Preserving America's Heritage

TESTIMONY FOR THE RECORD

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TO THE SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS
THE HONORABLE CORRINE BROWN, CHAIRWOMAN

HEARING ON THE
EFFECTS OF HISTORIC PRESERVATION REQUIREMENTS ON RAIL INFRASTRUCTURE

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INTRODUCTION

I am John Fowler, Executive Director of the Advisory Council on Historic Preservation (ACHP). The ACHP is an independent agency, created by the National Historic Preservation Act of 1966 (NHPA), to advise the President and Congress on historic preservation matters. We also administer Section 106 review – the portion of the NHPA that deals with review of Federal agency programs and projects that have the potential to affect historic properties. In this latter capacity, the ACHP has long been aware of the historic significance of America's rail infrastructure and the need to strike a balance between accommodating historic preservation concerns with the needs of active, profit-producing rail operators. These are not irreconcilable issues and the consultative planning process afforded under Section 106 regularly facilitates effective solutions.

In the last year the Section 106 process has been successfully concluded with agreements regarding improvements to the timber trestle bridges on the Alaska Railroad; clearance improvements to the Heartland Corridor through Virginia, West Virginia, Kentucky, and Ohio; and depot rehabilitations in Elm City and Parkton, North Carolina. These recent examples help to illustrate that federal agencies can efficiently take into account the effects of their undertakings on historic railroad-related properties through the Section 106 review process defined in our regulations, "Protection of Historic Properties" (36 CFR Part 800).

RAILROADS AS HISTORIC PROPERTIES

Railroads are central to the history and development of the United States. Railroads brought settlers to otherwise inaccessible localities, spurred the development of local industries and prosperity, and knitted the nation together with a network that moved goods and people with unprecedented efficiency and speed. The physical plant of America's railroads represented state of the art engineering and design, constructed

by the many immigrant groups that built our nation – stone walls by Italian masons, tunnels dug by Irish and Chinese laborers, and bridges and station buildings of all shapes and sizes. As the Subcommittee's background materials indicate, it is fully understandable that the National Register of Historic Places, the basic inventory of the nation's heritage sites maintained by the National Park Service, includes numerous railroad and railroad-related historic properties that have been recognized for their local, State, and national significance.

THE SECTION 106 REVIEW PROCESS

In the Section 106 review process, a federal agency that may carry out, fund or permit undertakings that affect a rail line evaluates whether the line has historic significance and sufficient integrity to illustrate that significance according to the Criteria for Evaluation established by the National Park Service in its regulations at 36 CFR Part 60. The federal agency conducts this evaluation in consultation with the applicable State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) and other consulting parties, including the rail operator. If no historic properties will be affected by the undertaking, the federal agency makes a finding and concludes the process.

If the federal agency determines that the rail line or individual elements meet the criteria for listing in the National Register, the agency continues consultation with the SHPO/THPO and other consulting parties to assess whether or not the historic properties will be adversely affected by the undertaking. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association (36 CFR § 800.5(a)(1)). If no historic properties will be adversely affected by the undertaking, the federal agency makes a finding and concludes the process.

CONCERNS WITH THE CURRENT LEGISLATIVE PROPOSAL

As a matter of policy, the ACHP opposes blanket legislative exemptions for particular resource types or classes of federal undertakings. Such intervention in the longstanding administrative review process is unwarranted to deal with the purported issues and would set an inappropriate precedent for other types of historic properties, validating the notion that special interests can invoke congressional action simply because they find the application of current law inconvenient.

The current proposals are designed to address issues that have been identified in two particular states, Alaska and North Carolina. Our understanding is that the challenges faced by the two testifying rail operators are neither widespread nor shared by others throughout the nation. This indicates that the problem is not systemic, requiring radical surgery of a 42-year old law. Rather, the concerns can be addressed through administrative relief options that are provided for in the ACHP's regulations and have a proven track record of adapting the Section 106 review process to meet agency missions while respecting the established Federal policies set forth in the NHPA which protect our nation's heritage.

RECENT EXAMPLES OF ADMINISTRATIVE RELIEF

The ACHP's regulations, which were last revised in 2004, have been successful in providing agencies administrative relief from provisions in Section 106 when situations warranted such accommodations. There are three examples that are noteworthy in that the outcomes have been fully adopted by Section 106 practitioners and have enabled much needed services and activities to proceed in a manner that balances historic preservation and project goals.

The first example is the development of a nationwide Programmatic Agreement with the Federal Communications Commission (FCC) and the telecommunications industry to streamline the review of cell tower construction. The agreement exempts tower siting projects at certain locations; limits the identification and evaluation of historic properties to those that were already listed in existing surveys; and establishes a consistent approach to defining the area in which historic properties are to be considered. This effort brought consistency, predictability, and efficiencies to the telecommunications industry as they expanded the network of cell towers necessary to keep up with the demands of the 21st century.

A second example is the exemption of historic natural gas pipelines that are subject to reviews by the Federal Energy Regulatory Commission (FERC). In response to the natural gas industry's concerns about having to modify plans to operate pipelines that were designated as historic properties, FERC requested that the ACHP exempt consideration of effects to the pipelines themselves from Section 106 review. The ACHP agreed to this approach and published a notice of the exemption in April 2002.

Another example which is noteworthy as a tailored approach to address unique types of historic properties that were subject to Section 106 review is highlighted the ACHP's 1991 Report, *Balancing Historic Preservation Needs with the Operation of Highly Technical or Scientific Facilities*. Per the request by Congress in 1989, the ACHP undertook an analysis of the impact the designation of scientific research institutions as historic properties would have on their mission and operations. The study focused primarily on a review of National Aeronautics and Space Administration (NASA) facilities and its need to continue to operate research and space exploration program at facilities that were historic and designated as elements of the "Man in Space" program. As a result of the findings in the study, it was recognized that science and technological agencies could benefit from a programmatic approach to compliance with NHPA. A Programmatic Agreement was executed with NASA that addressed stewardship issues, partnership opportunities, and development of mitigation measures for buildings that had to be altered or lost to facilitate agency mission. The Section 106 process was adapted to respond to NASA's mission without compromising the role that its facilities and objects played in the scientific history of the nation.

It should be noted that the impetus for the study was an effort by the scientific community to obtain a legislative exemption from Section 106. The Congress wisely chose to let the agencies use the existing administrative tools to address the issue successfully.

OPPORTUNITIES TO CONSULT WITH AGENCIES AFFECTING RAILROADS

While the examples above address non-transportation agencies, it should be noted that there might be additional administrative relief available in the federal agencies that provide financing, assistance, or approvals for railroad undertakings. As was the case with the Federal Highway Administration (FHWA) regarding its Interstate Highway System, the ACHP has worked with many federal agencies to identify opportunities for modifying and streamlining the Section 106 review process for particular programs. Rather than pursue a legislative exemption, FHWA consulted with the ACHP and other consulting parties to develop an exemption that released all Federal agencies from having to take into account effects to the Interstate Highway System. All agreed that attention through Section 106 should be focused on only those elements of the System that possessed exceptional historic significance. The diversity of historic railroad properties makes it infeasible to adopt the Interstate Highway exemption, but the process that led to the successful exemption can be a model for addressing historic railroad properties.

The very railroads that are bringing forward this call for exemption have had successful experiences with the administrative alternatives. At the local level, the Federal Railroad Administration (FRA), the Alaska State Historic Preservation Officer (SHPO), and the Alaska Railroad recently executed a Section 106 agreement regarding the treatment of historic timber trestle bridges, which need continued maintenance and improvements. This approach could be expanded, using a similar agreement recently executed among

FRA, the Delaware SHPO, and Amtrak for the Wilmington Shops as a model, to extend to the entire Alaska Railroad System. In the Wilmington Shops agreement, many maintenance and improvement activities are exempt from Section 106 review, and streamlined review processes are established for certain specific components of the Shops – the round house, the station – for more careful review.

The FRA, Federal Transit Administration (FTA), STB, and FHWA have not yet contacted the ACHP to discuss the programmatic alternatives that would provide the relief to the problems that railroad operators have shared with Committee. We are open to such discussions, however, as they may assist in finding solutions that could minimize project delays and increased costs for historic preservation reviews. Now that we have been made aware of the level of frustration felt by the Alaska Railroad and the North Carolina Department of Transportation with the possible designation of State railroad corridors, we will contact the Federal agencies with jurisdiction over their projects to further understand their challenges and to provide administrative relief in the short term, as needed. We also stand ready to participate with the railroad industry in their individual Section 106 reviews or consultations to develop programmatic approaches tailored to their circumstances.

Railroads are a vital component of our nation's transportation network, with growing importance as we face congestion and environmental challenges. The ACHP strongly believes its regulations can provide for an administrative solution that allows for the continued vitality of rail transportation while also ensuring a reasonable and appropriate level of preservation of our Nation's rich railroad heritage.

We appreciate the opportunity provided to the ACHP to share its testimony with the Committee. We look forward to working with you and other stakeholders to explore options that will address the long-term treatment of historic railroad properties and facilities.