BEFORE THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

DOCKET NO. ACHP-2017–25025:

NOTICE OF PROPOSED DRAFT PROGRAM COMMENT TO EXEMPT EFFECTS OF TRANSPORTATION-RELATED UNDERTAKINGS WITHIN RAIL RIGHTS-OF-WAY

SUPPLEMENTAL COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS AND AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

The Association of American Railroads (“AAR”) and American Short Line and Regional Railroad Association (“ASLRRA”), on behalf of themselves and their members, submit the following comments in response to the ACHP’s “Notice of Draft Program Comment to Exempt Effects of Transportation-Related Undertakings Within Rail Rights-Of-Way”, 82 Fed. Reg. 54,390 (November 17, 2017)\(^1\). These comments supplement the comments that AAR and the ASLRRA submitted on December 8, 2017, and are provided in light of subsequent discussions and an industry outreach meeting on May 21, 2018. We applaud the progress ACHP and FRA have made to improve and simplify the comment. However, we reiterate our original comments, and urge the ACHP to adopt a final exemption that follows the clearly expressed intent of Congress.

In the notice, ACHP proposes two alternative administrative steps to achieve an exemption from the Section 106 process under the NHPA. First, it proposes an “activity-based

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\(^1\) AAR is a trade association whose membership includes freight railroads that operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97% of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

ASLRRA is a non-profit trade association that represents the interests of over 500 Class II and Class III railroad members in legislative and regulatory matters.
“approach” that focuses on certain “routine undertakings” within rail ROW that would not be expected to have adverse effects on historic properties. Second, ACHP proposes a program comment to exempt effects of transportation-related undertakings within railroad and rail transit ROW from the Section 106 consultation requirements. As discussed in detail in our December 8, 2017 comments, neither of these alternatives satisfy the congressional intent clearly articulated in Section 11504 of the FAST Act of 2015, which called for a railroad ROW exemption from the NHPA’s consultation requirements that would be “consistent with the exemption for interstate highways.” The highway exemption provides a general exemption from Section 106 requirements for the Interstate Highway System, with some individual exclusions designated by the FHWA.²

Congress expressly intended to provide railroads with the same broad relief from the burdensome and time-consuming requirements of Section 106 as interstate highways. This means railroad activities in the ROW should be exempt in the vast majority of cases. Adding additional reporting and other requirements could deter project proponents and other agencies from using the exemption. Congressional intent was to avoid precisely these sorts of administrative burdens. Specifically, AAR and ASLRRRA oppose instituting reporting requirements when using Appendix A. This needlessly increases the paperwork burden, disincentivizes the use of Appendix A, and requires other agencies, such as the U.S. Army Corps of Engineers, to create new tracking systems.

America’s freight railroads currently spend millions of dollars every year to comply with Section 106 in order to undertake privately-funded safety and efficiency improvements on private land. Section 106 consultation is what imposes these costs—any federal “undertaking” activates the consultation requirements, and federal undertakings include not just projects or activities funded or overseen by a Federal agency, but also “those requiring a Federal permit, license, or approval” of any kind. 36 C.F.R. § 800.16. The FAST Act provision was meant to solve this problem by providing the same type of project approval streamlining for the privately-owned rail system consistent as the publicly owned highway system enjoys. The ACHP determined that only the most “exceptional and nationally significant” features of the interstate highway system should be subject to Section 106 analysis, and Congress clearly intended the same result for the rail system.³ Accordingly, the AAR and ACHP continue to urge that the FRA and ACHP Federal Register Notice and accompanying guidance should be focused on the preservation of historic properties on the ROW that have truly exceptional significance. This will allow for the best and most appropriate allocation of federal, state, local, and private preservation resources.

AAR and ASLRRRA also oppose the inclusion of a sunset provision for this matter. See 82 Fed. Reg. 54,398. ACHP included a note that the program comment would automatically expire twenty (20) years from the date of issuance. Neither ACHP nor DOT provided any justification for the inclusion of this provision, which is inconsistent with the FAST Act mandate that the relief be permanent—consistent with the highway exemption.

² The list is available at: https://www.environment.fhwa.dot.gov/histpres/state_archival.asp.
³ See https://www.environment.fhwa.dot.gov/strmlng/newsletters/may05nl.asp for a discussion of “Next Steps.”
Thank you for taking these suggestions under careful consideration. We urge the agencies to be mindful of the FAST Act legislative mandate, and its clear directive to alleviate the burdens of the Section 106 process on the railroads.

Respectfully submitted,

Alice Koethe
Assistant General Counsel
Association of American Railroads
Suite 1000
425 Third St., S.W.
Washington, D.C. 20024
(202) 639-2509

Keith T. Borman
Vice President and General Counsel
American Short Line and Regional Railroad Association
Suite 7020
50 F St., N.W.
Washington, D.C. 20001
(202) 585-3448

Submitted via electronic mail to RailROW@achp.gov and FRA.106Exemption@dot.gov on June 4, 2018.