July 31, 2019

Via email to FRA.106Exemption@dot.gov

Re: Draft Guidance for Implementing the Optional Property-Based Approach to Exempting Consideration of Effects to Rail Properties within Rail Rights-of-Way under Section 106 of the National Historic Preservation Act

To Whom it May Concern:

On behalf of the Association of American Railroads and the American Short Line and Regional Railroad Association, thank you for the opportunity to submit comments to the U.S. Department of Transportation’s July 8, 2019 draft guidance for implementing the Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way.¹ The railroad industry encourages DOT to create a workable program for project sponsors to identify those exceptional historic properties that uniquely “illustrate the history of the development of the nation’s railroads or rail transit systems” and thus remain subject to Section 106 review.²

The railroads have several concerns with the draft guidance. Most fundamentally, the rail right-of-way (“ROW”) program comment and guidance wholly fail to meet Congressional direction to provide significant relief from the Section 106 review process in the form of a broad exemption for the rail ROW. Beyond that:

- The draft guidance newly requires that railroads must ask, and be granted, permission before beginning to study a section of the rail ROW for potential use of the property-based exemption portion of the program comment. This new paperwork requirement is unjustified, provides no benefit to the process, and cannot lawfully be imposed by

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¹ AAR is a trade association whose members include 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 600 Class II and Class III railroad members in legislative and regulatory matters.

guidance that does not undergo formal notice-and-comment procedures under the Administrative Procedure Act, 5 U.S.C. § 553.

- The draft guidance discusses the inclusion of historic properties that are solely of state and local significance, without clearly specifying how such properties would meet the overall requirement of “illustrat[ing] the history of the development of the nation’s railroads or rail transit systems.”

- The outreach process outlined is cumbersome. Among other things, it appears to contemplate multiple (and duplicative) notifications to state historic preservation offices, and it over-involves the national historic organizations.

- Finally, the draft allows only one narrow option (loss of integrity) to address historical features on the rail ROW that are inappropriately listed on the National Register of Historic Properties.

I. The draft ignores Congressional intent.

Congress changed the law in order to provide railroads and other project proponents with relief from the burdensome demands of Section 106 reviews. In the Fixing America’s Surface Transportation Act of 2015 (“FAST Act”), lawmakers directed the DOT Secretary to establish 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 Federal Highway Administration. Congress expressly intended to provide similar broad relief from the burdensome and time-consuming requirements of Section 106 for the rail ROW. Based on the plain language of Section 11504, that relief should have been modeled on the interstate highway exemption, where DOT worked with stakeholders to develop a finite list of features that would require Section 106 consultation.

Disregarding Congressional direction, DOT and the Advisory Council on Historic Preservation developed a program comment that placed the burden on project proponents to build the list of exempt historic rail properties. The draft guidance continues the trend of adding, rather than removing, burdens on project proponents. Instead of explaining how the railroads can expeditiously develop a list of excluded rail properties, the draft guidance imposes additional requirements, encourages inclusion of historic properties of state/local significance, and adds many potential veto points for the historic preservation community. The purpose of the guidance as characterized on page 5 is “to make Section 106 review for individual undertakings more efficient,” but the guidance operates to accomplish the reverse. Indeed, this guidance for the property-based exemption requires more process, more stakeholder involvement, and more time than the current programmatic agreement approach allowed under ACHP regulations. Given this guidance, AAR and ASLRRA are hard-pressed to see why railroads would choose to pursue the sponsor-based approach instead of individual programmatic agreements under Section 106.
II. **The draft unlawfully imposes a new process and paperwork requirement.**

On pages 9-10, the draft guidance imposes a new requirement: railroads must ask, and be granted, permission before beginning to study a section of the rail ROW for potential use of the program comment. DOT provides no explanation and/or policy rationale for imposing this burden on project sponsors and does not include a cost-benefit analysis of this new requirement.

In particular, this draft fails to analyze the burdens on small railroads. The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121) ("SBREFA") requires regulatory agencies to maintain policies concerning small entities. These policies apply along with the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) ("RFA"), and the “excessive demand“ provisions of the Equal Justice Act (5 U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D)). For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Also, Executive Order 13272 requires federal agencies to notify the Small Business Administration Office of Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy.

A guidance document that imposes new rights or obligations that are binding as a practical matter ordinarily constitutes a legislative rule that must go through notice and comment. This is true despite DOT’s inclusion of disclaimer language. Section 553 of the Administrative Procedure Act requires publication of such a proposal in the Federal Register, along with an opportunity for interested persons to submit written data, views, or arguments. Though DOT uses permissive language for the notification requirement itself (“should”), it is clear that proceeding without permission could bring negative consequences from DOT. This new notification requirement is not justified under the law, and must be removed in the final guidance document.

III. **The draft lacks criteria for identifying excluded rail properties, especially in relation to the state or local historical significance category.**

The draft guidance appears to contemplate the inclusion of historic properties that are solely of state and local significance, without articulating how such properties could possibly meet the broader test of “illustrat[ing] the history of the development of the nation’s railroads or rail

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4 *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

5 5 U.S.C. § 553(b)&(c).

6 For example, the language on page 10 of the draft guidance states that a “USDOT OA will review the notification and notify the Project Sponsor in writing when it may proceed with the next steps in the process.” From this context, it is clear that project sponsors may not proceed until DOT gives permission.
transit systems.” AAR’s members raised concerns about including properties of state and local historical significance to DOT and ACHP during the program comment development process and understood that DOT would provide detail on the (presumably very limited) circumstances in which such properties could qualify for inclusion on a list of excluded historic rail properties. The draft fails to offer any guidance on this point. Local activists can be expected to use this silence to pressure for continued Section 106 review of properties of state and local historical significance, thereby further watering down the program and frustrating the intent of Congress.

IV. The draft imposes an unworkable and duplicative stakeholder outreach process.

The draft guidance exhibits overly abundant concern that state historic preservation organizations are adequately notified. For example, after DOT gives a railroad “permission to proceed” it “may notify the appropriate SHPO, [tribal historic preservation office], Indian tribe, and/or [Native Hawaiian organization] of the Project Sponsor’s intent to pursue the property-based approach.” DOT does not explain how it would select the appropriate offices. The next step is for the project sponsor to develop its proposal, which also requires notifying SHPOs and soliciting information from them about historic surveys and relevant properties. There is no need for the first DOT notification, as it will be largely duplicative of the second. The draft guidance also discusses coordination on page 13 (regarding surveys) and page 14 (more general coordination discussion with the suggestion that project sponsors allow historic offices 30 days to respond). DOT also plans to “notify and request input from appropriate SHPOs, THPOs, Indian tribes and/or NHOs” when reviewing a proposal. Next, DOT will provide the project sponsor’s full submission (or detailed summary) to historic offices yet again at the start of the public review and comment period. Finally, DOT may request additional input from SHPOs, THPOs, tribes, and NHOs during and after the public comment process.

This is simply too much process. More concerning, the draft also deprives project sponsors of the opportunity to answer or rebut the SHPO concerns that are repeatedly solicited throughout the process. AAR and ASLRRA strongly urge that the final guidance should (1) eliminate the DOT notification to SHPOs and others (along with the preliminary permission requirement), (2) simplify and reorganize the discussion of SHPO notification requirements to avoid the impression of duplication; and (3) clarify that DOT may coordinate with project sponsors (as well as the historic preservation proponents) during and after the public comment period to resolve issues.

V. The draft does not provide a solution for historical features on the rail ROW inappropriately listed on the National Register of Historic Properties.

The program comment made clear that just because a property is listed on the National Register or had been declared eligible for listing, it will not automatically be considered an excluded historic rail property. However, the draft guidance only allows for reconsideration of

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7 Draft Guidance, page 10.
8 Draft Guidance, page 35.
such status on the basis of a previously-listed or eligible property having lost “integrity” in accordance with NPS National Register Bulletin 15 after the designation had been made. The final guidance should make clear that (1) listed properties can be de-listed, or omitted from the program comment list of excluded historic rail properties, under any of the criteria in 36 C.F.R. § 60.15, and (2) the fact that a property is listed on the National Register or determined eligible does not mean that it is automatically considered an excluded historic rail property that “illustrates the history of the development of the nation’s railroads or rail transit systems.”

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The railroad industry encourages DOT to develop final guidance that limits Section 106 consultation to exceptional historic properties that uniquely “illustrate the history of the development of the nation’s railroads or rail transit systems,” in accordance with the FAST Act.

Respectfully submitted,

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