



4310-K6

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Proposed Draft Program Comment to Exempt Effects of Transportation-Related Undertakings within Rail Rights-of-Way.

AGENCY: Advisory Council on Historic Preservation

ACTION: Notice of availability and request for comments.

SUMMARY: The Advisory Council on Historic Preservation, in coordination with the U.S. Department of Transportation, proposes a program comment to exempt effects of transportation-related undertakings within railroad and rail transit rights-of-way. This program comment would exempt from Section 106 review certain activities that have the potential to affect historic properties within railroad and rail transit rights-of-way where those effects are likely to be minimal or not adverse. Further, this program comment includes an optional approach that could streamline the Section 106 review for additional types of transportation-related undertakings involving railroad and rail transit properties, including those that may cause adverse effects. Issuance of this program comment would

fulfill the requirements of Section 11504 of the Fixing America's Surface Transportation Act.

DATES: Submit comments on or before December 8, 2017.

ADDRESSES: Address all comments concerning the draft program comment to both the ACHP and the US Department of Transportation's Federal Railroad Administration (FRA) by US mail as follows: Charlene Dwin Vaughn, AICP, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 401 F Street NW, Suite 308, Washington DC 20001-2637, and Laura Shick, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Policy and Development, RPD-13, 1200 New Jersey Avenue, SE, Washington DC 20590. Comments may also be submitted through electronic mail to RailROW@achp.gov and FRA.106Exemption@dot.gov. Please submit comments to both the ACHP and FRA to ensure timely consideration.

FOR FURTHER INFORMATION CONTACT: Charlene Dwin Vaughn, Assistant Director, Federal Permitting, Licensing, and Assistance Section, Office of Federal Agency Programs, ACHP(202) 517-0207, cvaughn@achp.gov; Laura Shick, Federal Preservation Officer, Federal Railroad Administration,

(202) 366-0340, laura.shick@dot.gov; or Sharyn LaCombe, Federal Preservation Officer, Federal Transit Administration, (202) 366-5213, sharyn.lacombe@dot.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act ("NHPA") (54 U.S.C. 306108) requires federal agencies to take into account the effects of undertakings they carry out, license, permit, or assist on historic properties and provide the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment with regard to such undertakings. Historic properties are those that are listed on the National Register of Historic Places ("National Register") or eligible for such listing. The definition of historic properties and other terms relevant to the proposed Section 106 program comment for railroad and rail transit rights-of-way ("rail ROW") are provided in Section VI, Definition of Terms, and are consistent with the NHPA and the Section 106 regulations.

The Section 106 implementing regulations allow federal agencies to tailor the Section 106 process to meet their needs through a variety of program alternatives (36 CFR 800.14). Types of Section 106 program alternatives include program comments and exemptions. The process for

establishing an exemption is detailed in 36 CFR 800.14(c). In accordance with 36 CFR 800.14(c)(1), the ACHP may approve an exemption for a program or category of undertakings if: (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. The ACHP takes into account the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in reviewing a proposed exemption. Further, at 36 CFR 800.14(e), the Section 106 implementing regulations provide a process for the ACHP to issue a program comment. Through a program comment, the ACHP comments on a category of undertakings in lieu of conducting individual reviews under 36 CFR 800.4-800.6.

Section 11504 of the Fixing America's Surface Transportation Act ("FAST Act") (49 U.S.C. 24202), enacted on December 4, 2015, mandated the development of a Section 106 exemption for "railroad rights-of-way." The FAST Act requires that "the Secretary [of the United States Department of Transportation ("USDOT")] shall submit a proposed exemption of

railroad rights-of-way from the review under section 306108 of title 54 to the [ACHP] for consideration, consistent with the exemption for interstate highways approved on March 10, 2005 (70 FR 11928).” The FAST Act continues that, “Not later than 180 days after the date on which the Secretary submits the proposed exemption...to the Council, the Council shall issue a final exemption of railroad rights-of-way from review under chapter 3061 of title 54 consistent with the exemption for interstate highways approved on March 10, 2005 (70 FR 11928).” While the Section 106 regulations provide the process and criteria for development of program alternatives, the FAST Act modified the timeframe and directed agency actions.

This proposed Section 106 program comment includes an activities-based exemption that would fulfill the FAST Act mandate by exempting certain routine transportation-related undertakings that occur within rail ROW. The list of activities proposed to be exempt from Section 106 review is provided in Appendix A. Based on the past experience of USDOT Operating Administrations (“USDOT OAs”), undertakings limited to the activities specified in Appendix A have typically resulted in effects to historic properties that are either minimal or not adverse. In addition to incorporating exempt activities that meet the criteria specified in the Section 106 regulations at 36 CFR 800.14(c)(1), this program comment includes an optional,

Project Sponsor-led property-based approach that ultimately could provide additional streamlining for undertakings that may cause adverse effects.

I. Background

The railroad industry in the United States has developed for nearly two centuries. Ongoing activities such as maintenance, improvements, and upgrades are necessary to allow rail infrastructure to continue to serve the transportation needs of the nation safely and efficiently. Further, these activities when carried out properly preserve the infrastructure and historic transportation purpose of moving goods and passengers. Most of the nation's railroads are privately-owned and maintained through the continuous investments of private owners. According to the Association of American Railroads (AAR), privately-owned freight railroads spent more than \$630 billion on rail equipment and infrastructure, including tracks, bridges, and tunnels, during the 36-year period from 1980 to 2016.¹

The federal government also makes substantial investments in and has oversight of the nation's railroads and rail transit systems. This includes maintaining and expanding intercity passenger rail, rail transit, and

¹ <https://www.aar.org/Pages/Railroad-101.aspx>.

freight rail services, and regulating and improving the safety and efficiency of rail operations. USDOT serves both an investment (e.g., grants, loans) role and a regulatory and safety oversight role, with activities carried out most frequently by the following USDOT OAs: the Federal Railroad Administration ("FRA"), the Federal Transit Administration ("FTA"), and the Federal Highway Administration ("FHWA").

For example, FRA provides financial and technical assistance for planning and infrastructure projects that enable the nation's railroads to move passengers and goods across the United States. FRA's investments are principally, but not exclusively, in support of intercity passenger rail operations and often provide financial assistance for maintenance, improvements, and upgrades to railroad infrastructure, equipment, and technologies, including those focused on improving the safety of railroad operations and roadway/railroad grade crossings, as well as for research and development activities and training. FTA provides financial and technical assistance to transit agencies for investment in public transportation systems that include various forms of rail transit that occupy existing or former rail ROW, such as heavy rail, commuter rail, streetcar, and light rail. FHWA supports state, local, and tribal governments and federal agencies in the

design, construction, and maintenance of the nation's highway systems. Highways frequently cross over, go under, or are parallel to rail ROW, requiring extensive coordination between the entities responsible for the highway and the railroad or rail transit lines, including safety considerations. FHWA's Railway-Highway Crossings Program² provides funds for safety improvements to reduce the number of fatalities, injuries, and crashes at public railway-highway grade crossings.

On June 5, 2008, a congressional hearing before the Subcommittee on Railroads, Pipelines, and Hazardous Materials, within the House Committee on Transportation and Infrastructure, included testimonies by the ACHP, the Alaska Railroad Corporation, 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 Conservancy.³ The purpose of the hearing was to consider whether federal requirements for the preservation of historic properties created unnecessary delays and administrative burdens for improvements to rail

² <http://safety.fhwa.dot.gov/xings/>.

³ *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, 2008.*

infrastructure. This hearing revealed that while the nation's railroad system is historically important, the existing federal review process in some cases could be carried out more efficiently to expedite project delivery. As a result, Congress mandated a study to explore these issues and to recommend solutions.

Pursuant to Section 407 of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), FRA, in partnership with other USDOT OAs, state departments of transportation ("state DOTs"), and historic preservation organizations and agencies, including the ACHP, NCSHPO, and NTHP, conducted a study assessing the current state of historic preservation for federally funded railroad projects and the potential for expediting compliance with Section 106 and Section 4(f) (23 U.S.C. 138, 49 U.S.C. 303). In 2013, FRA submitted to Congress the resulting study, titled "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 and Improvement Projects" ("2013 FRA Study").⁴

⁴ *Report to Congress: Streamlining Compliance with the 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*, Federal Railroad Administration, March 2013, <https://www.fra.dot.gov/eLib/details/L04483>.

The 2013 FRA Study drew upon the experiences shared by the participating agencies and organizations, SHPOs, and other stakeholders, and on best practices and data extrapolated from case studies. The 2013 FRA Study concluded that there is no consistent approach on how to address the National Register eligibility of railroad corridors or how to avoid, minimize, or mitigate impacts to individual rail properties along a corridor once it is determined to be eligible for the National Register. The lack of consistency was attributed to a multitude of entities conducting National Register evaluations, including SHPOs, Tribal Historic Preservation Officers ("THPOs"), federal agencies, consultants, state DOTs and railroad and rail transit operators. These inconsistency issues raised concerns regarding the lack of specific nationwide guidance for identifying, evaluating, and classifying rail properties and differentiation based on likely importance of particular historic resources on the part of each evaluator. This variety of approaches leads to inconsistent standards for evaluation and procedures to consider and address impacts, an overly burdensome process, delays in project delivery, and some projects failing to advance. The substantial experience of USDOT OAs over the years in funding maintenance, improvements, and upgrades to

railroads and rail transit systems, and highway/rail grade crossings, has provided further evidence of this conclusion. Furthermore, the experience of USDOT OAs has been that undertakings involving maintenance, improvements, and upgrades to rail infrastructure often do not result in adverse effects to historic properties under Section 106 when early planning involves diverse stakeholders.

The 2013 FRA Study offered several streamlining recommendations, including the development of a Section 106 administrative exemption and a program comment. In 2015, Congress mandated a proposed administrative exemption in the FAST Act and directed USDOT that the exemption be consistent with the Interstate Highway Exemption. Developed by FHWA and approved by the ACHP in 2005, the Section 106 exemption for the Interstate Highway System acknowledges "the importance of the Interstate System in American history, but also recognizes that ongoing maintenance, improvements and upgrades are necessary to allow the system to continue to serve the transportation needs of the nation."⁵ Further, the concept for the exemption for the Interstate Highway System stated that, "While actions carried out by federal agencies to maintain or improve the

⁵ *Exemption Regarding Historic Preservation Review Process for Effects to the Interstate Highway System*, 70 FR 11928, Mar. 10, 2005.

Interstate System will, over time, alter various segments of the system, such changes are considered to be 'minimal or not adverse' when viewing the system as a whole. Moreover, the exemption does not apply to certain historically important elements of the system." Therefore, in exempting only certain effects of undertakings to the interstate highway system, the exemption met the requirements of 36 CFR 800.14(c)(1).

In accordance with Section 11504 of the FAST Act, the USDOT, led by FRA and FTA, proposed to the ACHP in July 2017 a Section 106 exemption that would have applied to certain types of undertakings within rail ROW that would result in effects to rail properties that were likely to be minimal or not adverse. FRA's and FTA's proposed exemption drew upon the collective expertise and experience of the USDOT OAs and acknowledged the unique history, construction, and technological improvements of railroads and rail transit systems. The exemption as initially drafted also included an optional Project Sponsor-led property-based approach that could have streamlined the review process for other types of undertakings having the potential to adversely affect historic properties.

To develop the proposed exemption, FRA and FTA held early coordination meetings with the ACHP, NCSHPO, and

NTHP. The purpose of these meetings was to discuss the most effective approach to an exemption that would satisfy the FAST Act requirement. It was also identified during these meetings that more information on the history of rail transit development in the country was needed to have comparable information to what was contained in FRA's 2013 Study. Subsequently, in 2017 FTA prepared a broad historic context report entitled, "Historic Context Report for Transit Rail System Development."⁶ Also during the early coordination meetings, the ACHP, NCSHPO, and USDOT acknowledged that opportunities for stakeholder outreach would be provided to obtain input from railroad and rail transit industries, state agencies (e.g., state DOTs), SHPOs and THPOs, Indian tribes and Native Hawaiian organizations, and historic preservation interest groups.

FRA's and FTA's original approach to the proposed exemption was to treat the ROW in which railroads and rail transit systems operate as a resource unto itself that would be exempt from Section 106 review. FRA and FTA conducted outreach to discuss and seek feedback from stakeholders regarding how such a property-based approach might be developed and implemented. The ACHP expressed

⁶ <https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/historic-context-report-transit-rail-system>.

concern that a property-based approach would exceed the limit of its authority to exempt activities under 54 U.S.C. 304108(c) and 36 CFR 800.14(c)(1) because it did not define the program or category of undertakings that would be subject to its terms and as proposed, it could allow adverse effects to historic properties without requiring Section 106 review. The ACHP recommended that FRA and FTA take an activities-based approach to the Section 106 exemption that focused on routine undertakings involving rail properties located within rail ROW, with effects that would be foreseeable and likely to be minimal or not adverse. This recommendation was echoed in comments submitted to FRA and FTA by numerous stakeholders, particularly from the preservation community. The ACHP also recommended FRA and FTA consider developing a separate program comment to provide for the property-based approach along a parallel track.

Subsequently, in response to the concerns and requests of Project Sponsors, particularly transportation stakeholders, that the program alternative should include the flexibility to address a broader range of undertakings and effects to historic properties, FRA, FTA, and the ACHP decided to incorporate the proposed activities-based exemption within a proposed program comment in order to

restore the two-part concept within a single program alternative, including the property-based approach, as originally proposed by FRA and FTA. The proposed program comment recognizes that many properties in the national railroad network and rail transit systems have historic significance and that important historic rail properties (as defined in the draft program comment, Section VI: Definition of Terms) located within rail ROW should remain subject to Section 106 review when proposed undertakings cannot avoid adverse effects on such properties.

The proposed program comment is intended to balance the need for continued safe and efficient transportation with the goals of historic preservation, and takes into account the differences between the Interstate Highway System and railroad and rail transit operations. Each railroad and rail transit system has its own unique history of construction and operation, including private or public ownership; periods of economic success; opening of key markets or geographic areas; and improvements, acquisition, and consolidation or abandonment. Many buildings and structures within rail ROW followed the common standard plans of a specific carrier, but there were exceptions for individual buildings, bridges, and other structures that may have unique qualities or unusual design

characteristics. Similarly, many rail corridors follow 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. Railroads have been adapted to accommodate modern freight, passenger train operations, higher speeds, and much heavier freight loads than those for which the original rail infrastructure was designed and built. Finally, rail ROW is typically privately-owned, making it challenging or impossible to perform the cultural resources surveys usually necessary to develop a comprehensive inventory of rail properties.

The nation's rail ROW and rail properties located therein have a long history, dating to the mid-1800s, and maintenance, improvements, and upgrades are necessary to their preservation and continued safe use. These activities have occurred and continue to occur regularly within rail ROW to maintain the efficient use and safety of the nation's railroads, rail transit systems, and roads; and support the continued function for which surface transportation is historically important.

II. Program Comment Concept

The continued operation of railroads and rail transit systems is vital to enabling the efficient and safe

movement of people and goods throughout America. Various linear segments of rail lines, as well as individual buildings and structures along those rail lines, were determined eligible for and/or listed on the National Register prior to Congress's mandate to develop a Section 106 exemption for rail ROW.

A primary objective of the proposed program comment is to expedite certain types of maintenance, improvements, and upgrades to railroad and rail transit infrastructure located within rail ROW that typically have not resulted in adverse effects to historic properties based on years of experience gained through the Section 106 consultations among USDOT OAs, SHPOs, and consulting parties for individual undertakings. Under such an approach, fewer routine undertakings involving rail properties would be subject to Section 106 review thereby enabling federal agencies to focus their time and resources on undertakings that have the potential to cause adverse effects on historic properties. Federal agency staff, Project Sponsors, SHPOs, THPOs, and other stakeholders would be able to devote more time and resources to developing solutions that avoid, minimize, or resolve adverse effects to important historic rail properties and non-rail historic

properties located within an undertaking's Area of Potential Effects ("APE").

Recognizing the concerns and needs of industry stakeholders and seeking to achieve further efficiencies in project reviews, the ACHP, FRA and FTA incorporated the originally proposed exemption into a different program alternative under 36 CFR 800.14: a program comment. Unlike an exemption, which the ACHP can only approve for undertakings that have effects to historic properties that are foreseeable and likely to be minimal or not adverse, a program comment may provide an optional alternative process for compliance with Section 106 for a category of undertakings, including those that may result in adverse effects. Therefore, the proposed program comment includes both an activities-based exemption and an optional Project Sponsor-led approach to identify important historic rail properties and streamline the review process for other transportation-related activities. It is important to note that this Project Sponsor-led approach would require an investment of time and resources and would not likely result in immediate efficiencies as would the approval of the list of exempted activities under Appendix A. To ensure the requirements of the FAST Act are met, the program comment would incorporate the substance of the exemption

for certain activities within rail ROW, as well as add the property-based approach as envisioned by FRA and FTA and discussed during the agencies' outreach to stakeholders in late 2016 and early 2017.

Given the unique history of the rail industry and the challenge of conducting the cultural resources surveys that would be needed to develop a comprehensive nationwide inventory of rail properties (including restrictions regarding access to privately-owned rail ROW, the extensive linear miles of rail ROW nationwide, and the number of qualified professionals and financial resources that would be needed), it is not feasible for USDOT OAs or Project Sponsors to identify all important historic rail properties nationwide concurrently with the development of this program alternative. The program comment would include a modified review process for transportation-related undertakings that would only apply after completion of the optional Project Sponsor-led approach to identify important historic rail properties within a study area.

Under the program comment, Project Sponsors, in coordination with the appropriate USDOT OA(s), the ACHP, NCSHPO, individual SHPOs/THPOs, NTHP, railroad and rail transit operators, state DOTs, and other appropriate stakeholders, would have the option to follow an

established process to develop a list of important historic rail properties within a designated study area. The Project Sponsor would ensure that the public would be given an opportunity to provide input on the proposed list of such properties. The appropriate USDOT OA(s), in consultation with Project Sponsors, the ACHP, SHPOs/THPOs, and other stakeholders, would confirm the significance and integrity of these important historic rail properties consistent with National Register criteria.

The intent of this optional Project Sponsor-led identification and evaluation effort would be to (1) revisit those rail properties that have been previously determined eligible for listing or listed on the National Register to confirm that the property meets one or more of the National Register eligibility criteria, retains integrity, and is considered important (as defined in Section VI, Definitions of Terms), and (2) identify previously unevaluated rail properties located within the study area that should be recognized as important historic rail properties. Once the identification process is complete, federal agencies would be able to carry out, license, permit, or assist transportation-related undertakings that meet the terms listed in the Program Comment without further Section 106 review.

Project Sponsors could benefit from this optional property-based approach because it would expedite Section 106 reviews for non-routine undertakings through the early identification of and agreement on important historic rail properties located in rail ROW. The upfront identification of such properties would allow Project Sponsors to plan for and design projects within rail ROW in a manner that could avoid or minimize effects to such important properties. Furthermore, if a Project Sponsor completes the process to identify important historic rail properties, another review efficiency would apply. Future transportation-related activities within the same study area that require a license, permit, or assistance from any federal agency and that would affect rail properties that are not included on a USDOT OA-approved list of important historic rail properties would not be subject to further Section 106 review.

The lead federal agency for a proposed transportation-related undertaking in rail ROW will be responsible for determining if the program comment applies. Approval by the lead federal agency would be required in the form of written approval or through another established review and decision-making process normally used by the lead federal agency (e.g., grant-making processes or permit issuance).

III. Public Participation

In accordance with 36 CFR 800.14(e)(2), USDOT, in coordination with the ACHP, is arranging for public participation appropriate to the subject matter and scope of the category of undertakings to be included within this program comment. This notice invites the public to comment on the proposed draft program comment.

In addition to this notice, FRA and FTA have previously solicited the views of a diverse group of stakeholders and subject matter experts. While that outreach was conducted with the intent to develop a Section 106 exemption (as defined in 36 CFR 800.14(c)), the substance of FRA's and FTA's original proposal is essentially the same as the content of the draft program comment that is being made available for public review and comment in this notice. This outreach included in-person meetings, webinars followed up with attendees' submittal of written comments and questions, teleconferences, and presentations at national transportation conferences with representatives from the following: USDOT OAs, the ACHP, NCSHPO, the National Association of Tribal Historic Preservation Officers, NTHP, tribal governments, individual SHPOs and their staff, THPOs, and state DOTs; national transportation associations (e.g., AAR, American Public

Transportation Association); private railroad companies; intercity passenger rail service providers (e.g., Amtrak) and rail transit agencies; the Surface Transportation Board (STB);⁷ and historic preservation organizations (e.g., American Cultural Resources Association). These agencies and organizations shared their unique and varied perspectives and concerns and provided valuable feedback. Prior to transitioning the approach from an exemption to a program comment and when proposing to request an exemption, in response to the ACHP's recommendation to satisfy its consultation responsibilities under 36 CFR 800.14(c)(3), FRA and FTA provided a draft exemption to all SHPOs and THPOs for review and requested their feedback regarding any significant issues. Pursuant to 36 CFR 800.14(c)(4), the ACHP shared a draft of the proposed exemption with Indian tribes and Native Hawaiian organizations and hosted two conference calls to solicit their input and feedback. Comments were received from nine SHPOs and 14 tribes in October 2017. FRA and FTA considered these comments and made further revisions to the draft of the proposed exemption primarily to clarify the scope of the proposed

⁷ The Surface Transportation Board (STB) is an independent agency that has broad economic regulatory oversight of the nation's freight rail system and jurisdiction over railroad rate and service issues; new rail line constructions; abandonments of existing rail lines; and railroad mergers and line acquisitions. Refer to STB's website at <https://www.stb.gov/stb/about/overview.html>.

exemption to make it clear that the focus was strictly on rail properties and would not apply to other types of historic properties that could be located within or adjacent to rail ROW. FRA and FTA also refined some of the proposed exempted activities in Appendix A in response to comments from SHPOs and Indian tribes, but did not eliminate any activities from the draft list because the agencies felt that all stakeholders should have the opportunity to review and provide comments. The draft exemption shared with SHPOs, THPOs, Indian tribes, and Native Hawaiian organizations in September and October 2017 focused only on exempted activities and did not include the optional Project Sponsor-led approach for identifying important historic rail properties.

The feedback received over the past year has been helpful in informing the development of the proposed program alternative and generally related to the following topics: (1) the scope, applicability, and implementation of exempt activities; (2) how important historic rail properties could be identified; (3) what types of resources, including archaeological sites, should explicitly not be covered by the program alternative; and (4) developing and clarifying the definitions of terms used in the proposed exemption. FRA and FTA used this

feedback to refine the proposed list of exempt activities included in Appendix A and to revise key definitions (such as the definition of rail ROW). As FRA and FTA refined the approach to and scope of the proposed exemption based on stakeholder input, they determined that certain actions, such as those approved by STB (e.g., rail line abandonments, new rail line constructions) as well as conversion of rail ROW to shared use (e.g., bicycle, pedestrian) trails (sometimes referred to as "rails-to-trails" initiatives), have the potential to cause adverse effects or greater than minimal effects on historic properties, and therefore are not appropriate for inclusion in the proposed list of exempt activities included in Appendix A. The fundamental purpose of the proposed exempted activities list is to enable federal agencies to expedite reviews and approvals of proposed transportation-related undertakings for certain types of maintenance, improvements, and upgrades to railroad and rail transit infrastructure; accordingly, FRA and FTA expect that these activities would primarily involve extant buildings, structures, and equipment in existing rail ROW. Therefore, and in consideration of stakeholder comments received to date, FRA and FTA determined that effects to archaeological resources of any nature, including those associated with

railroads and rail transit, should not be covered by the proposed exemption. Lastly, in response to feedback from NCSHPO and several individual SHPOs, the draft program comment includes an annual reporting requirement to help assess the effectiveness of Section 106 review streamlining as well as to help ensure that the program comment's terms are being appropriately applied.

In addition to providing substantive comments regarding the scope and content of the proposed exemption, some SHPOs questioned the type of Section 106 program alternative itself. The FAST Act specifically mandates development of an exemption; however, after further consideration and in order to fulfill the intent of that statutory mandate, USDOT and the ACHP have revised the exemption to this draft program comment. The program comment would have a broader scope and include more types of undertakings than would have the exemption.

IV. Proposed Text of the Program Comment

The following is the draft text of the proposed program comment:

Program Comment to Exempt Effects of Transportation-Related Undertakings within Rail Rights-of-Way

Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. 306108 ("Section 106"), requires

federal agencies to "take into account" the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued regulations that set forth the process through which federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 ("Section 106 regulations").

Under section 800.14(e) of those regulations, agencies can request the ACHP to provide a "program comment" on a particular category of undertakings in lieu of conducting separate reviews of each individual undertaking under such category, as set forth in 36 CFR 800.3 through 800.7. Federal agencies can meet their Section 106 responsibilities with regard to the effects of transportation-related undertakings on rail properties located in railroad and rail transit rights-of-way ("rail ROW") by following this program comment and the steps set forth therein.

I. Introduction

This program comment exempts from Section 106 review the activities listed in Appendix A provided the conditions specified therein are met. It also establishes an optional Project Sponsor-led property-based approach. This optional

approach could be followed to identify important historic rail properties in rail ROW in advance of specific transportation-related undertakings. Undertakings affecting such important historic rail properties and that involve activities not included in Appendix A would remain subject to Section 106 review, in order to ensure potential adverse effects are avoided, minimized, or mitigated. However, the optional property-based approach, described in Section IV below, if completed by an interested Project Sponsor, would also create efficiencies by 1) allowing transportation-related undertakings proposed to be carried out, licensed, permitted, or assisted by any federal agency to proceed without Section 106 review if the affected rail property(ies) is not on the USDOT OA-approved list of important historic rail properties and 2) providing Project Sponsors with an early awareness of which rail properties are important so that they could design projects in a manner to either avoid adverse effects or to factor sufficient time into project planning and design to resolve any unavoidable adverse effects.

The proposed program alternative has been developed in accordance with section 11504 of the FAST Act (49 U.S.C. 24202). Section 11504 mandated the development of a Section 106 exemption for "railroad rights-of-way." More

specifically, it required the Secretary of Transportation to submit a proposed exemption to the ACHP for consideration, and for the ACHP to issue a final exemption not later than 180 days after the date of receipt of U.S. Department of Transportation's ("USDOT's") submittal.

Pursuant to 36 CFR 800.14(e), the ACHP can issue a program comment on its own initiative or at the request of another agency. This program comment would provide the ACHP's comment on those transportation-related undertakings that may affect rail properties within rail ROW. If a federal agency responsible for carrying out, licensing, permitting, or assisting such an undertaking with the potential to affect rail-related historic properties meets the terms of this program comment, its Section 106 responsibility to take into accounts those effects would be satisfied.

Under 36 CFR 800.14(c), an exemption from Section 106 for federal undertakings must be consistent with the purposes of the NHPA. Furthermore, in order to be exempted, the potential effects of those undertakings on historic properties must be "foreseeable and likely to be minimal or not adverse." The substance of USDOT's originally proposed exemption, incorporated within this program comment, meets these criteria. The transportation-related undertakings

that federal agencies carry out, license, permit, and assist to maintain, improve, or upgrade rail properties located within rail ROW will alter over time various elements of rail ROW, but such changes are minimal or not adverse when viewing rail ROW as a whole and when limited to the activities specified in Appendix A.

II. Applicability

The program comment would apply to (1) those undertakings that are strictly limited to the activities listed in Appendix A and are carried out, licensed, permitted, or assisted by any federal agency and involve rail properties located within existing rail ROW; and (2) any transportation-related undertaking that would be carried out, licensed, permitted, or assisted by any federal agency and meets the terms for the completed optional Project-Sponsor led approach to identify important historic rail properties. The activities listed in Appendix A are for the intended purpose of routine maintenance, improvements, and upgrades to transportation infrastructure. Should the Program Comment be issued by the ACHP, federal agencies would be able to proceed with carrying out, licensing, permitting, or assisting undertakings that are limited to the activities listed in Appendix A and that meet the certain conditions specified

therein without further Section 106 review regardless of whether the rail properties involved or affected are eligible for or listed on the National Register. Undertakings involving activities that are not included in Appendix A would not be included within the proposed exemption section of the program comment (e.g., demolition; decommissioning, abandonment and/or conversion of rail infrastructure to a non-transportation use; double-tracking a historically single-tracked rail corridor; major new construction activities such as construction of a new or substantially expanded passenger station; or construction of a new railroad or rail transit line on new right-of-way (commonly referred to as "greenfield construction")). However, some of these activities may fall within the other section of the program comment regarding the optional Project Sponsor-led property-based approach.

Activities requiring a federal license, permit, or assistance that are not listed in Appendix A but constitute a transportation-related undertaking with the potential to affect rail properties located within rail ROW, as defined in Section VI, Definitions of Terms, would not require Section 106 review provided the optional Project Sponsor-led approach for identifying important historic rail properties has been completed for a defined study area and

the affected rail property(ies) within that study area are not included on a USDOT OA-approved list of important historic rail properties.

If the optional Project Sponsor-led approach to identify important historic rail properties has been completed for a defined study area, transportation-related undertakings involving activities that are not included in Appendix A and would affect properties included on a USDOT OA-approved list of important historic rail would require Section 106 review. This would ensure that potential adverse effects to important historic rail properties are appropriately avoided, minimized, or mitigated consistent with the purposes of the NHPA.

Federal agencies remain responsible for determining whether a proposed undertaking, including those activities listed in Appendix A, has the potential to cause effects to non-rail historic properties, such as those of religious and cultural significance to Indian tribes or Native Hawaiian organizations or archaeological sites of any nature, in the undertaking's APE. If a federal agency determines such potential exists, the federal agency must follow the requirements of 36 CFR part 800 or follow an applicable program alternative executed pursuant to 36 CFR

800.14 in order to consider the potential effects to such properties located within that APE.

Under the Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, a state may assume the Secretary of Transportation's responsibilities to comply with Section 106 for certain projects or classes of projects. In such cases, the state may rely on this program comment to fulfill its Section 106 responsibilities. Where a program alternative developed pursuant to 36 CFR 800.14, such as a statewide programmatic agreement, delegates Section 106 responsibility to another entity, that entity may also utilize the terms of this program comment for relevant transportation-related undertakings.

III. Activities Exempt from Section 106 Review

Undertakings that are carried out by a federal agency or require a federal license, permit, or assistance to maintain, improve, or upgrade rail properties located in railroad and rail transit rights-of-way ("rail ROW") and are limited to the activities specified in Appendix A: Exempted Activities, are exempt from the requirements of Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108 ("Section 106") because their effects on rail

historic properties are foreseeable and likely to be minimal or not adverse.

IV. Optional Project Sponsor-Led Property-Based Approach

If a Project Sponsor wishes to carry out a transportation-related activity that requires a federal license, permit, or assistance and is not included in Appendix A and therefore has the potential to cause adverse effects to historic rail properties, it must either: (1) notify the lead federal agency, which will then determine whether the standard Section 106 process or an available program alternative applies to the proposed undertaking; or (2) follow the Project-Sponsor led approach outlined in this section to identify important historic rail properties. Important historic rail properties, as defined further in Section VI, are individual rail properties or rail property types that meet the National Register eligibility criteria (36 CFR part 63), illustrate the history of the development of the nation's railroads or rail transit systems, and either possess national significance or are of certain state or local importance.

Given the variety and number of rail properties nationwide, the fact that many systems cross state boundaries, and the challenges of a "one size fits all" nationwide approach, important historic rail properties

would be initially identified within defined study areas by Project Sponsors that wish to get additional benefit from this program comment beyond the list of exempted activities included in Appendix A. The process would intentionally provide a great deal of flexibility for Project Sponsors to identify important historic rail properties to meet state and local needs and interests and to take into account state and local historic contexts. Within six months of the ACHP's issuance of the final Program Comment, FRA, FTA, and FHWA, in coordination with the ACHP, and other federal agencies who may have an interest in utilizing the Program Comment (e.g., permitting agencies such as US Army Corps of Engineers or US Coast Guard), will develop supplemental guidance for implementing the optional Project Sponsor-led property-based approach described below to identify important historic rail properties.

A. Process for Identifying Important Historic Rail Properties

1. Individual Project Sponsors or multiple Project Sponsors working collaboratively must clearly identify the study area to be subject to this process: the portion of rail ROW (i.e., by location (state, county); name of rail corridor, railroad, rail transit system or line; mile-post information;

etc.). Project Sponsors must propose to the appropriate USDOT OA(s) (i.e., FRA, FTA and/or FHWA), rail properties to be included on a list of important historic rail properties. To develop such a list, Project Sponsors will consult with the appropriate USDOT OA(s), appropriate State Historic Preservation Officers ("SHPOs"), appropriate Tribal Historic Preservation Officers ("THPOs"), and other interested parties, i.e. those parties that would typically be involved in the standard Section 106 process to identify historic properties as specified in 36 CFR 800.4(a)-(c), that have knowledge and expertise regarding rail properties and of the history and operations of the nation's railroads and rail transit systems. The proposed list of important historic rail properties may include particular individual properties (i.e., a building, structure, object, or district) or a property type (e.g., bridges of a certain type (stone arch, metal truss, covered, or moveable); roundhouses). The Project Sponsor's efforts to develop a list of important historic rail properties will be informed by available background research, historic context studies, surveys and evaluations performed by

persons meeting the Secretary of the Interior's Professional Qualification Standards for Architectural Historians, and other relevant documentation and professional experience and expertise.

2. Once a Project Sponsor proposes a list of important rail properties located within a study area, the Project Sponsor will coordinate with the appropriate USDOT OA(s) to determine an appropriate method(s) for seeking public input on the proposed list and to determine which entity(ies) will be responsible for implementing the agreed-upon public outreach strategy. The Project Sponsor and/or the USDOT OA(s), as appropriate, will then implement the agreed-upon strategy. The USDOT OA(s) will consider input from interested parties and the public before approving the list of important historic rail properties.
3. The USDOT OAs make the final decision regarding the list of important historic rail properties within each study area, and will publish all finalized lists on their respective agency websites (www.fra.dot.gov, www.fta.dot.gov, or www.fhwa.dot.gov). The relevant USDOT OA will update

the list anytime a Project Sponsor completes the process described herein to identify important historic rail properties located within another study area.

4. Once approved by the appropriate USDOT OA(s), the list of important historic rail properties will be available for use by any Project Sponsor and any federal agency.

B. No Further Section 106 Review Required

Should any of the exempted activities in Appendix A referred to in Section III be proposed and affect important historic rail properties included on a USDOT OA-approved list, no further Section 106 review would be required for those activities.

For rail properties in a given study area that are not included on a USDOT OA-approved list of important historic rail properties, the effects of transportation-related undertakings to those rail properties would be exempt from Section 106 review.

V. Continued Applicability of Section 106

Section 106 review is still required for transportation-related undertakings within rail ROW in the following situations under both the activities-based exemption and Project Sponsor-led property-based approach:

A. Undertakings that are located within, or would affect historic properties located on tribal lands;

B. Undertakings, within a study area that has completed the optional Project Sponsor-led approach that involve activities that are not included in Appendix A and would affect important historic rail properties

C. Undertakings that could affect historic buildings, structures, sites, objects, or districts that do not have a demonstrable association with the function and operation of a railroad or rail transit system;

D. Undertakings that could affect archaeological sites located within, partially within, or bisected by rail ROW, regardless of whether the sites are associated with railroads or rail transit systems;⁸ and

E. Undertakings that could affect historic properties of religious and cultural significance to federally recognized Indian tribes or Native Hawaiian organizations.

In addition, federal agencies remain responsible for determining whether a proposed undertaking has the

⁸ Examples include: archaeological remains of non-extant rail properties that have been determined eligible for the National Register under Criterion D or warrant evaluation for such eligibility because they may yield data and information on the development and operation of railroads and rail transit systems in U.S. history; archaeological sites that represent worker camps associated with the construction of a railroad and have been determined eligible for the National Register under Criterion A or warrant evaluation for such eligibility; prehistoric or historic archaeological sites that pre-date construction of a railroad or rail transit line and are historically significant for reasons that do not have a nexus with rail transportation.

potential to cause effects to non-rail above-ground historic properties (buildings, structures, objects and districts) and archaeological sites of any nature (regardless of a rail nexus) that are located in the undertaking's area of potential effects ("APE") but outside of or adjacent to rail ROW under both the activities-based exemption and Project Sponsor-led property-based approach.

Likewise, if an unanticipated discovery of a non-rail historic property, archaeological site, or human remains is made during implementation of an exempt activity listed in Appendix A, the Project Sponsor must cease the activity and consult with the lead federal agency, who must follow the requirements of 36 CFR 800.13(b) and/or applicable state burial law with regard to the discovery; if an undertaking involves multiple exempted activities, those that do not involve or effect the discovery may continue.

VI. Definition of Terms

A. Area of potential effects, as defined in 36 CFR 800.16(d), 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.

B. Historic properties, as defined in 36 CFR 800.16(1), means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places 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 religious and cultural importance to a federally recognized Indian tribe or Native Hawaiian organization that meet the National Register criteria.

C. Important historic rail properties means rail properties located in rail ROW that have been identified through the Project-Sponsor led approach established in Section IV. Such properties must meet the National Register eligibility criteria (36 CFR part 63), illustrate the history of the development of the nation's railroads or rail transit systems, and either possess national significance (see the definition below) or be of certain state or local importance. Examples of properties of certain state or local importance may include extant architectural properties, such as passenger depots, roundhouses, bridges, and tunnels that are not included in

common standard plans; that met unique engineering challenges; that have exceptional design quality and characteristics; or that are of unusual or noteworthy importance, or are a rare property type.

D. National significance means a historic property that is either, (1) designated as a National Historic Landmark; (2) designated as a Civil Engineering Landmark; (3) listed as nationally significant in its nomination or listing in the National Register; or (4) determined to have significance at the national level.⁹

E. Project Sponsor means an entity such as a state, tribal or local government, joint venture, or private company that is eligible to receive financial assistance under a federal transportation-related financial assistance program (e.g., grant, loan). A project sponsor may also be an entity that requires a federal permit, license, or approval in order to carry out a proposed activity in rail ROW (e.g., a permit under Section 404 of the Clean Water Act issued by the Army Corps of Engineers or a permit under Section 9 of the Rivers and Harbors Act of 1899 issued by the United States Coast Guard).

⁹ Properties that have previously been determined to be nationally significant may be re-evaluated as part of the optional Project Sponsor-led approach. Properties may be newly determined to be nationally significant as part of the consultation that would occur under the optional Project Sponsor-led approach.

F. Rail properties means, for the purpose of this program comment, infrastructure within the rail ROW that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system, including but not limited to: rails and tracks, ties, ballast, rail beds, signal and communication systems, switches, overhead catenary systems, signage, traction power substations, passenger stations/depots and associated infrastructure and utilities, freight transfer facilities, boarding areas and platforms, boarding platform shelters and canopies, bridges, culverts, tunnels, retaining walls, ancillary facilities, ventilation structures, equipment maintenance and storage facilities, railyards, parking lots and structures, landscaping, passenger walkways, and security and safety fencing. The definition does not include properties with no demonstrable relationship to the function and operation of a railroad or rail transit system, such as: adjacent residential, commercial or municipal buildings; archaeological resources underneath rail ROW that are unrelated to the railroad or rail transit line; or property unrelated to existing or former railroads and rail transit lines that is proposed to be used for new rail infrastructure.

G. Railroad and Rail Transit Rights-of-Way (rail ROW) means, for the purpose of this program comment, the land and infrastructure that have been developed for existing or former intercity passenger rail, freight rail, or rail transit operations, or that are maintained for the purpose of such operations. Rail ROW includes current or former railroad or rail transit lines regardless of current ownership and whether there is rail service operating on the railroad or rail transit line. It does not include land that was never developed and lacks visual evidence of historic railroad or rail transit use. Rail ROW includes and may be identifiable by the presence of infrastructure that has a demonstrable relationship to the past or current function and operation of a railroad or rail transit system that commonly includes but is not limited to the rail properties specified in the definition above.

H. Section 106 means Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations, 36 CFR part 800.

I. Undertaking, as defined at 36 CFR 800.16(y), 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.

VII. Effective date

This program comment shall go into effect on the date it is issued by the ACHP, at which time federal agencies may immediately utilize the list of exempted activities in Appendix A, including undertakings that have not yet been initiated and undertakings for which the Section 106 review process is underway but not completed.

VIII. Reporting

Any lead federal agency that utilizes this program comment shall report annually to NCSHPO, NATHPO, and the ACHP regarding the application of the exempt activities in Appendix A. The USDOT OAs will also report annually to NCSHPO, NATHPO, and the ACHP regarding any coordination with Project Sponsors to pursue the property-based approach.

XIV. Amendment

The Chairman of the ACHP may amend this program comment after consulting with the USDOT and other relevant federal agencies, NCSHPO, NATHPO, tribal representatives, the National Trust for Historic Preservation, and industry representatives, as appropriate. The ACHP will publish a

notice in the *Federal Register* informing the public of any amendments that are made to the program comment.

XV. Sunset clause

This program comment will expire twenty (20) years from the date of its issuance, unless it is amended prior to that date to extend the period in which it is in effect.

XVI. Withdrawal

The Chairman of the ACHP may withdraw this program comment, pursuant to 36 CFR § 800.14(e)(6), by publication of a notice in the *Federal Register* 30 days before the withdrawal will take effect.

Appendix A: Exempted Activities

Undertakings limited to the activities listed below and when occurring within rail ROW are exempt from Section 106 review because their effects on rail-related historic properties are foreseeable and likely to be minimal and not adverse.

The lead federal agency for a proposed transportation-related undertaking in rail ROW is responsible for determining if the program comment applies. Approval by the lead federal agency of undertakings involving exempt activities specified below will be required in the form of written approval or through another established review and decision-making process normally used by the lead federal

agency (e.g., grant-making processes or permit issuance). In particular, activities denoted with (*) and (**) require evaluation by professionals meeting the Secretary of the Interior's ("SOI") Professional Qualification Standards for Archaeologists or Architectural Historians, as appropriate. If the appropriate SOI-qualified professionals are not available to assist in the design and evaluation of activities denoted with (*) and (**), such activities are not exempt and remain subject to Section 106 review. Additional information regarding activities denoted with (*), (**), and (***) is provided following the list.

Before approving an undertaking, the lead federal agency (or a Project Sponsor that has been delegated or assigned responsibility for Section 106 compliance) must determine if the undertaking has the potential to cause effects to non-rail historic properties located within or in the vicinity of the rail ROW. For example, the construction of a new equipment maintenance building in an existing rail yard could introduce a visual, atmospheric, vibratory, and/or audible element that could affect nearby non-rail historic properties. If such potential exists, the lead federal agency (or a Project Sponsor that has been delegated or assigned Section 106 responsibility) must follow the requirements of 36 CFR part 800, including

establishing an Area of Potential Effects (APE) as defined in 36 CFR 800.16(d), or an applicable program alternative executed pursuant to 36 CFR 800.14 in order to consider the potential effects to non-rail historic properties located within that APE. This requires the federal agency and/or Project Sponsor to complete the four-step Section 106 review process for such non-rail historic properties in the APE: initiating the process; identifying historic properties; assessing adverse effects; and resolution of adverse effects to historic properties. Nevertheless, the effects of the activities listed below on rail properties within rail ROW remain exempt from Section 106 review.

If an unanticipated discovery of a non-rail historic property, archaeological site of any nature, or human remains is made during the implementation of an exempt activity, the Section 106 requirements at 36 CFR 800.13 and/or state burial law, as appropriate depending on the nature of the discovery, would apply because such resources are not covered by the program comment. In addition, although the activities listed below are exempted from Section 106, the Project Sponsor must still comply with the requirements of any easements, covenants, or state or local historic designations applicable to the affected rail property(ies). At minimum, the Project Sponsor must cease

all work in and secure the area of the discovery while the appropriate notifications are made and the parties consult to determine the appropriate course of action.

A. Track and Trackbed¹⁰

1. Replacement of rails, fasteners, ties, or bridge timbers. This includes replacing jointed rail with continuous welded rail. This does not include changing the gauge of the rail.
2. Addition of switches in an existing trackbed.
3. Replacement of Y-tracks, turn-outs, frogs, or switches within existing footprint.
4. Installation of new turn-outs, sidings, and crossovers in areas of previously disturbed soils or when construction methods do not require surface removal (*).
5. Replacement of subgrade, ballast, and sub-ballast materials.
6. Addition of fill free of debris or other clean borrow materials on top of existing soils or fill.
7. Excavation of clean borrow material from sources within the rail ROW (*).

¹⁰ These activities do not include alterations to the trackbed that would result in a substation visual change (i.e., elevation) in the relationship between the trackbed and the surrounding landscape.

8. Scraping and undercutting of an existing subgrade or embankment to restore a horizontal profile or increase vertical clearance (*). This includes modifying the subgrade only, not modifications to bridges, tunnels, or other infrastructure.
9. Widening an existing embankment for the addition of turn-outs (*).
10. Reinstallation of track in the same location where it existed previously but had been removed (e.g., reinstallation of double tracking on a currently single-tracked line that had historically been double-tracked).
11. Removal of abandoned sidings, rails, ties, or ballast.

B. Bridges and Tunnels

1. The following bridge and tunnel structure maintenance actions: cleaning; in-kind painting of the bridge superstructure or substructure; in-kind masonry repointing; deck overlay with the same or similar materials as existing; application of preservative and corrosion protection treatments;

ballast cribbing; affixing stiffeners; or patching spalled concrete.¹¹

2. Repair or replacement of brackets, hardware, angles, rivets, flanges, bearings, fasteners, motors, locking devices, or similar elements.
3. In-kind repair or replacement of structural or non-structural bridge members (e.g., I-beams, T-beams, girders, box beams, abutments, piers, parapets, bents, bridge protective systems (e.g., fenders, pile clusters, dolphins, sheer booms, sheer fences, island protection systems, or floating protection systems)) that do not alter character-defining features of the bridge (**). This does not include full or partial demolition of a bridge.
4. Actions to strengthen or address deteriorating structural conditions of bridges that are intended to preserve their useful life and that do not alter character-defining features of the bridge (**).

Examples include converting the bridge deck from an

¹¹ "In-kind" as used here and elsewhere in Appendix A means that new materials used in repairs or replacements must match the material being replaced in composition, design, color, texture, and other visual and material properties. Substitute materials should be used only on a limited basis and only when they will match the appearance and general properties of the historic material and will not damage the historic property. For more information, see <https://www.nps.gov/tps/standards/rehabilitation/rehab/stand.htm>.

open deck to a ballast deck; the replacement of traditional roller bearing assemblies to elastomeric or similar pad bearings; or changing the material beneath the ballast such that the change in material would not be visually discernable from outside of the ROW.

5. Repair or replacement of tunnel ventilation structures and associated equipment (e.g., fans, ducting) (**). Replaced structures must be substantially the same size as or smaller than existing and be visually compatible with the surrounding built environment.

6. Removal or replacement of any bridge or tunnel material or added-on element that is not part of the original construction or that was not added during a period of major alteration dating back to 45 years or earlier (**).

C. Rail Buildings (i.e., Passenger Stations and Depots, Maintenance and Equipment Buildings, Interlocking Towers, Signal houses)

1. In-kind repair or replacement of light fixtures in public spaces, such as passenger waiting areas.
2. Repair, extensions to the width, or extension or shortening of the length of boarding platforms, as

necessary to meet federally-mandated ADA-compliant boarding requirements or to accommodate longer or shorter trains, that are constructed with common concrete methods (e.g., concrete slab) (*). This does not include platforms constructed with brick, stone, tile, wood, or other materials. This does not include platform modifications that would result in the need to modify paths of travel, such as through the installation of ramps, to achieve ADA compliant access to/from associated passenger stations.

3. In-kind repair of platforms constructed with brick, stone, tile, wood, or other non-concrete materials (**). This does not include increasing the height of an existing platform to meet ADA requirements.
4. Maintenance, repair, or replacement (**) of escalators and elevators.
5. Cleaning, painting, or refinishing of surfaces with a like color and where the products or methods used would not damage the original surface.
6. In-kind masonry repointing.
7. Repair or replacement of passenger walkways constructed with common concrete or asphalt methods when consistent with existing materials.

8. The following federally mandated ADA improvements at passenger stations do not damage, cover, alter, or remove character-defining architectural spaces, features, or finishes:
 - a. Installation or replacement (**) of the following: restroom stalls/partitions, and hardware and fixtures such as grab bars, tilt frame mirrors, sinks, and toilets; tactile warning strips on floors, passenger walkways, and platforms; cane detectors; sidewalk curb cuts; automatic door openers; station identifier and wayfinding signage; public information display systems (PIDS); wheelchair lifts; and wheelchair lift enclosures. This does not include ADA improvements involving the installation, modification, or removal of ramps, stairs, doors, windows, roofs, platform boarding canopies and supports, or ticket counters.
 - b. Widening of or adjustments to the slope of passenger walkways constructed with common concrete or asphalt methods (*).
9. Interior maintenance work or alterations in stations or other railroad facilities that is limited to non-

public spaces that lack architectural distinction (**).

10. Replacement of pumps, air compressors, or fueling stations (*).
11. Removal of mechanical equipment inside railroad facilities not visible to the public (**). Examples include relay panels, switchgear, and track diagram boards.
12. Addition of new mechanical equipment in basements, beneath platforms, in designated mechanical equipment areas, or in areas that are otherwise out of public view.
13. Paving, painting, or striping of parking surfaces.
14. In-kind repair and replacement of platform boarding canopies and supports (*, **).
15. State-of-good-repair ("SOGR") activities (**) not otherwise on this list that are necessary to keep a station, depot, or other rail building inhabitable, safe¹², and in use, and may affect character-defining architectural features of the property, such as the

¹² As required by applicable federal or municipal fire, life safety, or health codes or standards.

repair or in-kind replacement of the following: elevator head houses and portals; roofs; doors; windows; stairs; or railings. SOGR activities do not include demolition, decommissioning, or mothballing of rail buildings that are not in use, or reconfiguring the interior spaces of passenger stations for a new use (e.g., enclosing a passenger waiting area to create new office, baggage handling, or event space).

D. Signals, Communications, and Power Generation

1. Maintenance, repair, or replacement of component parts of signal, communications, catenary, electric power systems, or other mechanical equipment that retains the visual appearance of the existing infrastructure (**). This includes replacement of individual signal masts, but does not include wholesale removal or replacement of a catenary system or signal bridge.
2. Maintenance, repair, or replacement (*) of radio base stations.
3. Maintenance, repair, or replacement (*) of the mechanical components of traction power substations, i.e., transformers, circuit breakers, electrical

switches. This does not include replacement of an entire substation.

4. Maintenance or repair of signal instrument houses and signal bungalows (**).
5. Installation, repair, or replacement of communications equipment on locomotives and rolling stock that are actively used for intercity passenger rail, rail transit, or freight rail. This does not apply to historic trains used for tourism.

E. Rail/Roadway At-Grade Crossings and Grade Separations

1. Maintenance of existing at-grade railroad crossings including installation of railroad crossing signs, signals, gates, warning devices and signage, highway traffic signal preemption, road markings, and similar safety upgrades (*).
2. In-kind repair, rehabilitation, or replacement of existing at-grade railroad crossings including installation of railroad crossing signs, signals, gates, warning devices and signage, highway traffic signal preemption, road markings, and similar safety upgrades (*, **).
3. Installation of new, at-grade railroad crossings on existing railroads and roadways, including installation of railroad crossing signs, signals,

gates, warning devices and signage, highway traffic signal pre-emption, road markings, and similar safety features (*). This does not apply when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

4. Expansion of existing sidewalks, constructed with common concrete or asphalt methods, along the sides of an existing at-grade rail crossing (*).
5. Maintenance, repair, or rehabilitation of existing grade-separated crossings of other transportation modes (highways, local roads, pedestrian underpasses) (*, **). This does not include modifications to existing grade separation structures (e.g., bridges, overpasses) that would result in a substantial increase in height or overall massing.
6. Addition of lanes, turning lanes, road widening, and pavement markings for at-grade crossings (*). This does not apply when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource

to a National Register-listed or eligible historic district.

7. Construction of curbs, gutters, or sidewalks adjacent to existing roadway for at-grade crossings (*). This does not apply when the crossing involves an individual National Register-listed or eligible roadway or a roadway that is a contributing resource to a National Register-listed or eligible historic district.

F. Safety

1. Repair, replacement, or installation of the following security and intrusion prevention devices (*, **): security cameras, closed captioned television (CCTV) systems, light poles and fixtures, bollards, emergency call boxes, access card readers, and warning signage.
2. Replacement of security and safety fencing where the replacement is substantially the same appearance as existing (*). This does not include replacement of an open-fence design with a closed design that would create a visual barrier.
3. Replacement or installation of safety equipment/fall protection equipment on rail bridges, signal bridges, or other non-station structures for the

protection of rail workers or the public (**).

Examples include railings, walkways, gates, tie-off safety cables, anchors, or warning signage.

4. Repair, replacement, or installation of wayside detection devices (*).
5. Repair, replacement (*), or installation (*,**) of bridge clearance/strike beams.

G. Erosion Control, Rock Slopes, and Drainage

1. Placement of rip rap to prevent erosion affecting bridges and waterways.
2. Erosion control through slide and slope corrections (*).
3. Rock removal and re-stabilization activities such as scaling and bolting.
4. Maintenance, repair, or replacement (*) of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone headwalls. This does not include uniquely constructed culverts such as those built by the Civilian Conservation Corps or those made out of unusual materials (e.g., a hollowed log).
5. Expansion, through horizontal elongation, of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone headwalls for the purpose of improved drainage (*).

6. Embankment stabilization or the re-establishment of ditch profiles where no new grading is involved.
7. Corrections to drainage slopes, ditches, and pipes to alleviate improper drainage or changing alluvial patterns (*).
8. In-kind repair or replacement of retaining walls (*, **).
9. Maintenance, repair, or alterations to the interiors of culverts and related drainage pathways.

H. Environmental Abatement

1. Removal of environmental hazards on bridge structures, e.g., treated wood that may leak into waterways or sensitive habitat, removal of graffiti; and abatement of lead/heavy-metal coatings and paintings. Activities that replace coatings or paint must be of the same color and appearance as the materials that have been abated.
2. Removal of asbestos-containing pipe insulation or transmitter relay panels in or on rail operations buildings, bridges, or tunnels.
3. Removal of contaminated ballast and sub-ballast materials.
4. Removal of contaminated soils (*).

I. Operations

1. Establishment of quiet zones, including the installation of required warning devices and additional safety measures installed at grade crossings, that do not entail closing of existing roadways.¹³
2. Increased frequency of train operations that do not result in noise or vibration impacts. (Note: A noise and vibration study would be prepared by a qualified subject matter expert as part of the NEPA process).
3. Temporary storage of rail cars on active rail lines.
4. Repair, maintenance, or replacement (*) of noise barriers. Replacements must be substantially the same size and visual appearance as existing.

J. Landscaping, Access Roads, and Laydown Areas

1. In-kind replacement of existing landscaping.
2. Mowing, seeding/reseeding, planting, tree trimming, brush removal, or other similar groundcover maintenance activities.

¹³ A quiet zone is an FRA exemption to the rule requiring trains to sound their horns when approaching public highway-rail grade crossings. More information on the creation of quiet zones is available in FRA's regulations at 49 CFR Part 222, Use of Locomotive Horns at Public Highway-Rail Grade Crossings, and in guidance promulgated by FRA's Office of Railroad Safety (for example, see <https://www.fra.dot.gov/Page/P0841> and <https://www.fra.dot.gov/eLib/Details/L04781>).

3. Herbicidal spraying.
4. Maintenance of existing access roads and lay-down areas (*).

K. Utilities

1. Installation, maintenance, repair, relocation, or replacement of underground utilities (*). Examples include electrical, sewer, compressed air lines, fuel lines, and fiberoptic cable.
2. Maintenance, repair, or replacement (*) of above-ground utilities. Replacements must be substantially the same size and scale (including height) as existing.
3. Installation, maintenance, repair, or replacement of utility lines and conduit inside tunnels that does not involve affixing new equipment to the exterior face of tunnel portals.
4. Affixing conduit, repeaters, antennae, and similar small-scale equipment on the exterior masonry face of tunnel portals where the color of the equipment matches the existing masonry in order to limit its visibility and does not damage the masonry construction (**).

L. Bicycle and Pedestrian Facilities, Shared Use Paths,
and Other Trails

1. Maintenance, repair, or replacement (*) of existing bicycle lanes, pedestrian walkways, shared use paths (e.g., bicycle, pedestrian), and other trails intended for non-motorized transportation that are constructed with common materials.
2. Adding lanes to existing shared use paths or other trails constructed with common materials (*).
3. Adding crossings for pedestrians and bicycle facilities, shared use paths, or other trails (*).
4. Installation of bicycle aid stations, bicycle racks and storage units, and similar amenities (*, **).
5. Maintenance, repair, or replacement (*) of bicycle aid stations, bicycle racks, and storage units, and similar amenities. Replacements must be substantially the same size and appearance as existing.
6. Installation of information kiosks, panels, and similar amenities for pedestrian, bicyclists, or other path or trail users (***) .
7. Maintenance, repair, or replacement (*) of information kiosks, panels, and similar amenities.

Replacements must be substantially the same size and appearance as existing.

8. Maintenance, repair, or replacement (*) of existing curbs, gutters, or sidewalks constructed with common materials (e.g., non-decorative concrete or asphalt).

M. Construction/Installation of New Rail Infrastructure

1. Minor new construction and installation of rail infrastructure that is compatible with the scale, size, and type of existing rail infrastructure, such as buildings for housing telecommunications equipment, signal instruments, and similar equipment; storage buildings that house landscaping or maintenance of way equipment or specialty vehicles for track repairs or inspections; locomotive and train car service and inspection (S&I) facilities; trailers or temporary structures for housing rail personnel; and safety/security fencing that uses an open design and does not create a visual barrier. (*,**) applies to all activities in this bullet. This does not include the construction of new passenger stations, rail yards, bridges, or tunnels, or demolition of existing structures.

2. Installation of utility and communications poles, transmission lines, and related equipment within electrified rail ROW (i.e., rail ROW with existing overhead transmission lines) (*). New poles and overhead lines must be substantially the same height as existing. *(Note: If another existing Section 106 Program Alternative, such as the ACHP Program Comment for Positive Train Control or the ACHP Program Comment for Wireless Communications Facilities, would apply to the proposed activities, defer to that Program Alternative.)*
3. Installation of new culverts beneath the trackbed in areas not visible or accessible to the public (*).

N. Rail Properties Less than 45 Years Old

1. Maintenance, repair, replacement, rehabilitation, or demolition of any rail property less than 45 years old is an exempt activity (unless the rail property is of exceptional importance as defined under NHRP Criterion Consideration G¹⁴ and as determined through consultation between the lead federal agency and the State Historic Preservation Officer (SHPO)).

However, as with all other activities in this list,

¹⁴ For information regarding the NRHP Criteria for Evaluation, see <https://www.nps.gov/nr/publications/bulletins/nrb15/>.

the Project Sponsor and lead federal agency must consider whether the activity may cause effects to adjacent or nearby non-rail historic properties (e.g., demolition of a tall rail building could alter the existing viewshed or eliminate a noise buffer). Depending on the nature of the proposed undertaking, such consideration of effects to non-rail properties may require the involvement of an SOI-qualified professional and consultation with SHPO and other consulting parties, as well as establishment of an APE and identification of historic properties in that APE, assessment of effects to those properties, and resolution of any adverse effects to those properties.

(*) **The proposed undertaking must be located entirely within previously disturbed soils or fill.** Previously disturbed soils are those that show visible evidence that construction techniques used during previous construction activities required the grading or removal of soil or the addition of fill. A project engineer may be able to determine whether the ground has been previously disturbed or the project location consists of fill based on a review of relevant engineering plans from earlier construction activities at that location. If it cannot be readily

demonstrated from a review of available documentation or a non-intrusive site investigation that the entire vertical and horizontal limits of ground disturbance for a proposed undertaking would be entirely located within previously disturbed soils or fill, the lead federal agency (or a Project Sponsor that has been delegated or assigned responsibility for Section 106 compliance) must ensure a Secretary of the Interior (SOI)-qualified archeologist confirms the presence or absence of previously disturbed soils. The Project Sponsor, if it has not been delegated or assigned responsibility for Section 106 compliance, must submit to the lead federal agency the archaeologist's recommendation, with supporting justification, that the undertaking would only affect disturbed soils, and the lead federal agency must provide written concurrence to the Project Sponsor before the undertaking can proceed. If the archaeologist determines that undisturbed soils are present in areas of proposed ground disturbance or if there is uncertainty, this program comment does not apply and the proposed activity remains subject to standard Section 106 review or another applicable program alternative.

() The proposed undertaking must meet one of the following circumstances:**

- The affected rail property(ies) is listed on the National Register of Historic Places (NRHP), has previously been determined eligible for listing on the NRHP, or the lead federal agency and Project Sponsor agree to treat the affected rail property(ies) as eligible for listing on the NRHP based on factors such as the date of construction (generally 45 years old or older) and the establishment of the period(s) of significance, an assessment of integrity, and the identification of character-defining features of the affected rail property(ies) by an SOI-qualified professional. SOI-qualified professionals may be federal agency staff, federal agency contractors, Project Sponsor staff, and/or consultants hired by Project Sponsors. The value of treating a rail property as being historic is the time-savings achieved by not having to go through the full identification, evaluation, and consultation steps of the standard Section 106 process. When the affected rail property(ies) is considered historic, the work must be performed in accordance with SOI standards. The work must follow the National Park Service Standards for Preservation and Guidelines for Preserving Historic Buildings, as appropriate.

Whenever possible, historic fabric must be repaired rather than replaced. The Project Sponsor, if it has not been delegated or assigned responsibility for Section 106 compliance, must provide written justification to the lead federal agency explaining why repair is not feasible. In cases where existing historic materials are beyond repair, replacement must be carried out in-kind. The lead federal agency must ensure the Project Sponsor is performing the work using or under the direct supervision of an SOI-qualified professional in the relevant discipline(s). Verification and approval in writing by the lead federal agency is required before the Project Sponsor can implement the proposed undertaking. Lastly, the lead federal agency must notify the relevant SHPO(s) in writing of the proposed undertaking upon the lead federal agency's approval and prior to the Project Sponsor's commencement of the undertaking. Or,

- The rail property is less than 45 years old and does not meet NHRP Criterion Consideration G. In such cases, the Project Sponsor may carry out maintenance, repair, rehabilitation, or replacement activities of any nature and does not need to follow SOI standards *with regard to the subject rail property*. However, the

restrictions noted in Section N of the preceding list apply.

(*) If the equipment to be removed includes obsolete or outdated technology, the Project Sponsor must contact the relevant SHPO, railroad museums or railroad historical societies, museums, educational institutions, or similar entities to determine if there is an entity that may be interested in purchasing or receiving the equipment as a donation, as appropriate.** The Project Sponsor, if it has not been delegated or assigned responsibility for Section 106 compliance, must demonstrate to the lead federal agency that it has made a good faith effort to contact such parties prior to removal and disposition of such equipment.

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