska Railroad corridor to be eligible for inclusion on the National Register of Historic Places as a historic district, and supports such a designation. Correspondence over the past several years with SHPO reveals this intent as demonstrated in Exhibit 1. Despite federal agency determinations that specific railroad resources are not eligible for the National Register, based on surveys conducted by cultural resource professionals, SHPO did not concur with many determinations and continues to evaluate most of our projects based on a potential Alaska Railroad historic district. SHPO has implied that nearly all our buildings, bridges, sidings, and other properties not significant enough to be individually eligible for the National Register, are eligible as

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contributing elements to a potential railroad historic district, solely due to their association with the Alaska Railroad.

As an example, we proposed extending an existing ordinary rail siding 2,000 feet to improve our operating flexibility. An archeological and historic survey revealed no adverse impacts from this mundane project. The SHPO did not concur and required an additional evaluation of the project because the SHPO believed that the siding and other features were historic solely due to being part of the Alaska Railroad. This added four months of delay to the project – which is considerable given Alaska’s unique construction constraints due to its short construction season (May–September) before ground freeze-up. It also added at least \$25,000 in extra costs.

The situation is exacerbated when removal and replacement of mundane and ordinary properties is planned, even when it is necessary to improve safety or operational flexibility. Removal and replacement constitutes an adverse effect under Section 106. An adverse effect to a property listed on or eligible for the National Register triggers Section 4(f) protection under the Department of Transportation Act (49 USC 303). This Act directs that the Secretary of Transportation shall not approve any program or project that requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of or from an historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm.

Section 4(f) protection also applies to contributing elements to historic districts that do not individually possess integrity and meet the criteria for National Register eligibility, which is the case with many Alaska Railroad properties. SAFETEA-LU Section 6009 specifically addressed de minimis impacts to historic sites, but not historic districts and contributing elements. According to the regulations and as confirmed by an Advisory Council on Historic Preservation representative, removal of a contributing feature, regardless of how minor or mundane the feature, is considered an adverse effect to the historic district. There is no mechanism for determining that an adverse effect to one or more contributing elements to a historic district can be considered a de minimis impact if the historic district as a whole is not adversely affected. Therefore, a minor contributing feature that is not individually eligible for the National Register has the same status under Section 4(f) as a significant bridge or other property that is eligible on its own merits.

This situation requires preparation of a Section 4(f) evaluation for the subject historic property, which is a detailed analysis documenting there is no feasible and prudent alternative to the use of the property, and all possible planning to minimize harm has been conducted. The Section 4(f) process unnecessarily delays environmental reviews and transportation decision-making. It adversely affects the Alaska Railroad by limiting our ability to improve rail safety, to enhance operational efficiency, and to expand our services in a timely manner. Important safety improvement projects, such as replacing a structurally deficient bridge, are unnecessarily encumbered by paperwork and delays, and higher costs.

In addition to the Bridge 432.1 situation highlighted in our oral testimony and Exhibit 2, examples regarding our timber trestle bridges further illustrate the problem. In these situations,

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the Section 106 and Section 4(f) processes delayed important safety upgrades. Between 2002 and 2006, 17 bridge safety projects, replacement of structurally deficient timber bridges, were delayed. Bridge 233.3 replacement was delayed one year because SHPO asserted the bridge was, quote, a “contributing feature to a potential historic district.” Removal of these bridges constituted an adverse effect and therefore completion of the Section 4(f) process was required. Exhibit 4 summarizes the 4(f) submittals that have been required since 2002.

Projects funded by other federal agencies would also be affected if the Alaska Railroad is determined to be or treated as an historic district. Consider separated highway/railroad grade crossing projects undertaken by the Alaska Department of Transportation and Public Facilities, funded by the Federal Highway Administration. Grade separation is a federally supported nation-wide safety initiative for pretty obvious reasons. Existing at-grade crossings constructed over 50 years ago would also be contributing elements to a railroad historic district. Agencies sponsoring conversion to separated grade crossings for safety reasons would also experience unnecessarily burdensome delays in environmental reviews and transportation decision-making, along with higher costs.

There are appeal mechanisms available. The appeal mechanism regarding eligibility determinations is to the “Keeper” of the National Historic Register. The appeal mechanism regarding findings of effect (e.g., is there an adverse impact on the historic property or not?) is to the Advisory Council on Historic Preservation. These appeal processes take time, adding to project delays and costs. In addition, they are made to historic preservation professionals who are, by their own statutory mandates, more focused on preservation than on operational realities.

A key part of our problem is the de facto assumption by SHPO that the Alaska Railroad is an historic district, and any individual properties near or over 50 years in age are eligible as contributing elements simply because of that association. There is no basis to appeal such a determination, as the regulations are clear that this would be an adverse effect. In fact, such an appeal could trigger a requirement to conduct a determination of eligibility for the entire Railroad for the National Register. Should the Alaska Railroad be formally determined eligible as an historic district, we would be in an even worse situation than we are now—undoing or reversing a determination would be even harder than preventing the determination in the first place.

In closing, we continue to support efforts to preserve Alaska’s history and that of the Alaska Railroad, but we must ensure the safe operation of the Railroad. The historic district issue is an ongoing immediate problem that needs to be fixed. The Alaska Railroad is a critical component of the state’s transportation infrastructure and must continue its mission as an economic tool for development. Essential safety improvement projects or projects to improve our operational efficiency and flexibility have been and will continue to be unnecessarily encumbered by paperwork and delays -- at the expense of the Alaska Railroad, the Federal government, the traveling public, and taxpayers, with no discernable public benefit. Through the Shuster Amendment, we can ensure the safe operation of the Railroad and continue our historic preservation efforts, focusing those efforts on truly deserving properties.

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Exhibit 4
Alaska Railroad Section 4(f) Submittals

- Section 4(f) Evaluations completed prior to 2002: None
- Section 4(f) Evaluations completed since 2002: Six (6)
1. Replacement of Five Alaska Railroad Bridges
 - Mile 187.6 – Iron Creek (Willow Creek Overflow)
 - Mile 200.9 – Caswell Creek
 - Mile 233.4 – Unnamed Drainage to Susitna River
 - Mile 233.6 – Unnamed Drainage to Susitna River
 - Mile 267.7 – Valentine Creek
 2. Replacement of Five Alaska Railroad Bridges
 - Mile 238.4 – Gold Mine Creek
 - Mile 239.0 – Unnamed Tributary to Susitna River
 - Mile 239.1 – Unnamed Tributary to Susitna River
 - Mile 245.8 – Portage Creek (also know as Porter Creek)
 - Mile 260.3 – Valentine Creek
 3. Replacement of Eight Alaska Railroad Bridges
 - Mile F5.7 - Placer Creek (timber)
 - Mile 217.5 - Question Creek (timber)
 - Mile 233.9 - Unnamed drainage to the Susitna River (timber)
 - Mile 244.6 - McKenzie Creek (timber)
 - Mile 252.5 - Skull Creek (timber)
 - Mile 256.2 - Unnamed drainage (timber)
 - Mile 305.7 - Chulitna River (steel)
 - Mile 354.4 - an unnamed drainage (steel)
 4. Replacement of Bridge 233.3 and Other Alaska Railroad Timber Bridges
 5. Alaska Railroad Moody Tunnel Removal
 6. Alaska Railroad Bridge 432.1 Replacement

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Exhibit 5
Alaska Railroad Historic Initiatives

The Alaska Railroad has ongoing programs that address its historic resources. We also undertake extensive public outreach activities to provide historic information to the public as described below.

Alaska Railroad Historic Record Collection at National Archives and Records Administration

In 1995, Alaska Railroad historic records were physically transferred to the National Archives and Records Administration – Alaska Region. These records cover the period when the Alaska Railroad was part of the U.S. Department of the Interior (1914-1967) and the U.S. Department of Transportation (1967-1985). In April 2007, NARA staff in Anchorage provided information on these records by identifying the records series, approximate dates, and cubic footage. NARA staff has also provided brief narrative summaries of the contents of each records series. Since 2002, Architectural Recordation Forms prepared for various Alaska Railroad features determined eligible for the National Register (e.g., bridges, Curry Wye, Moody Tunnel) are also archived here.

Alaska Railroad Photo Collection at the Anchorage Museum of History and Art

The Alaska Railroad houses its historic photo collection at the Anchorage Museum. The collection is comprised of approximately 15,000 images that include construction photos dating from as long ago as 1914. The photos are searchable by subject or railroad milepost. Photos and negatives are not loaned, but photo reproductions are available for purchase, either in print format on photo-quality paper, or as a digital scan on CD. Many of these photos are now available for public view on an internet site maintained by the University of Alaska-Fairbanks at vilda.alaska.edu.

Alaska Railroad Engineering Library

The Alaska Railroad maintains an engineering library, including historical design drawings and other information pertaining to the construction of the Railroad and its various elements (bridges, buildings, tunnels, etc.). SHPO representatives and cultural resources professionals are provided access to that information for research purposes.

Records Retention Project

The Alaska Railroad is developing a records retention program that includes digitization of Alaska Railroad records. Historic original engineering drawings are currently undergoing digitization. Unless otherwise prevented by law or security concerns, the Railroad's records are considered public records.

Donation/Preservation of Historic Structures and Equipment

In October 1997, the Railroad donated two historic residences known as the "Browns' Point Cottages" to the Municipality of Anchorage and issued a "no-fee" lease for the underlying ground. The cottages were constructed on railroad property in 1941 for the US Army Corps of Engineers. The cottages were restored and listed on the National Register in July 2004.

Numerous other structures and equipment have been donated by the Railroad to various local governments or non-profit organizations, including the Wasilla Depot and the Nenana Depot, both listed to the National Register in 1977, and historic rail equipment to the Museum of Alaska Transportation and Industry.

In addition, the Railroad's flagship passenger facility, the Anchorage Depot, was added to the National Register in 1999 and continues to be maintained and operated under historic preservation guidelines.

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Anchorage Museum of History and Art Railroad Exhibit

Anchorage Museum featured an Alaska Railroad exhibit April 16 through October 1, 2006. The exhibit highlighted the construction and development of the railroad and the communities tied to it, revealing the railroad's impact across southcentral and interior Alaska during the past century. In addition to photographs, the exhibit included three-dimensional artifacts, including railroad equipment, facility signs and memorabilia from the Railroad and its employees. The Railroad underwrote the exhibit and now owns 12 large interpretive boards that will be displayed in depots.

Other Interpretive Signage

Over the years many interpretive sign projects have included Alaska Railroad history. Recently, the railroad's bridge rehabilitation and construction program and the U.S. Forest Service's Chugach National Forest Whistle Stop program have also included interpretive signs. The Railroad also installed interpretive signs at its Curry location as part of a plan to develop a new tourist/cultural opportunity. Locations of interpretive signage are:

- Denali Park
- Moody Tunnel
- Curry
- Whistle Stop (Forest Service)
- Ship Creek (vicinity of original railroad headquarters in Anchorage)

Alaska Railroad Website

The Alaska Railroad currently hosts a historical photo timeline with editorial on its internet site highlighting significant events from 1914 to present.

Panoramas Magazine

This magazine, produced by the Railroad and distributed to all train passengers, includes several articles about the Railroad's history and references:

- Then and Now
- The Frederick Mears story
- Curry and gold
- Points of interest – Anchorage to Fairbanks: select mileposts described, often with historical information
- Next stop sections on each major town/city, which include relevant historical information

Tour Guides and On Board Staff

Alaska Railroad Tour Guides are high school students trained and paid at Railroad expense to share information on passenger trains using an intercom system in each rail car. The tour guide comments cover special points of interest, cultural and historical information, geological features, and many other interesting facts about Alaska and the Railroad's history. The Railroad updates all the tour guide scripts annually.

Collateral Materials Including Historical Information

The Alaska Railroad develops various materials containing historical information: *Alaska Railroad Strip Map* (provided to all rail passengers) features historical information by milepost. *Panoramas Magazine* (noted above) features many historical articles and facts. *Corporate Media Kit* features a history overview and timeline. Broadly distributed Railroad newsletters (*All Aboard*, *Community Ties*, *Tenant Ties*) often feature historical articles. The theme of the Railroad's 2004 Annual Report was "A Vision Etched in Steel" featuring historical references and photos.

Tourist Opportunities

The Railroad, often in partnership with others, is actively developing new tourist opportunities that educate visitors and provide historic information about the Railroad. Examples include the planned development in the Curry area (important in the early history of the Railroad through the late 1950s) and the Forest Service's Whistle Stop program. Both projects promote visitor use of the area and include interpretive signage about historic resources.

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*Preserving America's Heritage***TESTIMONY FOR THE RECORD**

**SUBMITTED BY JOHN M. FOWLER
EXECUTIVE DIRECTOR, ADVISORY COUNCIL ON HISTORIC PRESERVATION**

**TO THE SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS
THE HONORABLE CORRINE BROWN, CHAIRWOMAN**

**HEARING ON THE
EFFECTS OF HISTORIC PRESERVATION REQUIREMENTS ON RAIL INFRASTRUCTURE**

JUNE 5, 2008

INTRODUCTION

I am John Fowler, Executive Director of the Advisory Council on Historic Preservation (ACHP). The ACHP is an independent agency, created by the National Historic Preservation Act of 1966 (NHPA), to advise the President and Congress on historic preservation matters. We also administer Section 106 review – the portion of the NHPA that deals with review of Federal agency programs and projects that have the potential to affect historic properties. In this latter capacity, the ACHP has long been aware of the historic significance of America's rail infrastructure and the need to strike a balance between accommodating historic preservation concerns with the needs of active, profit-producing rail operators. These are not irreconcilable issues and the consultative planning process afforded under Section 106 regularly facilitates effective solutions.

In the last year the Section 106 process has been successfully concluded with agreements regarding improvements to the timber trestle bridges on the Alaska Railroad; clearance improvements to the Heartland Corridor through Virginia, West Virginia, Kentucky, and Ohio; and depot rehabilitations in Elm City and Parkton, North Carolina. These recent examples help to illustrate that federal agencies can efficiently take into account the effects of their undertakings on historic railroad-related properties through the Section 106 review process defined in our regulations, "Protection of Historic Properties" (36 CFR Part 800).

RAILROADS AS HISTORIC PROPERTIES

Railroads are central to the history and development of the United States. Railroads brought settlers to otherwise inaccessible localities, spurred the development of local industries and prosperity, and knitted the nation together with a network that moved goods and people with unprecedented efficiency and speed. The physical plant of America's railroads represented state of the art engineering and design, constructed

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by the many immigrant groups that built our nation – stone walls by Italian masons, tunnels dug by Irish and Chinese laborers, and bridges and station buildings of all shapes and sizes. As the Subcommittee's background materials indicate, it is fully understandable that the National Register of Historic Places, the basic inventory of the nation's heritage sites maintained by the National Park Service, includes numerous railroad and railroad-related historic properties that have been recognized for their local, State, and national significance.

THE SECTION 106 REVIEW PROCESS

In the Section 106 review process, a federal agency that may carry out, fund or permit undertakings that affect a rail line evaluates whether the line has historic significance and sufficient integrity to illustrate that significance according to the Criteria for Evaluation established by the National Park Service in its regulations at 36 CFR Part 60. The federal agency conducts this evaluation in consultation with the applicable State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and other consulting parties, including the rail operator. If no historic properties will be affected by the undertaking, the federal agency makes a finding and concludes the process.

If the federal agency determines that the rail line or individual elements meet the criteria for listing in the National Register, the agency continues consultation with the SHPO/THPO and other consulting parties to assess whether or not the historic properties will be adversely affected by the undertaking. 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 (36 CFR § 800.5(a)(1)). If no historic properties will be adversely affected by the undertaking, the federal agency makes a finding and concludes the process.

CONCERNS WITH THE CURRENT LEGISLATIVE PROPOSAL

As a matter of policy, the ACHP opposes blanket legislative exemptions for particular resource types or classes of federal undertakings. Such intervention in the longstanding administrative review process is unwarranted to deal with the purported issues and would set an inappropriate precedent for other types of historic properties, validating the notion that special interests can invoke congressional action simply because they find the application of current law inconvenient.

The current proposals are designed to address issues that have been identified in two particular states, Alaska and North Carolina. Our understanding is that the challenges faced by the two testifying rail operators are neither widespread nor shared by others throughout the nation. This indicates that the problem is not systemic, requiring radical surgery of a 42-year old law. Rather, the concerns can be addressed through administrative relief options that are provided for in the ACHP's regulations and have a proven track record of adapting the Section 106 review process to meet agency missions while respecting the established Federal policies set forth in the NHPA which protect our nation's heritage.

RECENT EXAMPLES OF ADMINISTRATIVE RELIEF

The ACHP's regulations, which were last revised in 2004, have been successful in providing agencies administrative relief from provisions in Section 106 when situations warranted such accommodations. There are three examples that are noteworthy in that the outcomes have been fully adopted by Section 106 practitioners and have enabled much needed services and activities to proceed in a manner that balances historic preservation and project goals.

The first example is the development of a nationwide Programmatic Agreement with the Federal Communications Commission (FCC) and the telecommunications industry to streamline the review of cell tower construction. The agreement exempts tower siting projects at certain locations; limits the identification and evaluation of historic properties to those that were already listed in existing surveys; and establishes a consistent approach to defining the area in which historic properties are to be considered. This effort brought consistency, predictability, and efficiencies to the telecommunications industry as they expanded the network of cell towers necessary to keep up with the demands of the 21st century.

A second example is the exemption of historic natural gas pipelines that are subject to reviews by the Federal Energy Regulatory Commission (FERC). In response to the natural gas industry's concerns about having to modify plans to operate pipelines that were designated as historic properties, FERC requested that the ACHP exempt consideration of effects to the pipelines themselves from Section 106 review. The ACHP agreed to this approach and published a notice of the exemption in April 2002.

Another example which is noteworthy as a tailored approach to address unique types of historic properties that were subject to Section 106 review is highlighted in the ACHP's 1991 Report, *Balancing Historic Preservation Needs with the Operation of Highly Technical or Scientific Facilities*. Per the request by Congress in 1989, the ACHP undertook an analysis of the impact the designation of scientific research institutions as historic properties would have on their mission and operations. The study focused primarily on a review of National Aeronautics and Space Administration (NASA) facilities and its need to continue to operate research and space exploration program at facilities that were historic and designated as elements of the "Man in Space" program. As a result of the findings in the study, it was recognized that science and technological agencies could benefit from a programmatic approach to compliance with NHPA. A Programmatic Agreement was executed with NASA that addressed stewardship issues, partnership opportunities, and development of mitigation measures for buildings that had to be altered or lost to facilitate agency mission. The Section 106 process was adapted to respond to NASA's mission without compromising the role that its facilities and objects played in the scientific history of the nation.

It should be noted that the impetus for the study was an effort by the scientific community to obtain a legislative exemption from Section 106. The Congress wisely chose to let the agencies use the existing administrative tools to address the issue successfully.

OPPORTUNITIES TO CONSULT WITH AGENCIES AFFECTING RAILROADS

While the examples above address non-transportation agencies, it should be noted that there might be additional administrative relief available in the federal agencies that provide financing, assistance, or approvals for railroad undertakings. As was the case with the Federal Highway Administration (FHWA) regarding its Interstate Highway System, the ACHP has worked with many federal agencies to identify opportunities for modifying and streamlining the Section 106 review process for particular programs. Rather than pursue a legislative exemption, FHWA consulted with the ACHP and other consulting parties to develop an exemption that released all Federal agencies from having to take into account effects to the Interstate Highway System. All agreed that attention through Section 106 should be focused on only those elements of the System that possessed exceptional historic significance. The diversity of historic railroad properties makes it infeasible to adopt the Interstate Highway exemption, but the process that led to the successful exemption can be a model for addressing historic railroad properties.

The very railroads that are bringing forward this call for exemption have had successful experiences with the administrative alternatives. At the local level, the Federal Railroad Administration (FRA), the Alaska State Historic Preservation Officer (SHPO), and the Alaska Railroad recently executed a Section 106 agreement regarding the treatment of historic timber trestle bridges, which need continued maintenance and improvements. This approach could be expanded, using a similar agreement recently executed among

FRA, the Delaware SHPO, and Amtrak for the Wilmington Shops as a model, to extend to the entire Alaska Railroad System. In the Wilmington Shops agreement, many maintenance and improvement activities are exempt from Section 106 review, and streamlined review processes are established for certain specific components of the Shops – the round house, the station – for more careful review.

The FRA, Federal Transit Administration (FTA), STB, and FHWA have not yet contacted the ACHP to discuss the programmatic alternatives that would provide the relief to the problems that railroad operators have shared with Committee. We are open to such discussions, however, as they may assist in finding solutions that could minimize project delays and increased costs for historic preservation reviews. Now that we have been made aware of the level of frustration felt by the Alaska Railroad and the North Carolina Department of Transportation with the possible designation of State railroad corridors, we will contact the Federal agencies with jurisdiction over their projects to further understand their challenges and to provide administrative relief in the short term, as needed. We also stand ready to participate with the railroad industry in their individual Section 106 reviews or consultations to develop programmatic approaches tailored to their circumstances.

Railroads are a vital component of our nation's transportation network, with growing importance as we face congestion and environmental challenges. The ACHP strongly believes its regulations can provide for an administrative solution that allows for the continued vitality of rail transportation while also ensuring a reasonable and appropriate level of preservation of our Nation's rich railroad heritage.

We appreciate the opportunity provided to the ACHP to share its testimony with the Committee. We look forward to working with you and other stakeholders to explore options that will address the long-term treatment of historic railroad properties and facilities.

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Ms. Marianne Wesley Fowler
Senior Vice President of Federal Relations
Rails-to-Trails Conservancy

Testimony
Presented to the Subcommittee on Railroads, Pipelines
and Hazardous Materials of the
Committee on Transportation and Infrastructure

June 5, 2008
United States House of Representatives

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Testimony of
Rails-to-Trails Conservancy
Presented to the Subcommittee on Railroads, Pipelines and Hazardous Materials
of the
Committee on Transportation and Infrastructure

June 5, 2008
United States House of Representatives

Introduction

Thank you for allowing Rails-to-Trails Conservancy the opportunity to testify at this hearing on “Historic Preservation of Railroad Property and Facilities.” Rails-to-Trails Conservancy (RTC) is a national nonprofit conservation organization founded in 1985. RTC’s mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. Specifically, RTC identifies rail corridors that are not currently needed for rail transportation and works with communities to facilitate the preservation and continued public use of the corridor through conversion into public trails and non-motorized transportation corridors. Headquartered in Washington, D.C., with four regional field offices located in California, Florida, Pennsylvania, and Ohio, RTC has more than 100,000 members and supporters nationwide.

Rails-to-Trails Conservancy opposes any attempt to exempt railroad corridors or facilities from federal historic preservation laws. Not only are historic railroad facilities central to our history and identity as a Nation, federal preservation laws also further our national policy to preserve America’s built railroad infrastructure for continued public use as transportation facilities. There is no applicable precedent for exempting an entire category of already-recognized – indeed iconic – historic properties from federal historic preservation laws. Unlike the limited exemption that was carefully crafted for the interstate highway system in 2005, any attempt to exempt railroad facilities from historic preservation laws would undermine key national policies and would inevitably deprive some of America’s most cherished historic resources of the modest legal protections that are routinely applied to all historic properties.

Rail Corridor Preservation and Historic Preservation Go Hand in Hand

Railroads have played an integral role in the history, development and national identity of America. At the turn of the century, the country’s labyrinth of rail lines hauled food to market, moved the coal that heated cities, took settlers into the Western frontier, and played a critical role in the development of communities across the country. Some of these corridors are engineering

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marvels, literally moving mountains and represent public works accomplishments of monumental proportions for a young Nation.

At the peak of the rail era in 1916, more than 270,000 miles of track crisscrossed the United States, carrying freight and passengers and fueling the economy and growth of a nation. The extraordinary symbolic importance of railroads to our collective sensibility as a nation is evident in Walt Whitman's elegiac poem, *When Lilacs Last in the Dooryard Bloom*, as a nation in mourning watched the train bearing President Lincoln's body from Washington to Springfield, in Whitman's expansive homage to the transcontinental railroad in the *Passage to India*,¹ and in Steve Goodman's evocative song "City of New Orleans."

The historic significance of unused railroad corridors makes them particularly attractive for continued public use as trails or scenic railways. Historic bridges, trestles, tunnels, and roadbeds are retained, archaeological artifacts or ruins are preserved in place, and these unique historic assets are made accessible to tens of thousands of members of the public daily for a wide range of recreational and physical activities. For example, the York County Pennsylvania's Heritage Rail Trail County Park was once part of the Northern Central Railroad Corridor, a railroad line constructed in the early 1830s that carried Abraham Lincoln as far as Hanover Junction on the way to deliver the Gettysburg address. The historic corridor and now trail stretches 21 miles from the Maryland line to the City of York, Pennsylvania.

But railroad facilities are not simply historic monuments or potential recreational facilities. Our nation's built railroad infrastructure is an invaluable and irreplaceable *transportation* asset. Today, it would be virtually impossible to recreate this system once the right-of-way is abandoned and sold, and bridges, tunnels and other costly structures destroyed. Like Humpty Dumpty, a rail corridor, once dismantled and fragmented, cannot easily be put back together again due to the present high cost of land and the difficulties of assembling rights-of-way in our increasingly populous nation. Historic preservation laws and policies serve to protect our nation's rail corridor system, "painstakingly created over several generations,"² from being irreparably lost as transportation corridors.

¹ In *Passage to India*, Whitman wrote:

I see over my own continent the Pacific railroad surmounting every barrier,
I see continual trains of cars winding along the Platte carrying
freight and passengers,
I hear the locomotives rushing and roaring, and the shrill steam-whistle,
I hear the echoes reverberate through the grandest scenery in the world,
* * *
Marking through these and after all, in duplicate slender lines,
Bridging the three or four thousand miles of land travel,
Tying the Eastern to the Western sea . . .

Walt Whitman, *Leaves of Grass* (1871)

² *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973).

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Congress has recognized the importance of preserving our built rail system in declaring our “national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.”³ This national policy favoring corridor preservation, proclaimed in the heyday of cheap oil, reflects Congress’ foresight in seeking to protect its significant public investment in the creation of these corridors, which were largely assembled through the use of eminent domain, public lands grants, loan guarantees and/or cash awards, and anticipating their possible return to active rail service.

While the focus of RTC’s mission is on preserving our nation’s built rail infrastructure as transportation corridors rather than specifically as historic monuments, corridor preservation and historic preservation go hand in hand. As the highly successful federal Transportation Enhancement Program recognizes, community preservation and livability are major goals of federal transportation policy, and rail-trails are superb examples of the preservation and adaptive re-use of historic resources. Federal historic preservation laws play a key role in helping to protect and preserve our nation’s built rail corridor infrastructure as a living part of our national heritage and as valuable – indeed, irreplaceable – transportation resources.

**Federal Historic Preservation Laws Help to Preserve Railroad Corridors
for Continued Public Use**

- ***Section 106 of the National Historic Preservation Act Helps Carry Out Our National Rail Corridor Preservation Policy***

Section 106 of the National Historic Preservation Act requires all federal agencies to take into account the effect of federal “undertakings” such as the issuance of permits or licenses on historic properties and to consider whether there are any alternatives that would avoid adverse effects.⁴ Section 106 comes into play when railroads seek permission from the Surface Transportation Board (STB) to abandon freight rail service on a line. The STB’s review of abandonment applications through the historic preservation lens is important, since abandonment authorization permits the railroads to divest themselves of its ownership of the corridor, including tracks, ties, trestles, bridges, culverts, and ballast as well as the underlying real estate, actions that could hamper efforts to preserve these corridors for continued public use as transportation corridors.

Congress has created several legal mechanisms to foster the preservation of historically significant railroad corridors and facilities that are proposed for abandonment. One of the most

³ 16 U.S.C. § 1247(d).

⁴ 16 U.S.C. § 470f.

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important mechanisms available to preserve inactive or unused railroad corridors is for them to be placed in the national “railbank,” which allows the corridor to be transferred to an “interim trail manager” for use as a trail until such time as it is needed again for rail service. Rails-to-trails conversions represent an alternative to destruction of historic rail corridors that allows for their preservation and adaptive re-use as transportation corridors and public amenities.

While Congress has granted the STB the authority to temporarily delay abandonment authorization if an alternative public use for the corridor is proposed, private railroads are (unfortunately) not required to make their unused corridors available for continued public use, even to a financially responsible manager. Instead, rails-to-trails conversions depend almost entirely on voluntary negotiations between private railroads and potential trail managers. And because railroads frequently seek STB abandonment authorization through “fast track” procedures, there is often little time for public agencies to secure the approvals and resources needed to negotiate a possible rails-to-trails conversion.

In this context, Section 106 provides a critical constraint to the ability of private railroads to dismantle historic transportation corridors and provides an important mechanism for the consideration of public re-use options that might avoid or minimize harm to these resources. To carry out its Section 106 obligations, the STB imposes conditions that temporarily bar railroads seeking abandonment authorization from removing any historic bridges or other features and requires railroads to engage in historic preservation consultations. These preservation conditions give public agencies and potential trail managers additional time to undertake the due diligence and reviews that necessarily precede public land acquisitions, and ensures that important historic structures and features that will facilitate trail use and enhance the trail experience are not removed until these consultations are complete.

Federal historic preservation laws were instrumental in preserving portions of the 66.5 mile Enola low grade line in Lancaster County, which was determined by the Keeper of the National Register to be eligible in its entirety for listing in the National Register of Historic Places. The rail historic line follows the Susquehanna River through some of the most scenic areas of the northern Piedmont, and includes numerous stone arch bridges and culverts. The preservation condition imposed by the Interstate Commerce Commission (ICC) prevented the railroad from precipitously dismantling the corridor. Today, plans are underway to transfer portions of the corridor to several Pennsylvania Townships for use as a trail.

- ***Federal Historic Preservation Laws Protect Railroad Corridors from being Harmed by Federally Funded or Licensed Projects***

Projects or activities affecting historic railroad bridges may also require the approval of the U.S. Army Corps of Engineers and/or the U.S. Coast Guard. Again, Section 106 provides important temporary protection to historic railroad corridors and their historic features and elements. For example, the Coast Guard is now undertaking a Section 106 review of the plans of Union Pacific Railroad to dismantle the historic Boonville Lift Bridge, a critical link between the

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Katy Trail National Park and Kansas City, Kansas. Likewise, federal land managing agencies must take into account the impacts of mining, grazing or other permitted actions on historic railroad corridors located on public lands.

Section 4(f) of the Department of Transportation Act⁵ also plays an important role in protecting historic rail corridors, including rail-trails, from being “used” as part of federally funded highway or transit projects, and provides a mechanism for the consideration of measures that would allow these historic corridors to be preserved intact for continued public use. Section 4(f) mandates that transportation agencies select any prudent and feasible alternatives that would avoid or minimize harm to historic rail corridors. In the case of rail-trails, for example, Section 4(f) might require the construction of a grade-separated crossing to allow trail users to safely cross over or under a highway.

Compliance with Section 4(f) and Section 106 for federal undertakings need not be particularly burdensome or time-consuming. The Federal Highway Administration (FHWA) has developed “programmatic” Section 4(f) procedures for projects that affect historic bridges, as well as Statewide Section 106 programmatic agreements to further the goals of environmental streamlining. Section 106 also provides an expedited mechanism for submitting National Register eligibility disputes to the Keeper of the National Register, which must respond to requests for eligibility determinations within strict time frames. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) enacted new Section 4(f) provisions governing “*de minimis* impact” projects that relies on Section 106 consultations to ensure that Section 4(f) remains applicable where historic properties are adversely affected by transportation projects. These programmatic agreements and procedures are examples of how historic preservation laws have been successfully streamlined for routine or low-impact project to minimize unnecessary paperwork and costs without eroding substantive protections.

**There is No Precedent for Exempting Historic Railroad Corridors Wholesale
from Historic Preservation Laws**

There is no applicable precedent for legislating a wholesale exemption from historic preservation laws for an entire class of historic resources and certainly not for a class of properties as important as historic railroad facilities. The limited exemption from Section 4(f) applicable to the interstate highway system, passed in 2005 as part of SAFETEA-LU, is a unique situation and does not establish a precedent for exempting historic rail corridors or facilities from preservation laws.

The limited exemption for the interstate highway system was prompted by the possibility that the interstate highway system as a whole was about to turn fifty years old, and would therefore be presumptively eligible for historic designation. The Advisory Council on Historic Preservation, which is the independent federal agency responsible for implementing Section 106, responded by developing an administrative process for determining the historic significance of

⁵ 23 U.S.C. § 138; 49 U.S.C. § 303.

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the interstate system.⁶ Under this process, the FHWA was given a one-year period to identify those elements of the interstate system that were historically significant, which would then remain fully protected by Section 106. This process allowed for the historic significance of the interstate highway system to be assessed in an orderly and efficient fashion, rather than on a piecemeal basis in the context of individual road projects. In SAFETEA-LU, Congress merely adopted the results of this administrative process to determine what portions of the interstate system should remain subject to Section 4(f).⁷

The interstate highway system is a vastly different type of resource from the national rail system. Construction of the interstate system was authorized and began in 1956, and upon completion, consisted of approximately 46,000 miles. Identifying historic elements that were to remain subject to federal preservation laws was relatively easily done, as the entire system is mapped, easily identified, and managed by the various state highway agencies, all of whom have an ongoing cooperative relationship with a single, federal agency -- the FHWA -- on a daily basis. The FHWA was therefore able to accomplish the task of identifying historic elements of the interstate highway system within the designated time frame and ensure that all historic elements of the interstate system were fully protected.

By contrast, the Advisory Council on Historic Preservation has not developed, or contemplated the development, of a comparable process for identifying historically significant rail corridors and/or their important elements. Attempting to develop such a process would present numerous administrative obstacles. First, unlike the interstate highway system, there is no single federal agency that could be tasked with the responsibility for identifying the many historic rail corridors or their historic elements that are potentially eligible for the National Register. The national railroad system, which at its peak consisted of more than 270,000 miles of track, is more than six times larger than the interstate highway system. Unlike the interstate system, most of these corridors date from the turn of the century, and many of these corridors have long been considered historic, and/or include historically significant elements, such as bridges and tunnels. While some historic corridors and structures were designated or identified during the course of Section 106 reviews triggered by abandonment authorization or other federal undertakings, many historic facilities have never been evaluated for historic significance, or upon reevaluation, would now be considered significant.

Second, there is no one federal agency that has jurisdiction over, or the resources or ability to communicate with, all railroad entities. The STB has jurisdiction only over active freight rail lines operating in interstate commerce and only in the context of exercising a specific regulatory function. These lines are managed by a variety of entities, ranging from state transportation entities, regional authorities, and Class 1 railroads to private business and

⁶ *Federal Register*, Vol 70, No. 46, at 11928 (March 10, 2005).

⁷ 23 U.S.C. § 103(c)(5).

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nonprofit organizations. Numerous active rail lines are not subject to the STB's regulatory authority.

Moreover, there are also currently over 15,000 miles of railroad corridors used as rail-trails, with 9,500 more miles under development. These former railroad facilities are managed by park agencies at all levels of government, as well as intergovernmental authorities, natural resource districts, and nonprofit organizations, and are likewise not subject to oversight by any single federal agency. There is no single database or repository of information even identifying where these corridors are located and what entities manage or have jurisdiction over them. Accordingly, it would be extraordinarily difficult, if not impossible, to develop a process for identifying historic rail corridors that ensured that important historic rail corridors and features remained protected by Section 106 and Section 4(f).

Conclusion

The National Historic Preservation Act was passed in 1966 in recognition that the spirit and direction of the Nation are founded upon and reflected in its historic heritage which should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people. Our built railroad system exists as a deeply evocative symbol of our history and identity as a nation as well as representing an extraordinary investment in an energy efficient form of transportation, and rightfully should be the subject of enhanced legal protections, rather than any proposal to remove them from protection altogether.

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NCSHPO

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National Conference of State Historic Preservation Officers**Testimony on Historic Preservation of Railroad Property and Facilities
For the Subcommittee on Railroads, Pipelines and Hazardous Materials
House Transportation and Infrastructure Committee
United States House of Representatives
June 5, 2008**

I would like to thank Chairwoman Brown, Ranking Member Shuster, and the members of the House Railroads, Pipelines, and Hazardous Materials Subcommittee for the opportunity to appear before you. I am Rodney Little, the State Historic Preservation Officer for the State of Maryland and former President of the National Conference of State Historic Preservation Officers. On behalf of the 57 Historic Preservation Officers we appreciate the opportunity to present our thoughts on the preservation of historic railroad property and facilities.

The National Conference of State Historic Preservation Officers (NCSHPO) is the professional association of the State government officials who carry out the national historic preservation program as delegates of the Secretary of Interior pursuant to the National Historic Preservation Act of 1966. The NCSHPO acts as a communications vehicle among the SHPOs and their staffs and represents the SHPOs with Congress, federal agencies and national preservation organizations.

For the past forty-two years, State Historic Preservation Officers (SHPOs) and State Departments of Transportation have worked cooperatively to advance transportation improvement activities that meet today's transportation needs, while simultaneously preserving our Nation's historic heritage. In 1966, Congress enacted the National Historic Preservation Act in order to preserve the many historic properties being harmed by federal activities. The key process identified in the legislation is commonly known as Section 106. When done correctly, the Section 106 process identifies potential conflicts and resolves them before the project begins so that activities can proceed in timely and cost-effective manner. The administrative tools needed to work effectively through potential issues exist today and are being used successfully across the country.

We are aware of discussions surrounding legislatively exempting railroads from historic preservation reviews in certain states or possibly the nation. Since Section 106 is an effective and efficient process, and our nation's railroads are significant in American history, potentially

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exempting the properties and rights-of-way of this important mode of transportation seems inappropriate. The Section 106 process is designed to solve problems and most often results with a win-win resolution.

My testimony focuses on the following: 1. our Nation's Historic Preservation Program 2. the Administration's support of historic preservation 3. Federal resources for preserving historic sites related to transportation 4. the importance of railroads in American History, and 5. the railroad's role in energy conservation and other opportunities.

National Historic Preservation Program

In 1966 Congress recognized the importance of preserving our past by passing the National Historic Preservation Act (NHPA 16 USC 470), which established today's Historic Preservation Program and without which, the historic railroad resources described above would likely not exist today.

The NHPA directs State Historic Preservation Offices (SHPOs) to carry out the federal preservation program: 1) Locate and record historic resources; 2) Nominate significant historic resources to the National Register of Historic Places; 3) Foster historic preservation programs and the creation of preservation ordinances at the local government level; 4) Provide funds for preservation activities; 5) Comment on federal preservation tax projects; 6) Create and update State Historic Preservation plans 7) Review all federal projects for their impact on historic properties; and 8) Provide technical assistance to federal agencies, state and local governments and the private sector. Though often unglamorous, SHPOs' work is the foundation of the preservation of our Nation's heritage.¹

Congress enacted the NHPA in response to public concern that many of our Nation's historic resources, including historic railroad properties and facilities, were being demolished without receiving any consideration in the Federal construction projects. Congress recognized that new legislation was needed to protect the many historic properties being harmed by federal activities and established what is known as the Section 106 review program in the NHPA.

Section 106 balances historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts and resolve them in the public interest. The review process is administered at the Federal level, by the President's Advisory Council on Historic Preservation (ACHP), and at the state level by the State Historic Preservation Office. It requires that every federal agency "take into account" how each of its undertakings could affect historic properties.

¹ National Park Service, "40 Years The Historic Preservation Fund Annual Report 2007," Washington, 2008.

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For example, the Dakota, Minnesota and Eastern (DM&E) Railroad is working on a major upgrade and expansion of their lines through Minnesota, South Dakota, and Wyoming. After first resistance to the historical significance of the railroad in the Section 106 process, through productive discussions they have now embraced the railroads' importance in American and South Dakota history. In addition, the DM&E Railroad supported the listing of the Chicago & North Western Railroad Bridge at Pierre/Fort Pierre on the Missouri River in the National Register of Historic Places in 1998, and as part of a Preserve America project this year, the DM&E Railroad helped fund an interpretive sign on the multi-span, swing-span bridge.

Throughout the past forty-two years, the ACHP and SHPOs have efficiently and effectively carried out our country's historic preservation program. Under the Administration's Program Assessment Rating Tool, management of Historic Preservation Programs received a score of 89% indicating exemplary performance of mandated activities. Reinforcing this finding is the December 2007 National Academy of Public Administration (NAPA) report "BACK TO THE FUTURE: A Review of the National Historic Preservation Program." NAPA, a non-profit, independent coalition of top management and organizational leaders, found that the National Historic Preservation Program "stands as a successful example of effective federal-state partnership and is working to realize Congress' original vision to a great extent."²

Administration Support of Historic Preservation

Executive Order 13287, "Preserve America," was signed by President Bush on March 3, 2003. The order establishes federal policy to provide leadership in preserving America's heritage by actively advancing the protection, enhancement and contemporary use of the historic properties owned by the federal government, and by promoting intergovernmental cooperating and partnerships for the preservation and use of historic properties.

The Executive Order directs federal agencies to improve their knowledge about, and management of, historic resources in their care. It also encourages agencies to seek partnerships with State, tribal and local governments and the private sector to make more efficient and informed use of these resources for economic development and other recognized public benefits.

Federal Resources for Preserving Historic Railroad Sites

Congress has established several programs to aid and assist the preservation of our Nation's historic assets. In order to receive funds through these programs the historic site must be classified as eligible for the National Register. Without National Register eligibility, thousands

² Office of Management and Budget, DETAILED INFORMATION ON THE NATIONAL PARK SERVICE - NATIONAL HISTORIC PRESERVATION ASSESSMENT, 2003, expectmore.gov and NAPA, "BACK TO THE FUTURE: A Review of the National Historic Preservation Programs" December 2007, p. 29

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of historic railroad properties and facilities would be unable to receive Federal Highway Administration Transportation Enhancement grants, National Park Service Save Americas Treasures grants, as well as Historic Preservation Federal Rehabilitation Tax Credits.

Transportation Enhancement Grants

Transportation Enhancement (TE) grants offer funding opportunities to help expand transportation choices and enhance the transportation experience. Eligible activities for funding include the acquisition of scenic or historic easements and sites, historic preservation, rehabilitation and operation of historic transportation buildings, structures, or facilities, conversion of abandoned railway corridors to trails, archaeological planning and research and establishment of transportation museums.

Save America's Treasures

The Save America's Treasures program provides competitive and Congressionally earmarked grants are for restoration, and/or conservation work on nationally significant historic structures and sites, including historic districts, sites, buildings, structures, and objects.

Federal Rehabilitation Tax Credits

The Federal Historic Preservation Tax Incentives program offers tax credits for the rehabilitation of income-producing historic structures. Since 1976, the National Park Service has administered the program in partnership with the Internal Revenue Service and State Historic Preservation Offices. Tax incentives are one of the nations most successful and cost-effective community revitalization programs having leveraged more than \$30 billion in private investment to rehabilitate historic building that give cities, towns and rural areas their special character. The tax incentives also generate jobs, enhance property values, and augment revenues for State and local governments through increased property, business and income taxes. The transformations of Washington DC's Union Station and Grand Central Station in New York City were made possible by using historic rehabilitation tax credits.

Importance of Railroads in American History

Colonization and Community

The first regular carrier of passengers and freight was the Baltimore and Ohio railroad, founded on July 4, 1824. Charles Carroll of Carrollton the last surviving signer of the Declaration of Independence laid the corner stone. Other American innovations included the 1826 three-mile Granite Railway in Massachusetts and the South Carolina Canal and Railroad Company, begun in 1830, that completed the first mechanical passenger train.

Railroad systems stretching across the Great Plains encouraged emigration and picked the town sites. The fortunes of many cities were made or broken by the passing of railroads through their limits. The railroad provided a market for goods, grain and cattle and it brought the mail and other news of the outside world. The development of the refrigerator car brought tropical and out

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of season foods to American homes. Railroads were the primary mode of transportation in pre-automobile days.

The invention of the telegraph, linked to railroad rights of way in the late 1840s and 50s, created a communication revolution creating instant communication across continents.

The railroad depot became the new center of each community. The depot agent was often a well-respected member of the community--and the depot was the place to congregate to hear news about the rest of the world. Today, railroad depots are once again emerging as community centerpieces.

Depots nationwide have architectural styles all to themselves. According to the Railroad Station Historical Society, at one time there were upwards of 40,000 depots; today that figure is halved. They come in different shapes and sizes, but basically all once served to expeditiously move passengers and freight. Many existing depots continue to serve their original function; others have been adapted to useable community space. After years of neglect the buildings are being reclaimed, preserved, and now serve as community or retail centers, museums and even transportation centers.

American Railroad Engineers

In 1826, Colonel John Steven, considered to be the father of American railroads, demonstrated the feasibility of steam locomotion on a circular experimental track constructed on his estate in Hoboken, New Jersey, three years before George Stephenson perfected a practical steam locomotive in England. The first railroad charter in North America was granted to John Stevens in 1815.³ Grants to others followed, and work soon began on the first operational railroads.

In 1830 Peter Cooper designed and built the Tom Thumb, the first American-built steam locomotive to be operated on a common-carrier railroad, for the B & O. The Pullman Sleeping Car was invented by George Pullman in 1857. Pullman's railroad coach or sleeper was designed for comfortable overnight passenger travel. Pullman's planned community in Chicago due to historic preservation efforts has been preserved as a residential community.

American Bridge Engineers

America has also fathered some of the world's foremost celebrated transportation engineers. Octave Chanute, chief engineer for the Erie Railroad, whose study of wind tolerances in the Pennsylvania Kinzua Valley would later influence his glider designs and the future of aviation; Thomas Curtis Clarke, senior partner with Clarke, Reeves and Company, whose vision and creativity led to the Chicago, Burlington and Quincy (IL) Railroad Bridge over the Mississippi River, the Poughkeepsie (NY) Bridge over Hudson, the New York Elevated Railway and the Hawkesbury Bridge in Australia; and Adolphus Bonzano, a mechanical genius and inventor who was the idea man behind the locking devices for draw bridges. Bonzano would later play a role

³ Thurman W. Van Metre, *Transportation in the United States* (Brooklyn: Foundation Press, 1950), p. 31.

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in hundreds of bridges, including the Red Rock (AZ) Cantilever Bridge over the Colorado River Canyon, completed in 1890.⁴

Today's Historic Railroad Facilities

Historic railroad depots, tracks, bridges and trains continue to fulfill today's community and transportation needs. Just North of Washington D.C. is the Thomas Viaduct which opened on July 4th, 1835 and longest stone arched railroad viaduct when constructed and in use today. It was the bridge ever to be built on a curve. During its construction it was widely believed that the bridge would not hold under the weight of a loaded train. However, it soon proved to be one of the sturdiest structures in the nation and today carries CSX and Maryland MARC commuter trains throughout the day. In 1964 the Thomas Viaduct was named a National Historic Landmark.

The Baltimore and Ohio Railroad (B&O) was one of the oldest railroads in the United States and the first common carrier railroad, with an original line from the port of Baltimore, Maryland, west to the Ohio River at Wheeling. It is now part of the CSX network.

The Altoona Pennsylvania Railroad's contribution to the nation's transportation infrastructure, marks it as one of the most important contributors to America's industrial revolution. By the 1920s, the Altoona railroad works employed 15,000 workers, and by 1945 the Pennsylvania Railroad's facilities at Altoona had become the world's largest rail shop complex. Today the Horseshoe Curve in Altoona stands as a National Engineering Landmark and the rail lines are still used by Norfolk Southern. The Rockville Railroad Bridge, slightly north of Harrisburg is the longest stone arch bridge in the U.S. Listed in the National Register of Historic Places in 1976, its four tracks have been in continuous use since 1906.

The Strauss Bascule Bridge Company of Chicago constructed a double-track bridge for the Florida East Coast Railway (FEC) in 1925 to span the St. Johns River in Jacksonville. This moveable bridge was the heaviest yet built for its time and utilized an unusual truss configuration. It was constructed on the old foundation of the original railroad bridge, which dates to 1889. The FEC line and the railroad bridge continue to operate today and provide an important link between Jacksonville and the rest of the state.

The Future of the Historic American Railroad

Going "Green"

With the worldwide concern over climate change, greenhouse gas emissions and oil prices, public transportation, including commuter, passenger and freight trains are becoming increasingly popular and seen as "environmental friendly" options. According to the American Association of Railroads, freight trains are now two to four times more fuel efficient and cleaner burning than over-the-road trucks on a ton mile basis and rail companies are continually

⁴ *Society for Industrial Archeology Newsletter, Fall 2005*

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improving their fuel efficiency through better locomotive technology, engineer training and employee involvement.

Industry Expansion

Due to substantial and sustained traffic increases and increasing energy costs, U.S. freight railroads are moving more freight than ever before and demand for freight rail service is projected to grow sharply. Passenger rail growth is also expected to expand. The American Association of Railroads predicts that “capacity will likely be the single most important factor determining our ability to provide the high quality rail services that will be essential for both freight and passengers.”

Tourism and History

Historic railroads and facilities will continue to play major roles in tourism and economic development. The Ohio Rail Tourism Association estimates that railroad visitors generate \$200 million for Ohio’s economy. Highlighted below are successful examples of combining railroad tourism and history from Colorado and Alaska:

- Colorado Historical Society

The Colorado Historical Society owns and operates the Georgetown Loop. The engineering marvel originally built in 1884, fulfilled the hopes of Georgetown citizens to become a prosperous settlement and connected Georgetown to Denver and points east. In connecting Silver Plume and Georgetown, towns over 2 miles apart, the tracks scaled an elevation of 640 feet over mountainous terrain, requiring trestles, cuts, fills, loops, and curves totaling 4.5 miles.

Today the Loop is a popular tourist attraction and an uncommon way to see the Clear Creek Valley. Along the route visitors may also stop for guided tours of a historic silver mine. The park is located on 978 acres and includes an 1884 depot, the Morrison Interpretive Center, two 1860s mines, an 1871 mill building, four reconstructed mine buildings, a locomotive maintenance building, the 1874 Poble House, and a new rolling stock shelter.

- The Alaskan Railroad

The Alaskan Railroad has played a central role in Alaska’s growth -- providing a means for communities to settle and flourish along the railway, supplying the Fairbanks gold fields, helping to build the Alaska Highway, supporting the war effort and hauling pipe and supplies for construction efforts.

Today, the Alaska Railroad continues its tradition of support for the Alaska community by carrying more than 500,000 passengers annually, providing access for Alaskans and visitors from tidewater in Seward and Whittier to the interior of Alaska. In addition, the railroad operation creates over 700 jobs for Alaskans. The railroad also plays a powerful role in the States economic development, hauling nearly 8 million tons of freight per year and transporting building products to construct Alaskan homes and businesses.

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The Railroad also works to improve the quality of life for residents along the railway by leasing land to communities for parks, bike trails and other public interest uses.

Conclusion

The importance of the American Railroad not only reaches back in time but also embraces the present and future. NCSHPO supports partnerships and agreements between the railroads and communities that simultaneously advance the expansion and repair of U.S. railways and preserve railway historic resources. Through Section 106 Reviews, federal agencies and the public decide the most effective ways to move projects forward while protecting our nation's heritage. National Register designations afford historic railroad resources eligibility for preservation incentives. NCSHPO believes that the railroads central role in our Nation's history should continue to be honored by affording it the protections and resources available for National Register eligible properties and sees no need for exemptions or additional legislation. The administrative tools needed to work successfully through potential issues exist and are being used effectively across the country. The federal government plays an invaluable role in preserving our nation's history and through our partnership, State Historic Preservation Officers stand committed to identify, protect, maintain, and continue to use our Nation's historic railway heritage.

Thank You.

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Testimony of

ELIZABETH MERRITT
DEPUTY GENERAL COUNSEL
NATIONAL TRUST FOR HISTORIC PRESERVATION

before the

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS
UNITED STATES HOUSE OF REPRESENTATIVES
HON. CORRINE BROWN, CHAIR

Hearing on

HISTORIC PRESERVATION OF RAILROAD PROPERTY AND FACILITIES

June 5, 2008

Thank you for the opportunity to share the views and concerns of the National Trust for Historic Preservation regarding the significance and preservation of historic railroad property and facilities. My name is Elizabeth Merritt and I am Deputy General Counsel for the National Trust, where I have served as in-house counsel for more than twenty-four years.

Background on the National Trust

Congress chartered the National Trust in 1949 as a private nonprofit organization to “facilitate public participation” in historic preservation, and to further the historic preservation policies of the United States. 16 U.S.C. §§ 461, 468. With the strong support of our 287,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to our eight regional and field offices throughout the country, and our Washington, DC headquarters, we have 29 diverse Historic Sites open to the public around the country.

The Chairman of the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, the independent federal agency whose regulations govern the implementation of Section 106 of the National Historic Preservation Act (NHPA). See 16 U.S.C. §§ 470f, 470i(a)(8); 36 C.F.R. Part 800. The Advisory Council works with other federal agencies, including the Department of Transportation, to assist them in fulfilling their responsibilities under the NHPA.

The National Trust has had a long-standing interest in transportation issues, and we have been a strong defender of federal laws such as Section 4(f) of the Department of

Transportation Act, 49 U.S.C. § 303, and Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, which protect historic resources. In fact, during the recent reauthorization of the federal surface transportation program that led to the passage of SAFETEA-LU,¹ the National Trust was actively involved in successfully opposing amendments to weaken Section 4(f), and in developing consensus-based proposals with state departments of transportation that provided carefully tailored modifications to the law, with safeguards and monitoring.

Proposed Exemption for Railroads from Historic Preservation Laws

The Alaska Railroad and the North Carolina Railroad would like to exempt historic railroad corridors and related properties and facilities from federal historic preservation laws, relying on the recent provision in SAFETEA-LU addressing the Interstate Highway System, 23 U.S.C. § 103(c)(5). The National Trust strongly opposes such an exemption. It would be inappropriate, unnecessary, unprecedented, and would inevitably encourage additional exemption requests. Existing historic preservation law provides mechanisms that are more than adequate to address the concerns of the railroads, and we have seen no evidence that these administrative tools would not resolve the railroads' concerns. The specific examples raised by the railroads simply do not seem to warrant Congressional intervention. Congress should ensure that the available administrative mechanisms have been fully employed before even considering a proposed exemption.

Historic Railroad Corridors as an Iconic Part of Our Nation's Heritage

As Congress declared in the National Historic Preservation Act of 1966, preservation is essential to the American identity—our historical and cultural foundations orient our people and reflect the spirit and direction of our nation. Few institutions have been more influential in shaping the American identity than the nation's railroads. More than mere crossroads of commerce, the corridors and associated properties of American railroads have literally and figuratively determined where we as a nation are going and how we got there.

In 1832, when Charles Carroll of Carrollton laid the first stone for the new Baltimore & Ohio Railroad (now preserved in the B&O Railroad Museum in Baltimore), the venerable patriot hailed the event as second in importance only to his signing of the Declaration of Independence—if indeed second to that. For the next century, the railroads, ever expanding in capacity, size, speed, and efficiency, came to symbolize the uniquely American combination of uncanny ingenuity, abiding optimism, hard work, and awesome achievement. Just as their presence is an integral part of our physical landscape, the railroads are psychologically intertwined with the landscape of our cultural memory.

¹ The Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users, Pub. L. No. 109-59 (Aug. 10, 2005).

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Engines of manifest destiny “fired with the passion of purposeful endeavor,”² the railroads opened the American west. As our cities and towns grew along the trunks and branches of the rail lines, their location was determined by how far a locomotive could travel between servicings. Railroad lines conquered the most inhospitable territory seemingly by sheer force of will; the preserved rail line clinging to the canyon of the aptly-named River of the Lost Souls³ in Colorado, for example, is a testament to the great sacrifice of life and limb of thousands of immigrant workers drawn to America by the promise of building the railroad.

A now-lonely sign in the Utah desert proclaims the unthinkable feat “Ten Miles of Track Laid in One Day.” This achievement, like countless other triumphs of engineering common to American rail corridors, was the fruit of back-breaking labor. The miserable conditions under which the rail lines were built epitomized work on the early railroads generally and stood in stark contrast to the lives of the railroad barons—America’s first class of the super wealthy. The rail lines themselves became symbols of a growing disparity of wealth and power—the disenfranchised were said to live “on the other side of the tracks.” This disparity, along with an outcry over working conditions and the exploits of the railroad companies generally, gave rise to modern labor organizations and much of our modern system of federal regulation. The rail corridors we seek to protect provided the battleground for the infamous and bloody strikes that defined the early labor movement.

The muscle provided by the nation’s vast natural resources and manpower relied upon the circulatory system of America’s rail lines. Without the vital connection of the rail lines, people could not get to work and resources could not be extracted, processed, and put to use. Consequently, rail lines were prize targets during the Civil War and both World Wars. Recognizing the pivotal function served by rail corridors, the federal government assumed responsibility for railroad operation at several times in American history, long before the creation of Amtrak and Conrail. The Nazis also recognized the importance of American rail lines to the war effort, sending a group of saboteurs to the United States in 1942 to destroy selected rail corridor targets.

It is appropriate that the preservation of railroad resources has always been a priority in federal law and policy, as exemplified by our nation’s railbanking laws, 16 U.S.C. § 1247(d). In addition, many historic rail lines have been preserved for heritage tourism. The Alaska Railroad, for instance, relies heavily on tourists attracted by the historic and scenic beauty of its line. The highly successful White Pass and Yukon (also in Alaska) and the Great Smokey Mountains Railway (North Carolina) serve as additional examples of historic rail lines as tourism destinations that in turn function as regional economic generators.

Historic railroad properties have also played an iconic role in the development of our

² State *ex rel. Smith v. Kemp*, 261 P. 556, 558-59 (Kan. 1927) (used by the court in context of upholding the preservation of lands associated with the Santa Fe and Oregon Trails via an eminent domain action).

³ Río de las Animas Perdidas, traversed today by the Durango and Silverton Narrow Gauge Railway.

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historic preservation laws and the preservation movement itself. It was against the backdrop of the destruction of New York's Pennsylvania Station that Congress passed the NHPA, which forms the foundation of our current federal preservation policy. And the threat to another railroad property—Grand Central Station—led to the Supreme Court decision that undergirds historic preservation regulation as a legitimate governmental objective at all levels: *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

In the years since the destruction of Pennsylvania Station, some 2,486 rail-related properties have been added to the National Register of Historic Places, representing about three percent of all current National Register listings. Actual National Register listings represent just a fraction of the properties that are eligible for the National Register, but a review of those rail-related properties provides a useful overview of the kinds of railroad resources that are significant to our heritage.

Nearly every element of railroad infrastructure, either individually or collectively, is represented on the National Register. Of those properties listed on the Register, approximately 1,500 are stations or depots built to service passengers, freight, or both, and approximately 525 properties are listed as historic districts. But there are also other structures that, while essential to the operation of the railroad and historically important, may be less visible than a centrally located station or depot that was often the cultural heart of the community. Among these supporting structures identified on the National Register are roundhouses (12), enginehouses (4), and hotels (10). Approximately 395 are engineering features of the railroad right-of-way, including bridges (295), tunnels (51), viaducts (19), trestles (12), underpasses (9), inclines (7), culverts (4), overpasses (3), and embankments (2). In addition, the National Register includes 19 rail lines that are listed as corridors or entire railways, including the right-of-way and all associated property. (See Exhibit A.) These are scenic tourist railroads or abandoned rail corridors that qualify for railbanking as trails. Given that the essence of the railroad both now and historically has been to connect one place to another, it is fitting that the corridors themselves—the connection as well as its inherent elements—are recognized as historically significant.⁴ We are submitting for the record a printed list of well over 100 pages, which includes all historic properties in the National Register whose significance is railroad-related.

⁴ Railroad corridors can have a historical significance independent of the rail, ties, structures, signage, and signals that comprise it. See *Friends of the Atglen-Susquehanna Trail (FAST) v. STB*, 252 F.3d 246 (2001) (the rail corridor as a whole, beyond its individual bridges and other elements, was deemed by the Keeper of the National Register to be historically significant). The *FAST* case also showed that the piecemeal nomination of individual elements of a rail corridor is ineffective and inefficient in preserving the historic rail corridor itself.

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Reasons Why the National Trust Opposes an Exemption for Railroad Properties**1. *Congress should not create a legislative exemption for a specific type of historic resource.***

Legislation is simply too blunt an instrument to achieve the desired balance between preserving historic resources and the efficient and responsible use of those resources. Allowing a broad exemption from historic preservation laws for the American railroad industry would not only endanger countless resources core to the American identity, but it would also set a potentially dangerous precedent. There is nothing to suggest that railroads are disproportionately burdened or constrained by historic preservation review or by the National Register-eligibility of their corridors—most of which were obtained by federal government grants in the first place. Absent a clear showing of an extraordinary burden that cannot be resolved administratively, there would be little to prevent other entities from seeking similar waivers.

Because many corridors date back to the time of the industrial revolution, they are not only comprised of characteristic features of significant historic import, they themselves are historically significant as well-established pathways. A wholesale exemption would unnecessarily ignore this value, and would foreclose the possibility of protecting the corridor itself, for example, in the context of railbanking.

2. *Federal dollars and permits should not be used to destroy our nation's heritage without consideration of less harmful alternatives.*

The whole purpose of the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act is to ensure that federal resources are not used to harm historic properties without the consideration of impacts and alternatives. Of course, National Register listing or eligibility does not prevent private property owners from harming or even destroying their own historic properties, as long as no federal funding or federal permits are involved. But where taxpayer dollars are awarded, or federal regulatory authority is invoked, those public benefits must be conditioned on compliance with our federal laws that require historic preservation and other policies to be included in the process of planning specific projects.

3. *The proposed exemption is overly broad.*

The sweeping breadth of the proposed exemption could potentially encompass the entire national network of railroads, including urban mass transit systems, not to mention historic depots and historic bridges, many of which have a high level of significance in their own right. The proposed exemption would potentially exclude from consideration virtually all conceivable property relating to the railroad—not merely the trackbed, the rails, ties, etc., but all “properties and facilities” of “railroad[s]”.

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The statutory definition of “railroad” provided by 49 USC § 20102 does little to narrow the broad exemption from historic resource review threatened by the proposed amendment. Section 20102(A) defines “railroad” as “any form of nonhighway ground transportation that runs on rails or electromagnetic guideways,” specifically including language referring to transportation “systems,” which would include a broad array of appurtenant—and likely historic—properties.⁵

Indeed, the statutory provision that excludes urban mass transit systems from the definition of railroad—49 U.S.C. § 20102(B)—is specifically omitted from the proposed definition, thus apparently expanding the scope of the proposed exemption to include all urban mass transit systems, many of which are highly significant historically, such as those in Boston, New York, and Chicago. Ultimately, the broad and ambiguous scope of the term “railroad” could sweep within the proposed exemption potentially all projects funded by the Federal Railroad Administration and the Federal Transit Administration.

4. Effective administrative mechanisms are available to address the railroads’ concerns.

National Historic Preservation Act. The regulations issued by the Advisory Council on Historic Preservation to implement Section 106 of the National Historic Preservation Act provide several administrative mechanisms for addressing complex issues presented by categories of historic properties or federal actions that may need special treatment. Many of these administrative tools would be ideally suited for addressing the kinds of concerns raised by the railroads. For example, these mechanisms include the following:

- “Programmatic Agreements” (PAs), which streamline or eliminate review for minor actions that have little potential to affect historic resources. 36 C.F.R. § 800.14(b). For example, the North Carolina DOT has an existing PA signed in 2007, which provides a streamlined review process for “minor” transportation projects throughout the state. Why couldn’t such a PA be developed specifically for rail projects? Indeed, the Alaska

⁵ While the most restrictive meaning of “railroad” in Black’s Law Dictionary refers to the track itself—“the road or way on which iron or steel rails are laid for wheels to run on”—the term also commonly refers to the entire enterprise operating on those rails, *Bradley v. Degnon Contract Co.*, 120 N.E. 89, 91 (N.Y. 1918), including all the structures necessary to its operation. See *U.S. v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 13 (1893) (“railroad” includes all structures necessary and essential to its operation, including the necessary appurtenances of ground adjacent to the right-of-way, station buildings, depots, machine shops, side tracks, turnouts, water tanks, etc.); *Smith v. Northern Pacific Ry. Co.*, 148 P. 393, 394 (Mont. 1915) (“railroad” incorporates all necessary appurtenances, as contemplated by Federal land grants to the railroads, including all structures, equipment, and machinery necessary to their operation). See also *Omaha & Council Bluffs Street Ry. Co. v. I.C.C.*, 230 U.S. 324, 334 (1913) (construing “railroad” to include “all bridges and ferries used or operated in connection with any railroad, and all the road in use by any corporation operating a railroad . . . , switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of . . . persons or property . . . , and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property”) (quoting 24 Stat. at L. 379, ch. 104, as amended 34 Stat. at L. 584, ch. 3591).

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Railroad has a PA in place that allows for the replacement of all of its historic timber bridges—further evidence that Section 106 is not an obstacle to necessary upgrades.

- “Program Comments” issued by the ACHP, which comment on an entire category of undertakings in lieu of individual reviews. 36 C.F.R. § 800.14(e). These have been used extensively by the Department of the Defense to accomplish Section 106 compliance for enormous numbers of historic properties. For example, in 2006 the ACHP issued program comments to address tens of thousands of historic ammunition production and storage facilities managed by the Defense Department nationwide. And in 2002 the ACHP issued program comments to address all Capehart-Wherry Era military housing nationwide.
- “Exempted Categories” issued by the ACHP, pursuant to 36 C.F.R. § 800.14(c). These carefully crafted and limited exemptions have been used recently by the Federal Highway Administration for the Interstate Highway System in 2005, and by the Federal Energy Regulatory Commission for historic natural gas pipelines in 2002. While we are not at all persuaded that an exemption is appropriate for railroad properties, at the very least it should be the ACHP and the Department of Transportation, rather than Congress, undertaking the complex task of attempting to define an exemption that would not sweep too broadly.

These administrative remedies should be given a chance to work, rather than having Congress address with a hatchet what should be addressed through a much more delicately crafted approach.

Department of Transportation Act. In addition to Section 106 of the National Historic Preservation Act, Section 4(f) has also been implemented through existing mechanisms for streamlining, and these have not been brought to bear in this case. For example, Section 6009 of SAFETEA-LU included a new exemption for “*de minimis*” impacts on resources protected by Section 4(f). This was a carefully crafted, consensus-based amendment, which the National Trust was actively involved in developing. We believe the “*de minimis*” exemption could be used to address many of the railroads’ concerns regarding Section 4(f). In addition, the Federal Highway Administration has adopted a number of “Programmatic Section 4(f) Evaluations,” which have been used to streamline review for Historic Bridges, Minor Actions, etc. The FHWA has also implemented detailed regulations, just recently revised at 23 C.F.R. Part 774, and a Section 4(f) “Policy Paper,” to provide guidance to applicants regarding Section 4(f). We have seen no reason why these existing mechanisms would not address the concerns of the railroads, and they should certainly be fully evaluated before a statutory exemption is considered.

The fact that many of our nation’s historic railroad corridors are actively and heavily used for freight and passenger traffic should not be a reason for exempting these resources from federal historic preservation laws. Other transportation agencies manage historic transportation corridors that are in active use, and manage them in a way that respects their

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historic character by complying with Section 106 and Section 4(f). For example, the list of significant elements of the Interstate Highway System, which have been singled out by the State DOTs for their historic importance, and remain subject to historic preservation laws, includes the following historic road corridors, which are active and heavily traveled:

Pennsylvania Turnpike	(160 miles)
Columbia River Highway, OR	(60 miles)
Alligator Alley, FL	(30 miles)
Vail Pass, CO	(15 miles)
Glenwood Canyon, CO	(12 miles)

In addition to these examples from the Interstate Highway system, historic parkways such as the Baltimore-Washington Parkway (MD), George Washington Parkway (VA), Rock Creek Parkway (DC), Merritt Parkway (CT), Bronx River Parkway (NY), etc. are all actively used transportation corridors that are eligible for the National Register as entire corridors, and are managed in compliance with section 106 and Section 4(f).

In short, there are well-proven administrative mechanisms that would allow for the protection of rail corridors and associated historic properties while also allowing the full use of those resources.

5. *Reasons Why the Interstate Highway Model Won't Work for Historic Railroads*

The limited exemption in SAFETEA-LU for the Interstate Highway System, which is cited in the proposed amendment as a model for a railroad exemption, is a poor prototype with respect to protecting historic railroad resources.

- The national railroad network, which encompasses 270,000 miles, is vastly more extensive than the Interstate Highway network, at 47,000 miles, with an array of historic resources that is much greater in number, diversity, and significance than those covered by the Interstate Highway exemption. This proposed exemption would eliminate environmental and historic review for all rail corridors throughout the country, including thousands of historic bridges, historic rail corridors, and potentially historic depots and other facilities as well. In addition, all historic rail corridor abandonments would be exempt from historic preservation review.
- Furthermore, the process for creating a list of individual elements with special significance, which would essentially be "exempt from the exemption," would be much more difficult for railroad corridors than for the Interstate Highway system. The national network of railroad infrastructure is largely privately owned and controlled. Because railroad historic resources are numerous and scattered, surveys would be required to identify the historic properties and features with special significance. Therefore, in contrast to the role of the State DOTs, who own and control the Interstate highway system, and had already largely inventoried their historic transportation

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infrastructure prior to the Interstate exemption, the process of gathering information for the list of significant individual elements of the railroad system would be highly unreliable, time-consuming, and costly.

- In the case of the Interstate Highway exemption, the Federal Highway Administration worked closely with the Advisory Council on Historic Preservation to comply with Section 106 *before* coming to Congress to seek a Section 4(f) exemption. By contrast, the railroads and the Department of Transportation have not even initiated those discussions.

Conclusion

America's railroad corridors and associated historic properties are essential to the American identity—its culture, history, and economy, past, present and future. In the absence of the protections afforded by Section 106 and Section 4(f), those corridors have no meaningful procedural guarantees for preservation consideration. No compelling showing has been made that the current preservation scheme is unduly burdensome on the railroads, or that a change in such a scheme is warranted. In particular, the Interstate Highway System is an inappropriate model for an exemption.

While legislation is too blunt an instrument to achieve the desired balance between preserving historical rail resources and the efficient and responsible use of those resources, there are well-proven administrative mechanisms either currently in place or available and not yet used, which could address the railroads' concerns. We are confident that any and all concerns the railroads may have can be appropriately addressed through a remedy arrived at through such a consensus process, and we respectfully ask Congress for the opportunity to do so. The National Trust stands ready and willing to participate in that process.

Railroad-Related National Historic Register Properties Incorporating Significant Rights-of-Way

Note: those listed below incorporate portions of the right-of-way larger than that usually associated with an average bridge or tunnel.

NHR Reference Number	State	County	City	Resource Name	Acreage	Notes
00000319	Arizona	Cocconino	Williams	Grand Canyon Railway	1,682.0	Tourist Railroad
73000462	Colorado	Archuleta	Antonito	Denver and Rio Grande RR San Juan Extension	1,430.0	Portions operated as Cumbres and Toltec Scenic RR (Tourist)
76002290	Delaware	New Castle	Porter	New Castle and Frenchtown RR Right-of-Way	~25 miles	Abandoned
80000932	Delaware	New Castle	Hockessin	Wilmingon and Western RR	73.0	Tourist RR
80002997	New York	Wyoming	North Java	Arcade and Africa RR	122.0	Tourist RR
81000078	Maryland	Allegany	North Branch	Western Maryland RR Right-of-Way between Mileposts 126 and 160	500.0	Abandoned
86002751	North Dakota	Foster	McHenry	McHenry Loop RR	32.5	Tourist RR
73000309	Massachusetts	Norfolk	Quincy	Quincy Granite Railway	0.7	Abandoned
76001616	Pennsylvania	Carbon	Jim Thorpe	Mauch Chunk and Summit Hill Switchback RR	47.0	Abandoned
66000666	Pennsylvania	Huntington	Rockhill Furnace	East Broad Top RR	500.0	Tourist RR
87000699	Utah	Box Elder	Park Valley	Central Pacific Railroad Grade Historic District	5,000.0	Abandoned
72001257	Utah	Box Elder	Ogden	Southern Pacific RR Lucin Cutoff Trestle	143.0	Abandoned
66000080	Utah	Box Elder	Promontory	Golden Spike National Historic Site	2,735.3	Not used by commercial RR; operated by NPS
94001423	Utah	Box Elder	Corinne	Transcontinental RR Grade	655.0	Abandoned
96000413	Utah	Summit	Echo	Union Pacific Park City Branch RR Grade	490.0	Abandoned
01000700	Virginia	Fairfax	Annandale	Manassas Gap RR Independent Line	11.9	Track never laid
74002019	West Virginia	Pocahontas	Cass	Cass Scenic RR	45.0	Tourist RR
93000693	Nevada	White Pine	Ely	Nevada Northern Railway East Ely Yard and Shops	40.0	Tourist RR
79003792	New Hampshire	Carroll	North Conway	North Conway Depot and Yard	5.0	Tourist RR

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Historic Preservation of Railroad Property and Facilities

**Testimony on Historic Preservation of Railroad Property and
Facilities**

Before the

Subcommittee on Railroads, Pipelines and Hazardous Materials

of the

House Committee on Transportation and Infrastructure

By

Patrick B. Simmons

**Director, Rail Division, North Carolina Department of
Transportation**

Thursday, June 5, 2008

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Historic Preservation of Railroad Property and Facilities

Chairwoman Brown, Ranking Member Shuster and distinguished members of the Committee, my name is Patrick Simmons. I am Director of the Rail Division with the North Carolina Department of Transportation (NCDOT). I appreciate the opportunity to share my perspective on the impacts of historic preservation of railroad property and facilities.

NCDOT is blessed to have a full service rail program. Our program is nationally recognized for our work with intercity passenger rail service, and ridership is up more than 20% over the past seven months on our State-sponsored passenger trains, the *Piedmont* and *Carolinian*. We are developing the federally-designated Southeast High Speed Rail Corridor (SEHSR) that will link the existing Northeast Corridor with communities south through Virginia, North Carolina, South Carolina, Georgia, Florida and other states in the Deep South and west. We administer our State's highway-railroad crossing safety program and are proud to have partnered with Norfolk Southern Railway (NSR) and the Federal Railroad Administration (FRA) to create the Sealed Corridor. Later this year, USDOT will report to the Congress on how the Sealed Corridor has saved lives at highway-railroad crossings

We partner with NSR, CSX Transportation (CSXT) and the North Carolina Railroad (NCR) Company in an ongoing program of infrastructure investments that improve safety, add network capacity and reduce travel times. We partner with the FRA to operate a railroad industry safety inspection program. We partner with NSR, CSXT, our state's two-dozen shortlines and communities to build sidings that enable new and expanded industrial development and job creation. We also acquire and hold rail corridors around the state to preserve them for future transportation use. We also partner with the Virginia Department of Rail & Public Transportation (VDR&PT), the Federal Highway Administration (FHWA), FRA and a community of some fifty (50) state and local agencies to develop the design and environmental evaluation of SEHSR. More information these programs can be found at www.bytrain.org and www.sehsr.org.

In 1849 our legislature authorized creation of the North Carolina Railroad (NCR), the first company chartered in our State. The NCR stretches 317 miles across the economic heart of North Carolina. More than 60% of our state's population and economy are within 15 miles either side of the NCR corridor. Today, the state owns 100% of the shares of common stock in the NCR. NCDOT and NCR partner to build projects that will improve passenger and freight travel as well as looking for ways to help communities reach their economic potential.

Railroading is an important part of North Carolina's history and it is a foundation for our future economic development and mobility. A copy of our state railroad map is attached, see also <http://www.bytrain.org/quicklinks/pdf/railmapdec07.pdf>.

The points I will address include: 1) North Carolina's experience with application of the National Historic Preservation Act of 1966, as amended, (the Act) to development of a railroad *corridors*, 2) the impact of the Act on project delivery, including schedules and costs, 3) our nation is poised to partner with railroads and other private sector partners to leverage investment, build needed capacity and enhance mobility, and 4) the amendment offered by Representative Shuster during mark-up of H.R. 6003, the Passenger Rail Investment and Improvement Act of 2008 is an excellent initiative to address this issue.

North Carolina Department of Transportation

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Historic Preservation of Railroad Property and Facilities

Recent and past application of the National Historic Preservation Act of 1966, as amended¹ (the Act) to designate freight and passenger railroad *corridors*, or any operating transportation *corridor* for that matter, as eligible for inclusion on the National Register of Historic Places by virtue of their historical importance is, I believe, a misapplication of intent. While well-meaning, application of the Act to railroad *corridors* can do more harm than good by impeding on the transportation deliverables sorely needed for the 21st Century.

Facilities

Without question, many great works of railroad engineering and architecture have been preserved for current and future generations and the Act has played a role with respect to some of these resources. There is also no question that many individual railroad structures deserve the protection they receive. The Act has and will continue to be applied to them in a way that allows for continued use and development.

For example the North Carolina Department of Transportation received from the National Trust for Historic Preservation the 2007 John H. Chaffee Trustees Award for Outstanding Achievement in Public Policy². This award recognized our railway station preservation and improvement program. This recognition was for the body of work exhibited by our rehabilitation of some 14 historic passenger stations. Together we worked with our State Historic Preservation Office (SHPO) and local communities to restore these facilities to modern use while at the same time respecting their historic character. See also <http://www.bytrain.org/istation/>

In this era when we need timely and effective responses to real world transportation capacity and mobility needs we can not afford to add significantly to our project delivery timetables nor can we suffer further cost escalation. For example, since 2002 NCDOT's Construction Cost Index has increased an average of 15% annually. This number is multiplied year on year.

Railroad Corridors

However, the designation of entire active railroad *corridors* as historic districts, or as eligible for inclusion on the National Register of Historic Places presents procedural, financial and legal obstacles to the continued operation of vital transportation services. Such designation extends federal protections of the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act to the *corridor* itself and to any and all components of the operating railroad within that *corridor*.

Historic *corridor* designation affects routine maintenance and safety improvements to roadbed, bridges and culverts, embankments, ballast, ties, rail, equipment, highway-railroad at-grade crossings, signal systems and minor structures. Regardless of designation, these components must be continually maintained, updated, and replaced according to engineering, safety, and economic considerations in order to remain safe and viable, and to meet changing transportation needs.

¹ The National Historic Preservation Act of 1966, as amended, Public Law 89-613, 116 USC 470 et seq

² <http://www.bytrain.org/istation/pdf/chaffeeawardrelease.pdf>

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Historic Preservation of Railroad Property and Facilities

The review process under the Act and Section 4(f) is complex. Applying such designation to an entire *corridor* is an unreasonable burden of administrative review and government "red tape" that makes federal support for even the smallest routine maintenance and safety upgrades unrealistically time consuming and infeasible.

NCDOT, in partnership with VA, is conducting engineering and environmental work on the portion of the SESHHR route that links our state capitols. The VA SHPO required evaluation of the *corridor* from Richmond south to the state line to determine eligibility of the *corridor* for the National Register. Shortly thereafter the NC SHPO requested the same evaluation for the *corridor* from Raleigh to the state line.

It should be noted that every structure within the corridor of interest (ranging up to 1,000 feet wide and including bridges, buildings, tracks, and supporting structures, etc.) had already been evaluated for historic significance.

To comply with this request added 6 months to the project schedule and some \$150,000 in direct and indirect costs to complete the necessary documentation. This request from the SHPOs was received after working on the project since 1992 and after receiving a previous federal record of decision³. We have dutifully filed a 75-page report documenting the history of the railroad *corridor*⁴. This is not the providence of government but rather academia and scholars.

Based upon the SHPO final determination of eligibility, further time and resources will be required to complete evaluation of the *corridor*, and every future expenditure of federal funds in the *corridor* will require us to address Section 4(f) and the Act, adding substantial costs in time and resources.

Not only does designation of a railroad *corridor* add time and costs to project schedules, it can affect grants, loans, and the applications for federal funds. Designating a railroad *corridor* also can impact safety by seriously impairing the timely flow of funds for grade crossing and other safety improvements. It could discourage railroads from seeking available federal financial assistance and it would impair the ability of governments to provide such assistance, diminishing the safety of an operating transportation system.

In short, considering and complying with rules for railroad *corridors* eligible for the National Register delays and squanders federal resources intended to support, to improve, and to continue the operation of the nation's railroads by requiring documentation and bureaucratic approvals that take time, complicate relationships with the private sector, and have little or no beneficial effect.

Operating railroads are a vital productive part of the nation's built environment. Just like our highways, inland waterways, seaports, and airports, railroads played a major role in the development of this nation and continue to be a vital part of our economy and landscape. They

³ Record of Decision for the Tier I Southeast High Speed Rail Corridor, October 2002

⁴ Supplement to Phase II Architectural Resources Survey Report, Southeast High Speed Rail Project Number 9.9083002, STIP Project Number P-3819

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must be given every opportunity to thrive, to be safe, to operate efficiently, and to continue to exist as part of our living heritage for future generations of Americans.

Impact on Public Private Partnerships

The National Surface Transportation Policy and Revenue Study Commission (Commission) reported to the Congress late last year on a series of recommendations intended to modernize our nation's transportation infrastructure⁵. The report included recommendations to:

- Significantly increasing investment in surface transportation, including investing at least \$225 billion annually from all sources (Federal, state, local, and private) for the next 50 years to upgrade to an advanced surface transportation system capable of sustaining strong economic growth;
- Accelerating the time between conception and delivery of major transportation projects to reduce costs while still addressing environmental concerns. Many federally-funded projects take between 10-13 years to complete after they are proposed, largely due to lengthy approval processes. Given the high rate of construction inflation, for example, simply reducing the time between conception of projects and delivery could save billions of dollars as well as bringing new facilities online more rapidly.

The Commission also recommended public investment in improved Freight Transportation to Enhance U.S. Global Competitiveness and Intercity Passenger Rail: A Program to Serve High-Growth Corridors by Rail.

Especially relevant to this hearing, the Commission also recommended Environmental Stewardship: Transportation Investment Program to Support a Healthy Environment. This consolidated program replaces several existing environmental programs, providing more flexibility to States in their efforts to mitigate the environmental impacts of transportation.

Central to this program of recommendations is the premise that public private partnerships will play an increasingly important role in the design, construction and operation of rail, intermodal and other facilities. But when the Act and Section 4(f) are applied to the recommendations of the Commission, I believe these requirements will serve to significantly lengthen project delivery and add costs to these programs.

Modal Competition

While recognizing that railroads are historically important, I recommend that a provision be added to Title 49 to clarify that only certain particularly important elements of railroads, and not entire operating *corridors*, warrant consideration for eligibility for the National Register of Historic Places.

⁵ Report of the National Surface Transportation Policy and Revenue Study Commission, December 2007

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SAFETEA-LU included just such a provision at Section 6007 entitled Exemption of Interstate System⁶. This provision exempting interstate highways from historic designation effectively places rail at a competitive disadvantage. It also favors public investment in highways versus developing public private partnerships between states and railroads.

By not leveling the playing field our program of infrastructure investment is further constrained from taking advantage of the enhanced economy, efficiency and productivity that the rail mode can offer. Should rail be the only interstate mode that carries this additional responsibility?

Our Class I railroads already are wary of governmental regulation—and rightfully so in this case. I believe the freight railroads will require to critically evaluate whether or not significant elements of their network may be constrained from further development and capacity enhancements. These companies are conservative and risk-adverse. A requirement such as historic designation that can apply broadly across their network will produce a setting that will make the task of entering into public-private partnerships all the more difficult.

Conclusions

- Designating railroad *corridors* as historic adds significant time and costs to project development,
- Designating railroad *corridors* as historic is an impediment to adding network capacity and enhancing safety,
- Designating railroad *corridors* as historic will hinder development of public private partnerships, and
- Designating railroad *corridors* as historic will not significantly add to the protection of historic resources.

Thank you for the opportunity to speak with you today. I appreciate your attention and look forward to answering your questions.

⁶ Public Law 109-59—August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

Appendix B
***De Minimis* and Section 4(f)**
Programmatic Evaluations (PE) Comparison Chart

Source: FHWA Resource Center, Section 4(f) Workshop.

Accessed: <http://environment.fhwa.dot.gov/projdev/4fnspeval.asp>

De Minimis and Section 4(f) Programmatic Evaluations (PE) Comparison Chart

	De Minimis Impact	Independent Bikeway or Walkway Projects PE	Use of Historic Bridges PE	Minor Involvement with Parks, Recreation Lands, and Wildlife and Waterfowl Refuges PE	Minor Involvement with Historic Sites PE	Transportation Projects that have a Net Benefit to a Section 4(f) Property PE								
Date Enacted	12/13/05 (guidance issued)	5/23/77	7/5/83	12/23/86		4/20/05								
Project Type	Any type of project.	Independent bikeway or walkway project, not incidental activities of a highway project.	Rehabilitation or replacement of historic bridges.	Improvement of operational characteristics, safety, and or physical condition of an existing highway on essentially the same alignment.		Any type of project on existing or new alignment.								
NEPA Level	CE, EA, or EIS	CEs or EAs only	CE, EA, or EIS	CEs or EAs only		CE, EA, or EIS								
Resource Applicability.	All Section 4(f) properties.	Parks or recreation areas only.	Historic bridges that are not a National Historic Landmark.	Parks, recreation lands, and wildlife and waterfowl refuges adjacent to the existing highway facility.	Historic sites adjacent to the existing highway facility.	All Section 4(f) properties								
Impact Threshold	<p>For Historic Properties: <u>No historic properties affected</u>, or ...</p> <ul style="list-style-type: none"> Transportation program or project <u>has no adverse effect</u> on historic sites <p>For Parks, Recreation, or Refuge Sites, project will not adversely affect the features, attributes or activities qualifying the property for Section 4(f) protection.</p>	No significant impacts (No displacements, historic site impacts, minimal water quality impacts, etc.).	<p>If bridge can be rehabilitated without affecting the historic integrity, Section 4(f) does not apply.</p> <p>If the bridge is to be demolished and/or replaced, Section 4(f) applies.</p>	<p>The amount of property that may be acquired/used :</p> <table border="1"> <thead> <tr> <th>Total Size Section 4(f) Site</th> <th>Maximum to Be Acquired</th> </tr> </thead> <tbody> <tr> <td>< 10 acres</td> <td>10 % of site</td> </tr> <tr> <td>10 - 100 acres</td> <td>1 acre</td> </tr> <tr> <td>> 100 acres</td> <td>1 % of site</td> </tr> </tbody> </table>	Total Size Section 4(f) Site	Maximum to Be Acquired	< 10 acres	10 % of site	10 - 100 acres	1 acre	> 100 acres	1 % of site	<p>Project may not remove or alter historic buildings, structures or objects, or archaeological resources important for preservation in place.</p> <p>Project must result in a no effect or no adverse effect determination via the Section 106 process.</p>	<p>No impact limits, but project results in an overall enhancement to the property.</p> <p>For historic properties the project doesn't necessarily require a no effect or no adverse effect determination, but property remains eligible for NRHP.</p>
Total Size Section 4(f) Site	Maximum to Be Acquired													
< 10 acres	10 % of site													
10 - 100 acres	1 acre													
> 100 acres	1 % of site													
Coordination and Concurrence Requirements	<p>For Historic Properties, section 106 consultation process utilized.</p> <p>Officials with jurisdiction over the property (if historic, SHPO or THPO (and ACHP, if participating)) must be informed of FHWA's intent to make a finding of <i>de minimis</i> impact, and they must concur in writing in the assessment of project effects.</p>	Official with jurisdiction concurs in writing that project is acceptable and consistent with designated use of property.	<p>If replacement is proposed, the bridge must be made available for an alternative use.</p> <p>SHPO concurs in writing with assessment of impacts and proposed mitigation.</p>	Official with jurisdiction concurs in writing with assessment of impacts and proposed mitigation.	SHPO concurs in writing with assessment of impacts and proposed mitigation.	Official with jurisdiction or SHPO/THPO concurs in writing with assessment of impacts, proposed mitigation, proposed measures to minimize harm; mitigation necessary to preserve, rehabilitate and enhance those features and values of the Section 4(f) property; and that such measures will result in a net benefit to the <u>Section 4(f) property</u> .								
Public notice	Public notice and opportunity for public review & comment also required	N/A	N/A	N/A	N/A	For projects with one or more public meetings or hearings, information on the proposed use of the Section 4(f) properties shall be communicated to the public								

Appendix C

Focus Group and Stakeholder Comments

Appendix C provides the detailed comments from the focus group and stakeholders contacted during the preparation of this study. Members were identified and their comments were summarized in Chapter 2.

Focus Group

As discussed in Chapter 2, FRA created a focus group for the study which consists of the agencies directly responsible for compliance with section 106 or Section 4(f) for railroad and rail transit projects, including:

- FHWA and FTA, the other Federal agencies with FRA in the U.S. DOT that may fund or approve railroad infrastructure projects.
- STB, the federal agency that has jurisdiction over proposed rail line abandonments, acquisitions, and new rail line constructions.
- DOI, the federal agency that may have responsibility to manage historic railroads that traverse federal lands.
- Historic preservation regulatory agencies and participants, including the ACHP, NCSHPO, NATHPO and NTHP.

Members of the focus group are identified in Table 2-1 on pages 2-1 and 2-2. FRA had preliminary discussions with each member of the focus group, held a workshop on June 1, 2011, to further develop the scope and content of the study, submitted the First Draft Interim Report for their review on July 15, 2011, set up a project website for the focus group, and held follow up meetings on August 10, 2011, and January 18, 2012 to discuss progress on the study and comments received. The focus group contributed by regular discussions and by providing comments on interim reports throughout the development of this study, many of which formed the basis for the potential solutions recommended in Chapter 8. Their comments are summarized in Chapter 2 and are provided in detail below.

NCSHPO and NATHPO⁶¹

At the focus group workshop on June 1, 2011, the NCSHPO said that it is important to consider the historic importance and continued operations of the railroad system overall, not just focus attention on the effects to common materials such as ties, rails, bridges, and individual buildings which must be changed to keep it operational. Because railroads are evaluated on a state-by-state basis, National Register eligibility findings are different, depending on the SHPO. NCSHPO indicated this study is an opportunity for federal agencies to define what constitutes an undertaking. The NCSHPO also

⁶¹ Although invited, the NATHPO did not participate in meetings or provide comments.

recommended reviewing historic context statements for railroads prepared by some states including Arizona and Colorado.

On July 27, 2011, NCSHPO provided the following comments on the First Interim Draft Report:

1. Excluded Actions
 - a. This seems to be a good place to start in the streamlining process. Eliminating maintenance would be very helpful.
 - b. Some activities like transfer of federal land or architectural changes for accessibility may take some tweaking to make exempt.
 - c. The ACHP Program Alternatives offer real options for streamlining railroad projects.
2. Interstate highway exemption: This is not a “best practice” for 106. The exemption occurred because of political pressure particularly when one saw the numerous highway-related magazines touting the significance of the 50th anniversary of the interstate system. For the Federal Railroad Administration, a more intellectually honest approach that achieves real streamlining can be produced.
3. “Truly” significant: Please drop this concept. Section 106 is about the consideration historic properties not about ranking relative importance before you begin. The identification stage of the 106 process needs to occur in a professional manner identifying everything National Register eligible within the Area of Potential Effects. (This also means evaluation of subsurface resources to make sure they meet the eligibility criteria.) It is in the conversation among the Federal agency, applicant, SHPO, and consulting parties about the definition and resolution of effects and the project needs that treatment decisions occur. Higher level of significance does not automatically mean a higher standard of preservation treatment.
4. “New” components (e.g., rails and ties) of a National Register eligible property such as a railroad do not automatically mean the railroad is not eligible. Continued use and operational requirements mean replacement of worn out parts. The significance of the 1835 main line of the Baltimore & Ohio Railroad from Baltimore to Washington remains as CSX maintains the track and roadbed for safety and efficiency.
5. Idea versus a property: It would be useful to pursue the concept introduced by the Wisconsin SHPO that railroads are an “idea” like a river and not really a historic property (see page C-16).

ACHP

The ACHP provided guidance to include more SHPOs to the study who grapple with the types of issues to be addressed in FRA’s study. FRA added the California, Montana, Ohio, and Texas SHPOs to the stakeholder group that already included the Alaska, Maryland, New York, and Wisconsin SHPOs and the NCSHPO. The ACHP asked that a geographically diverse range of rail carriers be represented. FRA added Norfolk Southern Corporation (NS), CSX Transportation, Inc. (CSX), Union Pacific Railroad (UPRR), Burlington Northern Santa Fe Railroad (BNSF), Consolidated Rail Corporation (Conrail), Canadian National/Illinois Central (CN/IC) and the American Short Line and Regional Railroad Association (ASLRRA) to the stakeholder group that already included the Association of American Railroads (AAR), Amtrak, and the ARRC. ACHP also asked FRA to encourage partnership with stakeholders, so FRA set up a series of workshops and webinars and a website to

share project information as the study develops in addition to the planned regular meetings and e-mail requests for review, comment and input.

At the focus group workshop on June 1, 2011, the ACHP said that federal agencies like to compartmentalize National Register eligibility findings, but the Keeper has found whole rail lines to be historic properties. Compartmentalizing also may leave out stakeholders. ACHP said that good documentation exists with railroads (ex. the ARRC) and that the evaluation of the Northeast Corridor was well documented. The study should look for precedents and set parameters for defining property types and how to evaluate historic significance. Traditional Cultural Properties and natural landscapes are “hot button” issues for evaluating historic properties (ex., Hawaii-new transit line).

The ACHP said the study offers an opportunity for a consistent approach to consultation. SHPO participation will be very important as the questionnaire responses will form a major component of the report. A prototype programmatic agreement should be considered. ACHP said the railroads should be asked for what type of capital improvements the federal funds are used, and the issues and challenges they face every day. There needs to be better coordination of NEPA, section 106 and Section 4(f). ACHP’s Office of Native American Affairs would be a good source for additional stakeholders and intertribal groups. ACHP provided FRA a study that indicates what techniques are useful and not so useful. ACHP indicated the study should include contact with NPS and the Wisconsin Historical Society about current National Register evaluation techniques for railroad corridors. Some 21st Century requirements that the Keeper of the National Register is developing will be relevant.

On August 10, 2011, ACHP provided some additional comments, including:

- APEs should be considered in the evaluation, assessment of effects, and proposed treatments of railroad corridors.
- When evaluating significance, it is important to mention settings, particularly cultural landscapes that may be relevant to improvements and expansion projects.
- Assess whether the railroad corridors have been evaluated using the historic context and thematic evaluations that are set forth in the Secretary of Interior’s Guidelines for Historic Preservation and Archeology. Before giving a list of NRHP listed and eligible properties, it is important to clarify the historic context, and to indicate whether railroads are evaluated primarily as part of section 106 reviews or based upon nominations from railroad owners or preservationists.
- Encourage Federal agencies to develop PAs for complex projects or programs exempt activities or those that would likely not result in adverse effects to historic properties.
- The exempted categories of undertakings in 800.14(c) and the use of exemptions in PAs are very different. The PAs are most often used to exclude categories of activities from routine reviews. The Exemption in 800.14(c) is a higher level national type of exemption that would require more extensive consultation and public notification in the Federal Register.
- The exempted categories of undertakings in 800.14(c) could also exempt certain types of historic railroads from section 106 when the railroad or type has already been documented and interpreted.

ACHP asked if there are standard treatments of tracks and rails, railroad bridges, etc. that could be treated in a routine and systemic way. Standard treatments are used to avoid adverse effects and thus, allow agencies to conclude reviews with no adverse effect findings. This is what the PAs cited in the study are intended to do. In addition, standard treatments can be a list of mitigation measures that are routinely applied to a type of undertaking that will result in adverse effects. Standard treatments enable DOTs and FHWA to have predictability and consistency as they develop mitigation measures for projects.

Program Comments are currently being pursued by FHWA for the treatment of common post-1945 reinforced concrete and steel bridges, and might support recommendations in this study that certain types of Program Comments be pursued by FRA. As of December 2011, the initial concept for the Program Comments was developed, but the details are still in progress. The Program Comments would be for mid-20th Century concrete highway bridges that are built under standard plans and with standard construction techniques, the common workhorse bridges in use nationwide. Comparative railroad bridge types that might be pursued by FRA for ACHP Program Comment would be the common standard 20th-Century through-plate girder bridge type and deck-plate girder bridge type (details on the process for developing Program Comments are provided in Chapter 4).

STB

STB contributed information developed by OEA in January 2008 at the request of NCSHPO, which explored possible measures to improve the historic review process in rail line abandonment cases while recognizing the need to minimize delay in the handling and resolution of STB proceedings. OEA distributed copies of this information to the following groups in 2008 for comment: NCSHPO, ACHP, ASLRRA, AAR, the United South and Eastern Tribes (USET), NATHPO, Tribal Strategies, Inc., NTHP, NRHP, National Congress of American Indians, NPS's Tribal Preservation Program, and National Geodetic Survey for review and comment. OEA received comments from the ACHP and NCSHPO. USET provided verbal comments to OEA, stressing the need for:

- Consultation with federally recognized tribes early in the section 106 process and
- The protection of cultural resources within a rail right-of-way that may not have been disturbed since the construction of a rail line.

As a result of a two-year dialogue with railroads and historic preservation groups, OEA identified the following potential measures for improving the historic preservation process without compromising the historic review:

1. Improving the quality of **Historic Reports** prepared pursuant to 49 CFR 1105.8(a) by requiring railroads to submit more detailed information to OEA and SHPOs earlier in the environmental review process in order to permit increased review time.
2. Issuing a delegation letter to SHPOs nationwide in accordance with 36 CFR 800.2(c)(4) to make it clear that applicants seeking authority from STB to abandon rail lines may initiate the section 106 process on behalf of STB.
3. Creating additional exempted categories pursuant to 36 CFR 800.14(c) of the ACHP's regulations, in order to allow the railroads, SHPOs and OEA to focus on those resources that are most important from a historic preservation perspective. For example, some types of actions and rail line abandonments

could be categorically excluded from section 106 if they are not likely to affect historic properties (e.g., where the rail right-of-way will likely be converted to use as an interim trail or sold to a preservation group, park, or recreation area.) In addition, certain types of properties could be exempt from section 106 review because they would not be considered historic (e.g., any sections of track that have been replaced or that have had major repairs within the past 50 years and any structures on the rail right-of-way that consist of common resources types. Finally, certain types of properties may be exempt from further review if historic review objectives have already been met (e.g., historic bridges or tunnels have already been documented; archaeological sites have already been documented; or salvage activities would not disturb materials or resources underlying the track, or archaeological sites are located directly adjacent to the rail line and have already been documented).

4. Developing statewide Programmatic Agreements (PAs) or a nationwide section 106 PA pursuant to 36 CFR 800.14(b)(2).

At the focus group workshop on June 1, 2011, STB clarified that it does not fund railroad projects, but does have jurisdiction over new rail line construction, abandonments, mergers, and operating licenses. STB offered the names of several staff members who may provide additional contacts for stakeholders, including intertribal groups.

FTA

FTA does not have formal public guidance at this time for complying with section 106. The agency heavily relies on information developed by the ACHP, NPS, and FHWA. FTA informally relies on FHWA's regulations and Section 4(f) Policy Paper. Although, it has been superseded by the Section 4(f) regulation, FTA and FHWA issued joint guidance on *de minimis* impacts after SAFETEA-LU that can be informative.

FTA contributed the information for complying with section 106 on its website at http://www.fta.dot.gov/planning/environment/planning_environment_2235.html and the AASHTO report from August 2009 entitled "Effective Practices for Considering Historic Preservation in Transportation Planning and Early Project Development," NCHRP Project 25-25, Task 49. While not formal guidance, the AASHTO report is helpful, and it identified "best practices" in five categories:

1. Develop computerized cultural resource inventories, often within a geographic information system (GIS), to identify "red flags" including historic properties protected under Section 4(f).
2. Use archeological predictive modeling to characterize and analyze project alternatives and map areas of high archaeological sensitivity within proposed alternatives.
3. Develop formal interagency procedures for considering historic preservation factors during planning or early project development.
4. Schedule regular consultation with SHPOs, Tribes, and other stakeholders.
5. Use section 106 PAs to establish procedures and protocols for considering historic preservation factors during both planning and early project development.

At the focus group workshop on June 1, 2011, FTA said that maintaining the historic railroad use into the modern era is a beneficial effect, even if there are some physical changes.⁶² FTA mentioned they have projects when inactive railroad lines are brought back into service for commuter rail (ex. Massachusetts Green Line). Transit agencies that need to maintain historic properties including the Massachusetts Bay Transportation Authority (MBTA) in Boston, the Metropolitan Transportation Authority (MTA) in New York, the Chicago Transit Authority (CTA), and Utah Transit Authority (UTA) in Utah should be considered for adding to the stakeholders. FTA (and FHWA) has a 4(f) exception at 23 CFR 774.13(a) that applies when, as a result of section 106 consultation, restoration, rehabilitation, or maintenance of transportation facilities that are historic properties will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the NRHP.

FHWA

FHWA contributed its section 4(f) Policy Paper (2005 and 2012), its Environmental Review Toolkit at <http://www.environment.fhwa.dot.gov/>, which has sections on Historic Preservation at and Section 4(f), and the “Every Day Counts” Programmatic Agreements Project conducted by the Center for Environmental Excellence by AASHTO.

FHWA also recommended that the nation’s railroads get a similar Section 4(f)/106 exemption granted by Congress to the Interstate Highway System in 2005, where only the most significant historic elements of the railroad network would be recognized and remain subject to historic preservation laws. FHWA recommended that historic railroad features should be addressed on a national or regional basis, to come up with a more consistent, systematic approach to their significance, as well as their management and mitigation. FHWA and FRA provided the National Gateway Phase 1 as an example of cooperation between U.S. DOT agencies working together to extend FHWA’s programmatic 4(f) approvals to appropriate rail projects. On the National Gateway, FHWA and FRA applied the FHWA Net Benefits Programmatic Evaluation to Phase 1, thereby facilitating the advancement of that project. Three of the SHPOs had determined railroad sections historic and 10 tunnels deemed contributing elements by the SHPOs would be adversely affected by the project. Despite the adverse effects to the tunnels, FHWA and FRA argued that the modification of these tunnels, with appropriate mitigation, facilitated the continued viability of the railroads to maintain and therefore preserve themselves as historic features in their entirety.

At the focus group workshop on June 1, 2011, FHWA indicated the Gateway Project would be a good case study for how to evaluate historic significance of railroads. FHWA (and FTA) have a 4(f) exception at 23 CFR 774(a) that applies when, as a result of section 106 consultation, restoration, rehabilitation, or maintenance of transportation facilities that are historic properties will not adversely affect the historic qualities of the facility that caused it to be on or eligible for the NRHP. FHWA also indicated there may be opportunities for partnerships with applicants in the railroad industry to make the process go more smoothly.

⁶² Federal Transit Administration and National Trust for Historic Preservation, *The Returning City, Historic Preservation and Transit in the Age of Civic Revival*.
<http://www.preservationnation.org/issues/transportation/additional-resources/returning-city-1.pdf>.

FHWA noted that as a result of the extensive experience developed with 4(f) with the Federal aid highway program, many of FHWA's partner State DOTs have developed extremely capable staffs of Cultural Resource professionals, who have developed strong relationships with their SHPOs. Resultantly the state DOT Cultural Resource staffs have good experience in evaluating linear transportation projects in relation to both archaeological and historic architectural resources. As was the case in National Gateway Phase I, FRA and FHWA relied heavily on the existing relationships between the state DOT Cultural Resource staffs and SHPOs to execute a 4-state Memorandum of Agreement in less than 6 months.

In an e-mail on August 11, 2011, FHWA noted some similarities between the Interstate Highway System and railroads. The Interstate System was developed with uniform design standards, but design features were by no means standard. Design was performed by State Highway Departments according to their respective design guidelines. The Interstate System was substantially constructed within a 40 year time window of time (some segments in certain areas incorporated older pre-existing roads). It has significant common elements with the railroad system. They are linear transportation systems that have had significant influence on the economic prosperity of the nation. In order to retain the economic edge, they must be able to readily change with the times, whether from design changes due to Congressional mandates to accommodate larger vehicles or to retrofit structures to protect against perils unanticipated when constructed (e.g., seismic activity or terroristic risk). The most significant distinction between railroads and highways (currently) is who owns them.

DOI

On January 26, 2011, the DOI (NPS) submitted to FRA its data for those railroad properties listed in the NRHP or found eligible through Federal agency-Keeper determination (See Chapter 3). NPS was unable to attend the focus group workshop on June 1, 2011. On August 17, 2011, the NRHP staff of the DOI/NPS had a telephone discussion with FRA and consultant ICF International to discuss the application of the NRHP criteria and the related guidance set forth in NRHP Bulletin 15, with regard to evaluating railroad-related properties. Among the topics discussed were the importance of developing and utilizing historic context, establishing a period of significance based on historic research, the strength of association necessary to evaluate under NRHP Criterion A for events and NRHP Criterion B for persons, and how re-grading, re-alignment, and regular replacement of materials affect various aspects of integrity. The NPS made it clear that the historic context should be broad enough to cover large multi-state railroad systems. It was suggested that a nationwide historic context could be developed as a framework, and then subsequent specific contexts could be developed for particular states or carrier systems. This could also be done using the NRHP Multiple Property Documentation Form, which is used to establish the historic context, property types, and registration requirements. The NPS is not currently developing an NRHP bulletin to provide guidance for evaluating railroads or other linear resources. The NPS mentioned that the irrigation system in California's Central Valley had been evaluated for the NRHP, and while trunk canals, branch canals and other major structures were found to be significant, smaller tributaries (i.e., ditches) were not. This might serve as a precedent for evaluating a railroad system for the NRHP, which has main lines, yards, branch lines, sidings, and spur lines.

Stakeholders

FRA created a stakeholder group for the study who are not directly responsible for compliance with section 106 or Section 4(f), but may participate in the compliance process, have experience with railroad undertakings, or have a vested interest in the outcome. The stakeholder group in the study consisted of additional federal agencies, national organizations related to historic preservation and railroads, SHPOs, state DOTs, and rail carriers. FRA solicited comments and information from each of the following participants in the stakeholder group.

The stakeholders are identified in Table 2-2 on pages 2-3 through 2-5. Although all stakeholders participated and shared insight and information, AAR, Amtrak, ARRC, BLM, the Maryland SHPO, Texas SHPO, and the Wisconsin SHPO in particular provided extensive comments to FRA that informed this study. The stakeholder comments are summarized in Chapter 2 and provided in detail below. Those aspects that are most relevant to streamlining section 106 and Section 4(f) compliance for federally funded railroad and rail transit projects were considered along with those from the focus group, and helped form the basis for the potential solutions recommended in Chapter 8.

AAR

In a memorandum received on July 11, 2011, the AAR provided two letters and the following fourteen points raised by various railroads for streamlining section 106 and 4(f). The first letter, dated June 7, 2011, was from the ARRC to the U.S. House of Representatives, specifically Rep. John Mica, Chairman of the Committee on Transportation and Infrastructure and Rep. Bill Shuster, Chairman of the Subcommittee on Railroads, Pipeline and Hazardous Materials. The second letter, dated April 8, 2009, was from Amtrak to FRA, and is discussed in detail under the Amtrak subsection.

1. *Designation of Entire Corridors as Historic.*

The enclosed letter from the Alaska Railroad illustrates the problem. The letter describes a situation where an unremarkable bridge was designated historic merely because it was on a railroad (i.e., the entire railroad was considered historic [see text box]). Another example is described in the enclosed letter from Amtrak, which cites New Jersey's designation of the entire Northeast Corridor in New Jersey as historic (see Amtrak subsection). Designation of entire railroads or entire corridors as historic interferes with routine maintenance activities and the development of important rail infrastructure.

Interstate highway corridors as such are considered exempt from section 106 and 4(f) except for certain particularly important elements identified in 2005. The same should hold true for railroad corridors.

Example from ARRC letter to Congress dated June 7, 2011:

The example we have used is our bridge 432.1. This is a small, unremarkable bridge constructed about 1950 in a remote and rural area along our main line track. It was declared historic simply because it was associated with the Alaska Railroad, not because of any merit in the bridge itself. The safety project to replace this deteriorating piece of infrastructure was delayed two years while the historic designation, the special protections afforded historic objects, and the "mitigation" for the removal or use of the historic object were resolved through the Section 106 and Section 4(f) processes. This involved, with some iterations, the Alaska Railroad, the Alaska State Historic Preservation Officer, the Federal Transit Administration, the Secretary of Transportation, the Secretary of Interior, the Department of the Interior (both in Washington D.C. and Alaska), the National Park Service, and the Advisory Council on Historic Preservation.

2. ***Designation of Generic Types of Structures.***

Similar to number one, some states simply consider all structures of a certain type as historic. Ohio, Georgia, West Virginia, and Pennsylvania designate every railroad bridge as historic. Such generic designations are not based on any actual analysis of the structures and should be prohibited.

3. ***The 50-Year Threshold.***

Often [SHPOs] presume that if a structure is 50 years old, it is historic. Most railroad infrastructure is much older, but should not automatically be considered historic. Under federal regulations, a structure is not eligible for designation if it is under 50-years old, but the regulations do not provide for the reverse – that a structure is historic merely because it is over 50 years old. There should not be such a broad presumption.

4. ***Routine Maintenance on Historic Structures.***

As the Amtrak letter points out, routine maintenance or repairs of a structure should not be subject to review if it will not change the structure in any significant way. Examples cited by Amtrak include repointing grout using the same color grout as the original grout and replacing tiles with identical tiles. AAR supports Amtrak's suggestion that FRA exempt certain categories of activities from the review process.

5. ***Work on Non-Historic Portion of Structures.***

The Amtrak letter points out that historic structures often have non-historic aspects and that work on the non-historic aspects should not require review. Amtrak cites modern roofs and television monitors in train stations as examples, as well as fencing and security cameras. Review should not be required for such work.

6. ***Work on Areas Inaccessible to the Public.***

The Amtrak letter points out that structures the public does not see generally should not be subject to review. Culverts under tracks are one such example. If work on such a structure would not affect features that would qualify as historic, the work should be exempt.

7. ***Balancing Historic Preservation with Other Objectives.***

At times, historic preservation objectives are at odds with environmental, safety, or other objectives, particularly with respect to bridges, culverts, and similar structures. In many cases, the railroads find the process for balancing concerns inadequate. The NEPA process can be used to balance these concerns.

8. ***Area of Potential Effect.***

STB, when conducting its reviews of proposed abandonments, properly limits the scope of review (area of potential effect) to the right-of-way. Often, the railroads find [SHPOs] attempting to expand the area of potential effect beyond the right-of-way, unjustifiably so. AAR understands that there may be some cases where railroad projects might visibly affect historic structures outside the right-of-way. Clear, consistent procedures for addressing such instances would be helpful.

9. ***The Process for Ascertaining the Historic Nature of Structures.***

The railroads find considerable variability between state offices in the process for conducting reviews. Some take considerable more time than others. Some have “evidentiary” requirements, such as glossy photos or additional reports that might or might not be pertinent to the structures or undertakings at hand. There should be a standardized process with timeframes that are adhered to and documentation standards.

10. ***Rebutting SHPO Assertions.***

Often, the railroads are frustrated by an inadequate opportunity to rebut assertions that a structure is historic. While the theoretical opportunity to rebut such assertions exists, the railroads’ experience is that in the face of such assertions agencies such as STB or the Army Corps of Engineers are reluctant (or often refuse) to question them. However, the federal agency usually is the entity in the best position to balance competing claims. The current, almost complete, deference to [SHPOs] provides no meaningful process for rebutting historic preservation claims. Standard procedures for reviewing disputed claims as to the historic nature of a structure would be helpful, e.g., collection of information on changes that have been made to the structure and elevation to a federal agency representative with expertise in evaluating claims of historic significance for review.

11. ***Trails.***

There seems to be considerable bias towards conditioning approval of a project on the creation of a trail. On the other hand, adding costs and delay to the review process could discourage abandonment projects that might yield a trail.

12. ***Mitigation.***

Certain [SHPOs] force mitigation efforts that involve only a tangential connection to the undertaking at hand. For example, railroads have been required to conduct a study of an entire river transportation network as part of a single bridge span replacement. Standardized mitigation, e.g., recordation, can be established for types of structures to reduce lengthy negotiations on mitigation.

13. ***Categorical Exclusions.***

The NEPA process for the creation of categorical exclusions could be a template for addressing the suggested exclusions above.

14. ***Training.***

To deal with some of the issues above, perhaps training for state historic preservation offices on railroads would be helpful.

Amtrak

Amtrak provided a letter to FRA dated April 8, 2009, that identified activities that should not be considered section 106 undertakings in accordance with 36 CFR 800.3(a)(1) because they are “the type of activity that does not have the potential to cause effects on historic properties.” Amtrak included the following five categories of projects:

1. Maintenance of railroad structures within a historic district when those structures:
 - a. are not individually eligible for or listed in the NRHP, or
 - b. have not been specifically found to be a contributing element of a historic district.
2. Replacement of any component of a structure in a “like-for-like” manner (“like-for-like” means in a manner that matches the material, details and appearance of the original).
3. Changes to or replacement of any component of a structure when the component in question is not a historically significant element of the structure.
4. Changes to or maintenance of portions of a structure that are not visible or accessible to the public.
5. Additions to or changes to a property that do not require significant contact with a structure and are reversible.

ARRC

In an e-mail dated April 5, 2011, the ARRC recommended an exemption similar to the Interstate Highway System (IHS) should be explored.

Like the [IHS], railroads have been evolving since their inception and continue to do so – they have been constructed, expanded, and upgraded to serve national transportation needs. Their integrity depends on continuing maintenance and upgrades so that they can continue to operate and move passengers and/or freight safely and efficiently. Actions carried out to maintain or improve railroads have altered and will continue to alter various elements of these systems, but these changes are minimal or are not adverse when viewing the systems as a whole. As with the IHS exemption, authority to identify outstanding portions of the interstate system for Federal historic protections would fall to the Secretary of Transportation. This approach recognizes that railroads have historic importance, but only certainly particularly important individual elements warrant protection under Section 106 and Section 4(f).

With regard to streamlining, ARRC executed a section 106 MOA with FRA and the Alaska SHPO for replacing ARRC’s remaining timber trestle bridges. Simultaneously a Section 4(f) Evaluation was prepared and approved. Another streamlining technique is to presume a resource is NRHP eligible solely for the purpose of making a finding of “no adverse effect” associated with the undertaking.

In a second e-mail dated August 9, 2011, the ARRC supplemented their comments, as follows:

1. Many parties from whom you have requested comments have not previously been heavily involved with the Section 106/Section 4(f) issue relative to railroad historic properties. A general problem statement may help.
2. The Section 4(f) situation relative to historic properties is a very real part of the problem. The *de minimis* impact criteria and associated determination requirements are different for historic properties than for parks, recreation areas, and refuges. For non-historic Section 4(f) resources such

as parks, there are reasonable means for achieving a *de minimis* finding. With a *de minimis* finding, the costs and delays associated with going through the full section 4(f) process are avoided.

This approach is not possible with historic properties that are Section 4(f) resources. *De minimis* impacts related to historic sites require a determination of either “no adverse effect” or “no historic properties affected” in compliance with Section 106. The Alaska SHPO has determined that many ARRC properties, while not individually eligible for the NRHP, are eligible as contributing elements of a potential historic district (the entire rail corridor). Thus, demolition and replacement of ordinary elements, such as a very ordinary bridge, are deemed to have an adverse effect and a *de minimis* finding is not possible. This adverse effect remains even though mitigation under Section 106 has been agreed to. The adverse effect triggers 4(f) regardless of the mitigatory measures.

In addition to the solution ARRC previously provided, several other thoughts have come to mind ... [that] may warrant consideration.

- Modify the Section 4(f) regulations relative to *de minimis* impacts for historic properties, so that avoidance, minimization, and mitigation or enhancement measures incorporated into the project can be considered in determining whether the impacts to the Section 4(f) resources qualify as *de minimis*. The same *de minimis* standard should apply to all Section 4(f) properties.
- USDOJ and FRA (and FTA) could develop and adopt a Programmatic Section 4(f) Evaluation (PE) for railroad facilities subject to Rail Safety Act. This document would set forth the basis for a Programmatic Section 4(f) approval that there are no feasible and prudent alternatives to the use of railroad properties to be replaced or rehabilitated with FRA or FTA funds, and that the projects include all possible planning to minimize harm resulting from such use. FRA and FTA would need to work through developing the PE with USDOJ, and it is not clear how long it would take since it would need to go through a public review process. This approach would likely require an individual review of projects, but sign off would be through the FRA or FTA administrator rather than USDOJ. There would need to be a mechanism for differentiating between properties individually eligible for the NR, and those that are eligible as contributing elements, ideally providing a Section 4(f) exemption for the latter. This approach would address the Section 4(f) issue, but not Section 106.
- FRA, FTA and ACHP could develop and adopt a Section 106 Programmatic Agreement for railroad facilities subject to Rail Safety Act. The PA would set forth the basis for compliance with Section 106 for maintenance and improvements in railroad corridors. Consistent with [National Register Bulletin] 15, the PA would specify that mere association with a railroad is not enough for a finding that a property is eligible for the [NRHP] – the specific association must also be important. Railroad properties must be evaluated on their own merits to determine if they are individually eligible for the NR. They should not be considered eligible just because they are part of a potential historic district or because they are associated with an event that has made a significant contribution to broad patterns of our history (e.g., construction of the railroad). The PA would also address eligibility determinations for “typical” properties. Most railroad properties display traits typical of their era of construction, however, they should only be determined eligible for the NR if they embody particularly distinctive engineering or architectural characteristics or are the work of a master. Ideally, the PA would also indicate DOEs are not needed for railroad properties if a proposed undertaking would clearly have no adverse effect regardless of any historic significance the property may have. FTA and FRA would need to work with ACHP to develop the PA, and again, there would need to be a public review process. This approach would address Section 106 issues, and therefore, most Section 4(f) issues.

BLM

The BLM has negotiated a nationwide PA and individual statewide PAs for streamlining routine BLM undertakings through the section 106 process. BLM contributed its section 106 prototype PA and assisted FRA in obtaining BLM protocol agreements currently in force in Arizona, California, Colorado, Nevada, New Mexico, and Wyoming. In an e-mail to FRA on April 4, 2011, BLM noted that most of the railroad corridors through the southern Nevada District Office of the BLM have been determined eligible for the NRHP under Criterion A; however, there are few contributing elements left, as most of the rails, ballast, structures, etc. have been upgraded many times since original construction.

Maryland SHPO

In a memorandum dated July 20, 2011, the Maryland SHPO's Review and Compliance staff compiled the following notes regarding streamlining opportunities, which are included here in their entirety:

These suggestions for streamlining speak more about how to implement the existing regulations in the most effective and efficient way possible rather than about how to change the regulations that exist currently.

Methods and Techniques – Eligibility Determinations for [Railroad]-related Resources, including Corridors

- Proactive Identification and Evaluation of Railroad Resources – Over the past several decades, Section 106 compliance projects have required the survey and National Register evaluation of many railroad lines on Maryland's Western Shore, while the state's Eastern Shore railroads remained unevaluated. MTA began proactively assessing Eastern Shore Railroad lines in accordance with MHT's survey guidelines in 2009. To date we have determined three railroad lines NR-eligible, with four additional lines currently under review. This inventory effort will facilitate the Section 106 review process for future projects involving these lines.

Projects Involving [National Register]-eligible [Railroad] Properties, Especially Adverse Effects, in MD

- Approx. 375 projects since 2001 (FRA, FTA and MTA)
- Six Adverse Effects since 2001:
 - CSXT National Gateway Project
 - MARC Maintenance Facility/Electrification
 - Point of Rocks Parking Lot Expansion
 - CSXT Capital Subdivision Projects
 - Light Rail Double Tracking
 - Hurlock Freight Station

Comments, Examples, Case-Studies

- Usual consultation process for adverse effects projects – resulting in execution of MOA;
- During consultation, develop solutions to avoid adverse effects through context sensitive designs, materials, landscaping (ex. various Amtrak railroad surveillance, security and lighting projects).

Streamlining Techniques or Best Practices

- MHT currently has no existing Programmatic Agreements with FRA, CSX, FTA or MTA;
- Early coordination with agencies to help with project scoping;
- MHT staff will work with agencies to meet accelerated project schedules;
- MHT staff dedicated to transportation projects funded by state DOT;
- Identify appropriate consulting parties and involve these parties early in the consultation process (NPS, local governments, heritage areas, non-profits, neighborhood organizations, etc), seek input and consider their comments in project development;
- Consult early and often with SHPO throughout all phases of planning and Section 106 process.

North Carolina DOT

In a letter dated March 1, 2012, after a review of draft Chapters 1 through 5, the North Carolina DOT (NCDOT) submitted the following three comments:

We realize the final chapters of the report will compare streamlining options and make recommendations. In light of that, and because timely fulfillment of environmental regulations is critical to successful implementation of rail improvement projects across the country, we feel it is imperative that the report make clear recommendations addressing the following:

1. Authorizing FRA to accept environment documents approved by other modal administrations as fulfilling NEPA requirements for FRA projects, with just the addition of an addendum covering any specifics that FRA requires. Ultimately USDOT should seek legislation authorizing a similar "NEPA toolkit" for all modes.
2. Authorizing FRA to allow Categorical Exclusions (CEs) not only from a list of specific project types, but also to allow CEs for projects not listed specifically, but that with a minimal amount of documentation can be shown appropriate for the CE status (often called "documented CEs"), as allowed by existing FHWA regulations.
3. Inclusion of language in the Rail Title of the surface transportation or Passenger Rail Infrastructure and Investment Act reauthorization that would exempt railroad corridors from evaluation under Section 106 of the Historic Preservation Act.

This exemption would pertain to the actual rail "corridor" itself, not to the individual elements within the corridor, and would basically mirror the current exemption provided for the Interstate Highway System in SAFETEA-LU.

Such an exemption would not hinder the protection of historic resources, and yet would clarify responsibilities for the railroads and better provide for sustained investment in the rail system through more effective public/private partnerships.

Texas SHPO

Streamlining Tools and Techniques

As stated in an e-mail dated April 27, 2011, in general, the Texas SHPO finds that early coordination is the most consistently effective streamlining tool. Early coordination, paired with conscientious follow-up with the SHPO, other consulting parties, and the public until all concerns are resolved, is the best way to prevent schedule delays and higher costs, as far as historic properties are concerned.

A second streamlining tool would be to establish a protocol for SHPO consultation, including the identification of categories of projects that will not require review. This could take the form of a PA.

A third streamlining technique is to provide sufficient information for review to ensure that SHPO review staff can complete the review in a timely manner. The following measures can improve the effectiveness of coordination:

- In cases where federal agencies delegate the responsibility for initial coordination with SHPO under Section 106 to their applicants, clear expectations should be laid out, and the federal agency should be directly involved with adverse effects and dispute resolution.
- The APE should fully take into account all indirect effects, and SHPO concurrence with the APE and survey methodology should be obtained before fieldwork commences to minimize the likelihood of additional survey work being needed.

- It is important to ensure that qualified professionals perform the work, whether federal agency staff or hired consultants. To identify historic properties and evaluate effects, the project team should include an archeologist and a historian, architectural historian, or historic architect.
- Historic rail alignments should be evaluated as a collection of interrelated resources. In addition to landmark elements such as depots and bridges, rail systems may be National Register-eligible as historic districts.

Developing a historic context for rail resources in Texas would be of immense assistance, particularly if many upcoming federal agency projects will make use of existing—and potentially historic—rail rights-of-way. An advanced study to identify a historic context for rail resources and develop a methodology for their evaluation may prevent future drawn-out consultation regarding historic significance of not-well-understood rail resources.

The Texas SHPO is concerned by the erosion of their state's railroad heritage. Some resource types may no longer exist in Texas, and others, such as round houses and interlocking towers, are increasingly rare. Efforts to preserve these resources while providing new passenger rail service would be welcomed. Where preservation is not possible, however, FRA should pursue adequate mitigation in response to consulting party and public input. As a preliminary idea, rail operators have extensive archives of photographs and drawings; digitization of their records for hosting by a rail museum or library, or incorporation of material into Historic American Engineering Record (HAER) documentation, could be a worthwhile endeavor.

Best Practices

The programmatic agreement (PA) between the Texas SHPO, FHWA, and Texas Department of Transportation (TxDOT) provides for effective consultation regarding transportation projects. This PA clearly outlines an accelerated process for section 106 coordination with the Texas SHPO. In addition, the Texas SHPO has established good working relationships with major urban rail entities throughout the state. Though these organizations generally do not have qualified professionals on staff, they commission thorough studies by cultural resources firms. They are conscientious in addressing historic properties, and in some cases, through the 4(f) process, have found ways to effectively avoid adverse effects.

Cost and Schedule Implementations

Through their perspective as a consulting party, the Texas SHPO typically is not aware of the true magnitude of cost or schedule implications for railroad projects that are delayed, although they understand that it is constantly a concern of the organizations and agencies with which they work. The Texas SHPO finds, however, that delayed projects are frequently the result of delayed coordination. Early coordination and follow-through to resolve outstanding issues is the best way to prevent negative cost and schedule implications.

Wisconsin SHPO

In a memo dated June 10, 2011, the Wisconsin SHPO stated:

The most effective streamlining techniques are reasonable determinations of eligibility; reasonable determinations of what constitute undertakings and adverse effects; and the development of programmatic agreements.

FRA should develop a philosophy of what are eligible resources that does not presuppose that all railroad lines are historic but rather evaluates each on its own merits. In cases where a determination of eligibility has not yet been made, it is important not to confuse ideas with resources. A railroad system is an idea. The resources are the tangible remnants of the implementation of that idea, usually found in associated buildings and bridges. It is helpful to use an analogy from another transportation system. Prior to the development of railroads, the nation's rivers were the national transportation system; yet, no one claims that the Mississippi River and its riverbed are historic properties. Certain vessels that plied the river have been registered. Likewise, buildings along the river that are important to the river-based transportation system are registered as historic. But the river itself (analogous to a railroad corridor) is not a historic property. Similarly, the most frequent type of railroad resource is associated buildings such as depots and bridges.

In cases of properties already determined eligible, attention needs to be paid to what components still have integrity. Like George Washington's proverbial hatchet, in which the head has been changed twice and the handle three times, some elements in rail corridors have lost their original integrity. Repairs to rails and ties that have been replaced many times and no longer retain historic integrity should not be considered adverse effects. In [Wisconsin], we have not found any railroad beds to be eligible for the National Register.

In addition, entire classes of repairs can be excluded from review through programmatic agreements. These would be effective ways of streamlining the process. It would also require FRA to develop clear definitions of what it considers to be an undertaking. Railroad work in some ways is analogous to work on highways in that they are both linear resources. In Wisconsin, we have a very effective Programmatic Agreement with [FHWA] and the Wisconsin Dept. of Transportation. This agreement has substantially streamlined the review process, reduced the number of reviews, and has cut review time.

Metro North Railroad

In a telephone conversation on July 11, 2011, Metro North Railroad (MNR), the New York City commuter rail system, provided some insight into their historic property consultation process. MNR has developed a good relationship with the staff at the NY SHPO, and consults early and often so that projects involving historic properties are not delayed. New York has state historic preservation laws that MNR complies with on a more regular basis than federal historic preservation laws, and as a result, MNR has developed the experience and expertise to comfortably submit the appropriate documentation and findings to the NY SHPO. FTA funding is often used for major repairs to stations, bridges, and viaducts and historic resources are an issue in approximately 30% of FTA funded projects. Problems may arise when there is opposition to a project, and groups use historic preservation as a lever to slow down the approval process. Here are some suggestions for streamlining:

- Consistent consultation guidance should be developed to accommodate staff changes.
- NEPA documents should be tied to Section 106 findings so the NEPA document is not elevated unless it is appropriate.
- There should be sunset dates for consideration of comments from interested parties.