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ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Issuance of Program Comment To Exempt Consideration of Effects to Rail Properties Within Rail Rights-of-Way

AGENCY: Advisory Council on Historic Preservation.

ACTION: Program Comment issued to exempt consideration of effects to rail properties within rail rights-of-way.

SUMMARY: The Advisory Council on Historic Preservation (“ACHP”) issued a Program Comment to exempt consideration of effects to rail properties within rail rights-of-way at the request of the U.S. Department of Transportation to accelerate the review of these undertakings under Section 106 of the National Historic Preservation Act and to meet the requirement of Section 11504 of the Fixing America’s Surface Transportation Act. The Program Comment can be used by any federal agency with responsibility to consider the effects of undertakings within rail rights-of-way. Federal agencies using the Program Comment may fulfill their Section 106 responsibilities for the relevant undertakings by implementing the terms of this comment, which include identifying those activities that meet the conditions in Appendix A and opting into the process to identify excluded historic rail properties and seek further streamlining of the review process under the property-based approach.

DATES: The Program Comment was issued by the ACHP on August 17, 2018.

ADDRESSES: Address all questions concerning the Program Comment to Kelly Y. Fanizzo, Office of General Counsel, Advisory Council on Historic Preservation, 401 F Street NW, Suite 308, Washington, DC 20001-2637. You may submit questions through electronic mail to: kfanizzo@achp.gov.

FOR FURTHER INFORMATION CONTACT: Kelly Y. Fanizzo, (202) 517-0193, kfanizzo@achp.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act (“NHPA”), as amended, 54 U.S.C. 306108 (“Section 106”), requires federal agencies to take

into account the effects of undertakings they carry out, license, permit, or fund to historic properties and provide the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which federal agencies comply with these responsibilities. Those regulations are codified under 36 CFR part 800 (“Section 106 regulations”).

Under Section 800.14(e) of those regulations, federal agencies can request the ACHP to issue a “Program Comment” on a particular category of undertakings in lieu of conducting reviews for each individual undertaking in the category. An agency can meet its Section 106 responsibilities with regard to the effects of those undertakings by implementing an applicable Program Comment that has been issued by the ACHP.

I. Background

At the request of the U.S. Department of Transportation (“USDOT”), the ACHP has issued a Program Comment that provides new efficiencies in the Section 106 review for undertakings with the potential to affect historic rail properties within railroad and rail transit rights-of-way (“rail ROW”). 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 required that “the Secretary [of the 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 continued 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.

The ACHP worked closely with the Federal Railroad Administration (“FRA”), the Federal Transit Administration (“FTA”), the Federal Highway Administration (“FHWA”),

and the Office of Policy Development, Strategic Planning, and Performance within the Office of the Secretary, USDOT (“OST-P”); representatives from the railroad and rail transit industries; and historic preservation stakeholders to develop the final Section 106 program alternative for rail ROW. The ACHP communicated extensively with the staff of the Senate Committee on Commerce, Science, and Transportation (“Senate Committee”) as well in developing this program alternative. The ACHP recommended incorporating the originally proposed exemption within a Program Comment to better achieve the intent and purpose of the FAST Act and meet the needs of the various stakeholders.

The Program Comment is the product of consultation and careful review. The USDOT and FRA conducted outreach on the preliminary exemption concept and early drafts prior to submitting a formal request to the ACHP in July 2017. The ACHP in turn published the draft Program Comment in the **Federal Register** (82 FR 54390, November 17, 2017), and hosted additional meetings with industry and preservation representatives in 2018. Recognizing the complexity of the issues to be addressed and wanting to ensure the final product met the statutory requirement of the FAST Act to be consistent with the interstate highway exemption, the staff for the Senate Committee extended the deadline for the final issuance of the Program Comment. The final Program Comment takes into account the many significant comments and questions raised by various stakeholders over the course of its development and represents the collective work of the ACHP, USDOT (inclusive of FRA, FTA, FHWA, and OST-P), and the Senate Committee staff to ensure that it meets the FAST Act requirement.

The Program Comment is comprised of two major parts: (1) An activity-based approach, and (2) a property-based approach. The activity-based approach provides a list of activities in Appendix A for which, when the specific conditions are met, no further Section 106 review is required. 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. The property-based approach establishes a process whereby project sponsors can opt to work with the relevant USDOT OA and stakeholders to develop a list of excluded historic rail properties that would remain subject to Section 106 review, and exempt from

review the effects of undertakings to all other historic rail properties within a designated area. While the activity-based approach will be immediately effective, the property-based approach does not go into effect until USDOT publishes implementing guidance. Once in effect, both the activity-based approach and the property-based approach are available for use by all federal agencies with a responsibility to carry out Section 106 review for undertakings that may affect rail properties within rail ROW.

The Program Comment does not apply to undertakings that are located within or would affect historic properties located on tribal lands; undertakings consisting of activities not included in Appendix A and that may affect an excluded historic rail property designated by USDOT; undertakings that could affect historic buildings, structures, sites, objects, or districts that do not have a demonstrable relationship to the function and operation of a railroad or rail transit system; undertakings that could affect archaeological sites located in undisturbed portions of rail ROW, regardless of whether the sites are associated with railroads or rail transit systems; and undertakings that could affect historic properties of religious and cultural significance to federally recognized Indian tribes or Native Hawaiian organizations. There is no sunset clause in the Program Comment; however, there will be regular program review and evaluations between the USDOT and the ACHP to ensure its proper implementation.

II. Public Participation and Response to Comments

The USDOT conducted outreach between 2016–2018 with a variety of stakeholders, including State Historic Preservation Officers (“SHPOs”), Tribal Historic Preservation Officers (“THPOs”), Indian tribes, Native Hawaiian organizations, national historic preservation organizations, national railroad and rail transit associations, state departments of transportation, and railroad and rail transit companies, regarding development of the Program Comment; this included webinars; conference calls and in-person meetings to address concerns of specific stakeholders; presentations at national transportation conferences, and sharing and seeking informal comments on early drafts. The ACHP published the draft Program Comment in the *Federal Register* (82 FR 54390, November 17, 2017). The ACHP notified SHPOs, THPOs, Indian tribes, Native Hawaiian organizations, national

preservation organizations, and other stakeholders via emails on November 21, 2017, to provide them notice of the publication and solicit input. The public comment period was open until December 8, 2017, and the ACHP and USDOT received a total of 261 comments from 48 commenters: 11 SHPOs; 6 Indian tribes; 7 state DOTs; 5 transit organizations; 5 federal agencies; 4 railroad organizations; 4 trade organizations; 2 stakeholders; and 4 other organizations.

The comments raised several procedural and substantive issues, including the following: Questioning the consistency of the draft Program Comment with the interstate highway exemption as required by the FAST ACT; clarifying the types of historic properties that may be covered by the Program Comment including historic properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations, and archaeological sites; clarifying the SHPOs’ and THPOs’ roles regarding the development of the excluded historic properties lists; questioning the potential conflict of the Program Comment’s requirements with Section 4(f) of the US Department of Transportation Act; monitoring the accountability of the project sponsor in appropriately applying the Program Comment; asking about the need for a dispute resolution provision; clarifying and defining specific terminology; specifying annual reporting requirements; questioning the types of activities that should or should not be exempt from Section 106 review under Appendix A; and questioning the types of activities in Appendix A that should be subject to review or supervision by an individual meeting the Secretary of the Interior’s (“SOI”) Professional Qualifications Standards for Archaeologists or Architectural Historians.

In response to the comments received to the November 2017 publication, the ACHP and USDOT made several revisions to the Program Comment. The exclusion for historic properties of religious and cultural significance to Indian tribes and Native Hawaiian organizations and archaeological sites was clarified. The ACHP and USDOT also clarified how the USDOT would publish implementing guidance to provide further detail regarding the identification and evaluation of excluded historic rail properties. The Program Comment incorporates dispute resolution provisions, additional clarification or removal of specific terms and definitions, and a revised list of activities in Appendix A.

The ACHP and USDOT hosted meetings and invited representatives of the National Conference of State Historic Preservation Officers (“NCSHPO”), the National Trust for Historic Preservation, the National Association of Tribal Historic Preservation Officers, and the railroad and rail transit industries in February and May 2018. These meetings continued discussions about the draft Program Comment and in particular, addressed the list of activities to be included in Appendix A and determining which activities should require supervision of SOI-qualified personnel, and the process for establishing the lists of excluded historic rail properties and the scope of the exemption under the property-based approach. Draft versions of Appendix A and the property-based approach were circulated for additional review and comment following the May meeting. By the June 4, 2018, comment response date, the ACHP and USDOT received a total of 128 additional comments from 16 commenters: 11 SHPOs, including NCSHPO; 4 industry representatives; and 1 historic preservation stakeholder.

The SHPOs provided several general comments and many specific comments on both the revised draft Appendix A and the property-based approach. Some questioned the broad scope of the Program Comment; however, due to the requirements of the FAST Act, the two-part approach has been retained in the final version as the ACHP and USDOT believe it represents the best way to achieve the intent and purpose of the statutory mandate.

Many SHPOs asked for annual reporting in the Program Comment. The Program Comment was initially revised to clarify an annual reporting requirement as well as the information that agencies must include in such reports. Several SHPOs asked that an expiration date be included in the Program Comment. While the sunset clause and reporting requirement have been removed, as noted in the discussion of additional comments below, the revised Program Comment requires a regular evaluation be conducted (within one year of issuance and every two years thereafter) to ensure the effective operation of the Program Comment and that its terms are being met. The lack of an expiration date and process for regular evaluations is consistent with the interstate highway exemption.

Many SHPOs asked for a dispute resolution process both in the decision-making under Appendix A and the development of the excluded historic property lists. The Program Comment

was revised to include an opportunity for objection under Appendix A implementation when it appears that a specific activity may be adversely affecting historic properties. It was also clarified that USDOT may request ACHP assistance in resolving any disputes or questions in the development of the excluded historic property lists. The ACHP, rather than the Keeper of the National Register, is the appropriate entity to resolve disputes in the development of the excluded historic property lists because such disputes are about the applicability of the Program Comment rather than the National Register eligibility of any property. Should a question regarding a property's eligibility be raised during the implementation of the Program Comment, USDOT may consult with the Keeper at any time to resolve questions or disagreements.

One SHPO remarked that it would like to see more checks and balances in the Program Comment to ensure effects to historic properties are minimal or not adverse. The Program Comment has been revised to incorporate the comments received into the list of activities in Appendix A and to incorporate SHPO and tribal involvement in the development of the excluded historic property lists. The Program Comment includes activities that may adversely affect historic properties and is not limited to the conditions imposed on exemptions per 36 CFR 800.14(c). In response to a concern that this approach is contrary to the NHPA and other preservation laws, the ACHP and USDOT believe the Program Comment, with its two-part approach, strikes the right balance to achieve the requirements of the FAST Act and is consistent with the interstate highway exemption. Further, one SHPO recommended that traditional cultural properties also be listed as a property type to be excluded from the terms of the Program Comment. The applicability of the Program Comment is consistent with that of the interstate highway exemption in that it does not modify the Section 106 review of effects to non-rail properties, historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations, or to archaeological sites located in undisturbed locations. Because the Program Comment specifies that it does not apply to, and Section 106 continues to apply to these properties, the ACHP determined it was not necessary to specify that traditional cultural properties are not covered by the Program Comment.

Finally, a concern was again raised regarding the coordination or impact of this Program Comment on a federal agency's Section 4f requirement. The Program Comment does not modify in any way USDOT's responsibility to comply with Section 4f or an agency's or project sponsor's responsibility to comply with any other applicable federal, state, or local legal requirement. In regard to discovery situations of non-rail historic properties, all relevant laws, for example those related to treatment of human remains, continue to apply.

In response to many comments, the introduction and applicability section of Appendix A was revised and clarified. Most SHPOs suggested specific edits to the list of activities and conditions in Appendix A. A number of SHPOs suggested that SOI-qualified professionals review additional activities or asked that specific activities be removed from the Appendix. Other SHPOs asked to be more involved in the Appendix A process and to be provided an opportunity to review any activity that requires SOI-qualified professional's involvement. Changes were made to many individual activities, such as certain work done to meet the Americans with Disabilities Act, replacement of light fixtures in public spaces, and the addition of lanes and road widening for at-grade crossings within a National Register-eligible or listed historic district. In other cases, the ACHP and USDOT believe the activities and conditions in Appendix A work to reasonably ensure the activities would have minimal or no adverse effect on historic properties. The Program Comment includes an objection process in cases where there is a concern that an adverse effect is occurring or occurred, and the regular program evaluations would provide an additional opportunity to assess the implementation of Appendix A.

SHPOs raised a concern that the use of in-kind replacement might result in a loss of integrity to a historic district. Further, one SHPO said no loss of a character-defining feature should be exempted from Section 106 review. The ACHP and USDOT believe Appendix A allows for a measured balance of preservation and greater efficiency by exempting consideration of effects under Section 106 for those activities that would likely result in minimal or no adverse effect to historic properties.

Some SHPOs asked how federal agencies and project sponsors without SOI-qualified professionals on staff would determine whether the proposed activity had the potential to affect archaeological sites in undisturbed locations. In response, a definition of

"previous disturbance" was added to the definitions section of the Program Comment to better clarify for all users the scope of the Program Comment. In addition, many ground disturbing activities in Appendix A require the involvement of an SOI-qualified professional.

NC SHPO, and all of the commenting SHPOs, expressed concern with the lack of SHPO and other stakeholder involvement in the development of the excluded historic property lists. Further, several expressed concern regarding the sources of information that project sponsors would be instructed to consult in developing their initial proposed list as well as the timeline for any SHPO or tribal review of draft lists. In response, the Program Comment was revised to require SHPO and tribal notification by project sponsors in the initial development of the proposed lists and by USDOT in determining the final lists. The USDOT is required to seek public review and comment on each proposed list, and may also require a project sponsor to conduct additional evaluation, including field surveys, or prepare documentation to show how it identified historic properties. It is the USDOT who makes the final decision regarding the list of excluded historic rail properties following the outlined process, not the project sponsor. Additional information regarding USDOT's coordination with project sponsors during the development of the excluded historic property lists, recommended outreach to knowledgeable stakeholders, and the timelines for SHPO and tribal review will be provided in the implementing guidance.

Some SHPOs were concerned with the resource-specific approach that is allowed under the property-based approach. Part of this concern was that it may allow inadvertent effects to other historic properties by its misapplication or by a lack of knowledge about other historic properties that may be present within an undertaking's area of potential effects. Further, one SHPO asked how the context and significance of rail properties that may extend beyond a specific study area would be evaluated. As noted above, the Program Comment now includes a requirement for SHPO and tribal notification and a request for input in the development of the excluded historic property lists. The intent is for the determination of each study area to be meaningful and cognizant of the rail line's or rail transit system's historic context. The Program Comment also includes a regular evaluation requirement to allow the ACHP, USDOT, and other stakeholders

the opportunity to review its implementation and determine its effectiveness. Should evaluation show that other historic properties are being adversely affected by a misapplication of the program comment, the parties would be able to address it, for example, via the amendment process in the Program Comment.

Further, commenters expressed concern about potential unintended or unknown adverse effects, including visual effects, to archaeological sites and traditional cultural properties. Consistent with the interstate highway exemption, the Program Comment does not apply to non-rail historic properties and any archaeological site of any nature in undisturbed locations. Section 106 review to consider the effects to these types of historic properties would still need to occur, even if specific activities or effects to certain rail properties would be streamlined under the terms of the Program Comment.

There was some confusion as to whether the criteria for including a rail property on the excluded property list was just an assessment of its National Register eligibility or whether such evaluation only considered rail properties significant at the national level. On a related point, one SHPO said it appeared the duties of the SHPO regarding developing and maintaining lists of eligible and listed historic properties were being given to the USDOT. The excluded historic property lists only refer to the applicability of the Program Comment, not to any particular property's eligibility for the National Register. The Program Comment is not intended to modify the process for determining properties eligible for listing on the National Register. While there is reference to a property's significance, properties significant at the state and local level may also be considered for inclusion in the excluded historic property lists. The same criteria for developing the lists of excluded historic properties was used in the interstate highway exemption, and per the requirement of the FAST Act, this Program Comment is consistent with that approach. In response to a concern raised about any change to the process of de-listing a property from the National Register, the relevant text has been deleted.

There was also a question whether the term "non-rail" historic property should be more clearly defined. In response, the ACHP and USDOT reviewed the definition of rail historic property and believe it is clear, including any temporal association. The use of these terms relates to the mandate of the

FAST Act to exempt effects within rail ROW.

Many SHPOs requested that any surveys be done by SOI-qualified professionals and more generally, that project sponsors be required to use SOI-qualified professionals in proposing excluded historic rail properties. USDOT may require a project sponsor to conduct additional evaluation, including field surveys, and prepare documentation to show how it identified historic properties. SHPOs also raised a question about whether the property-based approach would allow for a loss of integrity to historic districts due to cumulative effects. The Program Comment has been revised to require specific opportunities for SHPO and tribal involvement in the development of the excluded historic property lists. It is also important to note that the Program Comment does not apply to consideration of effects to any non-rail historic properties.

Many SHPOs noted concern about the level of detail to be provided in the implementing guidance as well as a concern with the lack of required consultation with SHPOs and other parties by the USDOT and the ACHP in developing the guidance. In response, more details were added in the Program Comment to the description of the content of the guidance. Further, this approach models the approach taken in the interstate highway exemption by USDOT to develop implementing guidance to assist in the implementation of the program alternative.

The National Trust for Historic Preservation endorsed the comments provided by the Colorado SHPO as well as provided a few additional points. They asked that revisions be made to clarify the continued applicability of Section 4f and National Environmental Policy Act to undertakings that may be subject to the Program Comment, and that SOI-qualified personnel be involved in additional activities in Appendix A. They asked that a dispute resolution process be added to Appendix A as well. Finally, they expressed concern about the level of detail to be included in the implementing guidance document and the lack of consultation with SHPOs and other parties in its development. These comments reflect points raised and addressed in the discussion above.

Four industry representatives provided comments on the drafts of Appendix A and the property-based approach shared with stakeholders in May 2018 (the American Public Transportation Association, Amtrak, the Association of American Railroads [AAR] and American Short Line and

Regional Railroad Association collectively). They reiterated previous concerns that this draft was not consistent with the interstate highway exemption and did not do enough to effectively streamline the review process for undertakings within rail ROW. However, Amtrak said the Program Comment would enhance its ability to perform crucial maintenance and enhancement projects in a timely manner. As noted above, the ACHP and USDOT believe this two-part Program Comment meets the statutory requirement to exempt the consideration of effects within rail ROW consistent with the interstate highway exemption. The industry representatives asked that the sunset clause be deleted from the draft, and it has been removed and replaced with regular evaluations. They expressed concern over the reporting requirement as being too burdensome under Appendix A. The reporting requirement was initially revised to be an annual report. Finally, the industry representatives noted concern over the title of the "excluded" historic property lists, and revisions were made to the section headings to clarify the applicability and context for these lists.

After making the edits noted above, USDOT submitted a revised final draft Program Comment to the ACHP on June 25, 2018. The ACHP made further revisions and circulated this draft to its council members and industry representatives for an informal review. In response, AAR and the Senate Committee staff asked for additional changes to the Program Comment, and in particular, asked the ACHP to remove the reporting requirement as it was still seen as overly burdensome on industry. The final version of the Program Comment does not include any annual reporting requirement but requires more frequent program evaluations and requires USDOT OAs to review their use and application of the Program Comment.

III. Final Text of the Program Comment

The following is the text of the Program Comment as issued by the ACHP:

Program Comment Program Comment To Exempt Consideration of Effects to Rail Properties 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 responsibilities. Those regulations are codified under 36 CFR part 800 (“Section 106 regulations”).

Under section 800.14(e) of the Section 106 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 satisfy their Section 106 responsibilities with regard to the effects of 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

The ACHP is issuing this program comment to exempt consideration of effects under Section 106 to rail properties located within rail ROW. This program comment has been developed in accordance with Section 11504 of the Fixing America’s Surface Transportation Act (“FAST Act”) (49 U.S.C. 24202), which 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 the U.S. Department of Transportation’s (“USDOT”) submittal.

This program comment establishes two methods to meet the statutory directive: An activities-based approach and a property-based approach. The activities-based approach described in section III exempts from Section 106 review the activities listed in Appendix A, “Exempted Activities List,” provided the conditions outlined therein are met. Those activities involve maintenance, repair, and upgrades to rail properties that are necessary to ensure the safe and efficient operation of freight, intercity passenger, commuter rail, and rail transit operations. While those activities may over time alter various historic elements within rail ROW, these changes are likely to be minimal or not adverse and are necessary to continue meeting the transportation needs of the nation. The property-based approach described in section IV provides an optional process for identifying excluded historic rail properties that are subject to Section 106 review, while exempting consideration of effects to other rail properties.

If a federal agency responsible for carrying out, licensing, permitting, or assisting an undertaking with the potential to affect historic rail properties meets the terms of this program comment, its Section 106 responsibility to take into accounts those effects will be satisfied.

II. Applicability

A. Applicability of Program Comment

1. The program comment applies to undertakings that may affect rail properties located within rail ROW. Any federal agency responsible for an undertaking located within rail ROW may utilize this program comment to satisfy its Section 106 responsibilities for those undertakings.

2. 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.

3. 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 undertakings as applicable. This program comment does not supersede or modify any existing program alternatives, including existing executed programmatic agreements. In cases when this program comment and one or more other program alternatives apply to a proposed undertaking, the federal agency has discretion to determine which program alternative to follow.

B. Continued Applicability of Section 106

1. This program comment does not apply to, and the federal agency must comply with the requirements of 36 CFR part 800, or adhere to the terms of an applicable program alternative executed pursuant to 36 CFR 800.14, for the following:

a. Undertakings within rail ROW in the following situations:

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

ii. Undertakings consisting of activities not included in Appendix A and that may affect an excluded historic rail property designated by USDOT pursuant to section IV;

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

iv. Undertakings that could affect archaeological sites located in undisturbed portions of rail ROW, regardless of whether the sites are associated with railroads or rail transit systems. An archaeologist meeting the Secretary of the Interior’s Professional Qualifications (“SOI-qualified professional”) may assist in identifying undisturbed soils; and

v. Undertakings that could affect historic properties of religious and cultural significance to federally recognized Indian tribes or Native Hawaiian organizations (“NHOs”).

b. Undertakings that are not within rail ROW. For undertakings for which the area of potential effects (“APE”) is partially within but extends beyond rail ROW, this program comment applies only to the portions of the undertaking within rail ROW. Federal agencies must consider potential effects to properties adjacent to rail ROW that could be affected by the undertaking, including noise or vibration effects or changes to a historic property’s setting.

2. If an unanticipated discovery of a non-rail historic property, archaeological site of any nature, or human remains, or an unanticipated adverse effect on a previously identified non-rail historic property is made during the implementation of an exempted

activity listed in Appendix A, the Section 106 requirements at 36 CFR 800.13 and/or applicable burial law, as appropriate depending on the nature of the resource, apply because effects to such resources are not covered by this program comment. At minimum, the Project Sponsor must cease all work in the affected area, secure the area, and notify the federal agency within 72 hours. The federal agency will consult with the State Historic Preservation Officer (SHPO), federally recognized Indian tribes, NHOs, and any other stakeholders as appropriate, to determine the appropriate course of action. If an undertaking involves multiple exempted activities listed in Appendix A, those that do not involve or affect the non-rail resource, as determined by the federal agency, may continue. The Project Sponsor must comply with any applicable state and/or local law regarding the resource.

C. This program comment does not alter the requirements of any applicable easements, covenants, and/or state or local historic preservation ordinances. Other federal and state laws such as the National Environmental Policy Act and Section 4(f) of the USDOT Act also remain applicable, as appropriate.

III. Activities-Based Approach to Exempting Consideration of Effects Under Section 106

A. Undertakings to maintain, improve, or upgrade rail properties located in rail ROW that are limited to the activities specified in Appendix A are exempt from the requirements of Section 106 because their effects on historic rail properties are foreseeable and likely to be minimal or not adverse. The activities included in Appendix A are exempt from further Section 106 review regardless of whether the rail properties affected are eligible for or listed on the National Register of Historic Places or whether the activities may affect an excluded historic rail property as designated by USDOT pursuant to section IV.

B. If a SHPO, a federally recognized Indian tribe, or an NHO believe an undertaking carried out under Appendix A is adversely affecting or has adversely affected a historic rail property, the SHPO, Indian tribe, or NHO may notify the federal agency responsible for the undertaking of its concern. The federal agency will promptly investigate the concern within 72 hours of the notification. The federal agency will then determine the appropriate course of action, in consultation with the Project Sponsor, SHPO, Indian tribe, NHO, and other stakeholders, as appropriate.

IV. Property-Based Approach to Exempting Consideration of Effects Under Section 106

Project Sponsors may opt to collaborate with a USDOT Operating Administration (“OA”) to designate excluded historic rail properties within a defined study area, as described in section IV.A, for which the federal agency must comply with requirements of Section 106 for undertakings that have the potential to affect those properties. Once a USDOT OA formally excludes historic rail properties within a study area, consideration of effects to all other evaluated rail properties within that study area shall be exempt from Section 106

review for any undertaking by any federal agency. In accordance with section IV.C. below, USDOT will publish implementing guidance that will provide further detail regarding the identification and evaluation of excluded historic rail properties. This property-based approach shall go into effect on the date USDOT publishes the implementing guidance within nine months of issuance of this Program Comment.

A. Identification of Excluded Historic Rail Properties

1. A Project Sponsor that opts to follow the property-based approach to identify excluded historic rail properties must follow the steps outlined below, in accordance with the implementing guidance. To provide maximum flexibility and utility in this process, a Project Sponsor can opt-in on its preferred timeline.

a. A Project Sponsor must clearly define the study area, *i.e.*, the portion of rail ROW to be evaluated, which can be identified by location (*e.g.*, state, county), name of rail corridor, railroad, rail transit system or line, and/or mile-post information, etc.

b. A Project Sponsor may choose to evaluate for designation as excluded historic rail properties either (i) all rail properties in the defined study area, or (ii) a particular property type or types, such as rail bridges, stations and depots, tunnels, etc. within the defined study area.

c. A Project Sponsor's evaluation efforts should also be informed by a variety of available and existing information, including historic context studies, local and state inventories, surveys and evaluations; railroad company records (*e.g.*, bridge inventories or inspection reports); knowledgeable railroad and rail transit personnel; railroad and rail transit historical society museum and archival collections; railroad and rail transit enthusiast website publications; state or local historic preservation organizations; and other relevant documentation and professional experience and expertise. Prior to submitting its proposed list to the USDOT OA, each Project Sponsor must notify the SHPO(s) in the state(s) within which the study area lies, and Indian tribes or NHOs who may attach religious and cultural significance to historic properties within the study area, of its evaluation efforts to identify excluded properties and request their input. If existing information is not available to determine the potential historic significance of rail properties within the defined study area, the USDOT OA may require the Project Sponsor to conduct a physical survey of the study area carried out by or under the direct supervision of individuals meeting the SOI's professional qualifications.

d. A Project Sponsor must submit to the USDOT OA the rail properties it proposes be designated as excluded historic rail properties, along with a summary of its evaluation efforts including whether it evaluated all rail properties within the study area or only a certain type(s) of rail property, in accordance with the implementing guidance.

2. Once a Project Sponsor submits a proposal to designate excluded historic rail properties for a study area to the USDOT OA,

the USDOT OA will take the following actions to review and designate excluded historic rail properties:

a. The USDOT OA will review each proposal received from a Project Sponsor in accordance with the implementing guidance. The USDOT OA shall notify and request the input of the SHPO(s), Indian tribes, and/or NHOs when reviewing a Project Sponsor's proposal. The USDOT OA will have the discretion to require a Project Sponsor to conduct additional evaluation and/or provide additional documentation to demonstrate that the Project Sponsor made a reasonable effort to identify potential excluded rail properties. Following its review of a Project Sponsor's proposal, the USDOT OA will make the proposed list, modified as necessary based on its review and any consultation or additional evaluation or documentation, available for public review and comment, and will consider input from interested parties and the public before designating the excluded historic rail properties within a study area. The USDOT OA may seek input from the ACHP, including advice regarding resolution of any objections or concerns from commenters, before making such designations. The USDOT may, as needed, consult with the Keeper of the National Register to resolve questions or disagreements about the National Register eligibility of any rail properties.

b. The USDOT OA will designate excluded historic rail properties within a study area within 12 months of receipt of a Project Sponsor's adequately supported proposal, in accordance with the implementing guidance.

c. USDOT will publish and periodically update the list of designated excluded historic rail properties on its website (www.transportation.gov).

B. Effect of Designation as an Excluded Historic Rail Property

1. All undertakings that may affect USDOT-designated excluded historic rail properties are subject to Section 106. However, undertakings that include activities listed in Appendix A require no further Section 106 review regardless of the rail property that would be affected, including excluded historic rail properties.

2. Once a USDOT OA designates excluded historic rail properties within a study area and the list is published on the USDOT website, consideration of effects to all other evaluated rail properties within that study area are exempt from Section 106 review. If a Project Sponsor chooses to evaluate only a specific rail property type, rather than all historic properties, within a study area, then consideration of effects to rail properties other than the type evaluated remain subject to Section 106.

C. Implementing Guidance

1. Within nine months of the ACHP's issuance of the final Program Comment, USDOT, in coordination with the ACHP and other federal agencies who may have an interest in utilizing the Program Comment, will publish guidance for implementing the property-based approach.

2. The guidance will: Provide further instruction and examples for evaluating rail

properties for potential designation as excluded historic rail properties to remain subject to Section 106; describe the process by which a Project Sponsor may propose excluded historic rail properties to a USDOT OA, including early coordination between the Project Sponsor and the USDOT OA; establish timeframes for USDOT OA review of proposals and designation of excluded historic rail properties; and establish public involvement methods.

V. Definition of Terms

Any terms not defined below shall follow the definitions in the NHPA, 54 U.S.C. 300301–300321, and in 36 CFR parts 60 and 800.

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

B. "Excluded historic rail properties" means those historic properties that illustrate the history of the development of the nation's railroads or rail transit systems and:

1. Are at least 50 years old, possess national significance, and meet the National Register eligibility criteria as defined in 36 CFR 60.4;

2. are less than 50 years old, possess national significance, meet the National Register eligibility criteria, and are of exceptional importance;

3. were listed in the National Register, or determined eligible for the National Register by the Keeper pursuant to 36 CFR part 63, prior to the effective date of the Program Comment and retain eligibility as determined by the USDOT OA; or

4. are at least 50 years old and meet the National Register eligibility criteria at the state or local level of significance, as determined by the USDOT OA.

C. "Historic property" is defined in 36 CFR 800.16(l) and 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.

D. "In-kind" means that new materials used in repairs or replacements match the material being repaired or replaced in design, color, texture, other visual properties, and, where possible, materials. For more information, see The Secretary of the Interior's Standards for Rehabilitation, at <https://www.nps.gov/tps/standards/rehabilitation.htm>.

E. "National significance" means a historic property that is eligible or listed in the National Register and either:

1. designated as a National Historic Landmark;

2. designated as a Historical Civil Engineering Landmark;

3. listed as nationally significant in its nomination or listing in the National Register; or

4. determined by a USDOT OA to have significance at the national level.

F. "Project Sponsor" means an entity such as a state, tribal or local government, joint venture, railroad commission, compact authority, port authority, transit agency or authority, or private company that is eligible to receive federal financial assistance (e.g., grant, loan). A Project Sponsor may also be an entity that requires a federal permit, license, or approval 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).

G. "Rail properties" means infrastructure located within 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 and rail transit yards, parking lots and parking structures, landscaping, passenger walkways, and security and safety fencing. Rail properties may also include a section of a railroad or rail transit line. 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; or property unrelated to existing or former railroads and rail transit lines that is proposed to be used for new rail infrastructure.

H. "Railroad and Rail Transit Rights-of-Way" means the land and infrastructure that have been developed for existing or former intercity passenger rail, freight rail, rail transit operations, or that are maintained for the purpose of such operations. Rail ROW includes current and/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 includes property that was previously developed for railroad or rail transit use even though the infrastructure has been modified or removed, and the property may lack visual evidence of previous railroad or rail transit use. It does not include land that was never developed for 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.

I. "Section 106" means Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108.

J. "Study area" means the portion of rail ROW identified for the purposes of the evaluation under the property-based approach described in section IV. It may be delineated by: location (e.g., state, county); name of rail corridor, railroad, rail transit system or line; or mile-post information.

K. "Undertaking" is defined at 36 CFR 800.16(y) and 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.

L. "Undisturbed portions of rail ROW" means soils that have not been physically impacted by previous construction or other ground disturbing activities such as grading. Undisturbed soils may occur below the depth of previously disturbed soils or fill.

M. "USDOT OA" means the United States Department of Transportation's Operating Administrations, including the Federal Railroad Administration ("FRA"), the Federal Transit Administration, and the Federal Highway Administration.

VI. Effective Date

The activities-based approach to exempting consideration of effects under Section 106, as described in section III, shall go into effect on the date the program comment is issued by the ACHP. At that time, federal agencies may immediately utilize the list of exempted activities in Appendix A. This includes undertakings that have not yet been initiated and undertakings for which the Section 106 review process is underway but not completed.

The property-based approach to exempting consideration of effects under Section 106, as described in section IV, shall go into effect on the date USDOT publishes the implementing guidance in accordance with section IV.C.

VII. Program Comment Review

Within one year of the issuance of this program comment, and every two years thereafter, the USDOT OAs and the ACHP shall evaluate the ongoing effectiveness and efficiency of the implementation of this program comment. The USDOT OAs shall review their use and application of the program comment, and may invite transportation stakeholders to participate in this review as appropriate.

VIII. Amendment

The ACHP may amend this program comment after consulting with the USDOT OAs and other relevant federal agencies, the National Conference of State Historic Preservation Offices ("NCSHPO"), National Association of Tribal Historic Preservation Officers ("NATHPO"), tribal representatives, the National Trust for Historic Preservation, and representatives from the railroad and rail transit industry, 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.

IX. Withdrawal

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 List

I. General Rule

A. The federal agency is responsible for determining if an undertaking is covered by one or more activities in the Exempted Activities List. At its discretion, the federal agency may require the Project Sponsor to provide relevant documentation, such as plans, photographs, or materials specifications, so that the federal agency can determine whether the Exempted Activities List applies.

B. Whenever possible, historic materials must be repaired rather than replaced. At its discretion, the federal agency may require the Project Sponsor to provide written justification explaining why repair is not feasible. In cases where existing historic materials are beyond repair, replacement must be carried out in-kind as defined below.

C. Several of the activities in the Exempted Activities List require that the work be "in-kind." For purposes of this program comment, "in-kind" means that new materials used in repairs or replacements match the material being repaired or replaced in design, color, texture, other visual properties, and, where possible, materials. For more information, see The Secretary of the Interior's Standards for Rehabilitation, at <https://www.nps.gov/tps/standards/rehabilitation.htm>. Except where specified in the Exempted Activities List, a Project Sponsor is not required to involve an SOI-qualified professional in carrying out in-kind work. However, the federal agency, at its discretion, may require the Project Sponsor to provide documentation demonstrating that the work would be in-kind, utilize non-damaging or reversible methods, etc.

D. Certain activities, as specified in the Exempted Activities List, require that the federal agency and Project Sponsor ensure the work is performed by or under the supervision of individuals that meet the SOI's Professional Qualification Standards in Architectural History, Architecture, and/or Historic Architecture (see 36 CFR Appendix A to part 61), as appropriate, and must be performed in accordance with the SOI Standards for the Treatment of Historic Properties (<https://www.nps.gov/tps/standards.htm>). If an SOI-qualified professional is not available to assist in the evaluation and/or design of a specified activity, that activity is not exempt from Section 106 review.

E. The Exempted Activities List does not apply to archaeological sites of any nature located within undisturbed portions of rail ROW. Therefore, if an exempted activity would cause ground disturbance in undisturbed portions of the rail ROW, the federal agency is responsible for complying with Section 106 regarding consideration of potential effects to archaeological sites before approving the undertaking.

F. The Exempted Activities List does not apply to non-railroad or rail transit related

buildings or structures located within or adjacent to rail ROW within an undertaking's APE. The federal agency remains responsible for determining whether an activity in the Exempted Activities List has the potential to affect non-rail historic properties and for complying with Section 106 with regard to those properties before approving the undertaking.

G. If an unanticipated discovery of a non-rail historic property, archaeological site of any nature, or human remains, or an unanticipated adverse effect on a previously identified non-rail historic property is made during the implementation of an activity on the Exempted Activities List, the Section 106 requirements at 36 CFR 800.13 and/or applicable burial law, as appropriate depending on the nature of the resource, apply because effects to such resources are not covered by this program comment. At minimum, the Project Sponsor must cease all work in and secure the area and notify the federal agency within 72 hours. The federal agency will consult with SHPO, federally recognized Indian tribes, NHOs, and other stakeholders as appropriate, to determine the appropriate course of action. The Project Sponsor must comply with any applicable state or local law regarding the resource. If an undertaking involves multiple activities on the Exempted Activities List, those that do not involve or affect the non-rail resource, as determined by the federal agency, may continue.

H. The Project Sponsor must comply with the requirements of any applicable easements, covenants, and/or state or local historic preservation ordinances. Other federal and state laws such as the National Environmental Policy Act and Section 4(f) of the USDOT Act also remain applicable to activities exempted from Section 106, as appropriate.

II. Exempted Activities List

A. Track and Trackbed

1. Track and trackbed maintenance, repair, replacement, and upgrades within the existing footprint (*i.e.*, existing subgrade, sub-ballast, ballast, and rails and crossties (track)). These activities must not include alterations to the trackbed that would result in a substantial visual change (*i.e.*, elevation or alignment) in the relationship between the trackbed and the surrounding landscape or built environment.

2. Reinstallation of double tracking on a currently single-tracked line that had historically been double-tracked.

B. Bridges and Tunnels

1. In-kind maintenance and repair of bridges and tunnels.

2. In-kind replacement of bridge hardware and mechanical and electrical components (*e.g.*, brackets, rivets, bearings, motors).

3. Maintenance or repair of tunnel ventilation structures and associated equipment (*e.g.*, fans, ducting).

4. Replacement of tunnel ventilation structures that are not located within a previously identified historic district.

5. Replacement of tunnel ventilation structures that are located and publicly visible within a previously identified historic

district, provided the replaced structures are substantially the same size as or smaller than the existing structures and are visually compatible with the surrounding built environment.

6. Maintenance, repair, or replacement of tunnel emergency egress hatchways.

7. Maintenance, installation, repair, or replacement of lighting, signal and communications systems, railings, and other safety- and security-related equipment or elements located within the interiors of tunnels.

8. Removal or replacement of any bridge or tunnel material or added-on element that is not part of the original construction.

9. Actions to strengthen or repair deteriorating non-character defining structural components of bridges that are intended to maintain their useful life and safe use and that do not substantially alter the bridge from its existing appearance.

10. The following activity must be performed or supervised by an SOI-qualified professional: In-kind replacement of character-defining structural or non-structural components of a bridge superstructure or substructure that do not diminish the overall integrity of the bridge. This does not include demolition of a bridge and replacement with an entirely new structure.

C. Railroad and Rail Transit Buildings (*e.g.*, Passenger Stations and Depots, Maintenance and Equipment Buildings, Interlocking Towers) and Boarding Platforms

1. Modifications (*e.g.*, repair, extension, widening, slope adjustments, changes in height) to non-character defining passenger platforms and walkways that are necessary to meet Americans with Disabilities Act (ADA) requirements or other federal or municipal public or life safety codes and standards, provided those changes do not require associated improvements such as relocation of station doors, construction of ramps, etc. When the original material and construction used something other than common concrete or asphalt methods (*e.g.*, decorative brick or tile), new materials (*e.g.*, non-slip) may be used but must visually match the existing decorative pattern.

2. Maintenance or repair of escalators, elevators, or stairs. Repair of decorative (*i.e.*, non-mechanical) elements must be in-kind. Repair of stairs constructed of material other than common concrete (*e.g.*, brick, tile, marble) must be in-kind.

3. Cleaning, painting, or refinishing of surfaces with a like color and where the products or methods used would not damage the original surface.

4. Maintenance, repair, or replacement of fire or security alarm or fire suppression systems, physical access controls, security cameras, wireless internet, and similar safety, security, or computer equipment and devices.

5. Installation of new fire or security alarm or fire suppression systems, physical access controls, security cameras, wireless internet, and similar safety, security, or computer equipment and devices, except within publicly accessible areas of stations or depots. Such new installations must, to the

extent feasible and when appropriate, use a minimally obtrusive design; match the color of surrounding paint, wall coverings, finishes, etc.; avoid damaging or removing historic fabric; be attached to non-historic fabric; be concealed within existing enclosures or conduit or behind walls and ceilings; be co-located with existing similar modern equipment, etc.

6. Maintenance, repair, or replacement of HVAC or electrical systems.

7. Installation of new HVAC or electrical systems, except within publicly accessible areas of stations or depots. Such new installations must, to the extent feasible and when appropriate, use a minimally obtrusive design; match the color of surrounding paint, wall coverings, finishes, etc.; avoid damaging or removing historic fabric; be attached to non-historic fabric; be concealed within existing enclosures or conduit or behind walls and ceilings; be co-located with existing similar modern equipment, etc.

8. Minor ADA improvements at passenger stations that do not damage, cover, alter, or remove character-defining architectural spaces, features, or finishes. Examples include the installation of restroom stalls/partitions, hardware and fixtures such as grab bars, tilt frame mirrors, and sinks and toilets; tactile warning strips on floors, passenger walkways, and platforms; cane detectors; sidewalk curb cuts; automatic door openers; and handrails.

9. Maintenance, repair, or replacement of previously installed ADA elements.

10. Maintenance, repair, or replacement of pumps, air compressors, or fueling stations.

11. Removal of mechanical equipment inside railroad and rail transit facilities not visible to the public. Examples include relay panels, switchgear, and track diagram boards. If the equipment to be removed includes obsolete or outdated technology, the Project Sponsor must contact the 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 must demonstrate to the federal agency that it has made a good faith effort to contact such parties prior to removal and disposition of such equipment.

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 existing parking surfaces.

14. In-kind maintenance or repair of platform boarding canopies and supports.

15. In-kind maintenance or repair of architecturally distinctive light poles and fixtures.

16. State-of-good-repair ("SOGR") activities not included elsewhere in this section that are necessary to keep a station, depot, or other railroad or rail transit building inhabitable and safe, as required by applicable federal or municipal fire, life safety, or health codes or standards, and in transportation-related use that meet the following conditions:

a. Maintenance and repair activities that affect character-defining architectural

features (e.g., elevator head houses and portals; roofs; doors; windows; stairs; platform canopies; columns; floors; ceilings) must be in-kind.

b. SOGR activities do not include demolition, decommissioning, or mothballing of railroad or rail transit 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).

17. Maintenance, repair, or replacement activities that are not included elsewhere on this list and involve non-character-defining non-structural elements, features, systems, hardware, and fixtures in the interior or on the exterior of non-station railroad or rail transit buildings.

18. In-kind maintenance or repair of original architectural features in the interior or on the exterior of passenger stations (e.g., handrails, ticket counters, mouldings).

19. In-kind maintenance or repair of character-defining signage (e.g., station identifier, wayfinding) within publicly accessible areas of stations or depots.

20. Maintenance, repair, or replacement of non-character defining signage (e.g., station identifier, wayfinding) within publicly accessible areas of stations or depots.

21. The following activities must be performed or supervised by an SOI-qualified professional:

a. Replacement of character defining escalators, elevators, or stairs, and decorative elements related thereto.

b. ADA improvements at passenger stations that involve the modification or removal of character-defining features such as stairs, floors, ceilings, doors, windows, roofs, platform boarding canopies and supports, benches/seating, or ticket counters; or that involve the addition of new ramps, stairs, escalators, elevators, wheelchair lifts, wheelchair lift enclosures, station identifier and wayfinding signage, and public information display systems ("PIDS").

c. SOGR activities that include replacement of character-defining architectural features or otherwise require substantial rehabilitation to address deteriorated conditions. As previously indicated, SOGR activities do not include demolition, decommissioning, or mothballing of railroad or rail transit 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. Installation of new fire or security alarm or fire suppression systems, physical access controls, security cameras, wireless internet, and similar safety, security, or computer equipment and devices within publicly accessible areas of stations or depots.

e. Installation of new HVAC or electrical systems within publicly accessible areas of stations or depots.

f. Replacement of platform boarding canopies and supports.

g. Replacement of architecturally distinctive light poles and fixtures.

h. Replacement of original architectural features in the interior or on the exterior of

passenger stations (e.g., handrails, ticket counters, mouldings).

i. Replacement of character-defining signage (e.g., station identifier, wayfinding) within publicly accessible areas of stations or depots.

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 or transmission lines, but does not include demolition and replacement of an entire 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, e.g., transformers, circuit breakers, electrical switches. This does not include demolition and replacement of an entire substation.

4. In-kind maintenance or repair of signal bungalows, signal houses, control houses, instrument houses, and structures of similar function.

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.

6. The following activities must be performed or supervised by an SOI-qualified professional:

a. Replacement of signal bungalows, signal houses, control houses, instrument houses, and structures of similar function.

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

1. Maintenance, repair, or rehabilitation of at-grade railroad and rail transit crossings including installation of railroad and rail transit crossing signs, signals, gates, warning devices and signage, highway traffic signal preemption, road markings, paving and resurfacing, and similar safety improvements.

2. Replacement of at-grade railroad and rail transit crossings on existing railroads, rail transit lines, and roadways, including components such as crossing signs, signals, gates, warning devices and signage, highway traffic signal pre-emption, road markings, paving and resurfacing, and similar safety features.

3. Expansion of sidewalks, constructed with common concrete or asphalt methods, along the sides of an existing at-grade railroad or rail transit crossing.

4. In-kind maintenance or repair of grade-separated crossings of other transportation modes (highways, local roads, pedestrian underpasses).

5. In-kind rehabilitation or replacement of 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 or

substantial change in appearance.

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

6. Addition of lanes, turning lanes, road widening, and pavement markings at existing at-grade crossings when the crossing does not involve an individual National Register-listed or known historic roadway or a roadway that is a contributing resource to a National Register-listed or known historic district.

7. Construction of curbs, gutters, or sidewalks adjacent to existing roadway at existing at-grade crossings when the crossing does not involve 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.

8. The following activities must be performed or supervised by an SOI-qualified professional:

a. Addition of lanes, turning lanes, road widening, and pavement markings at existing at-grade crossings 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.

b. Construction of curbs, gutters, or sidewalks adjacent to existing roadway at existing at-grade crossings 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 and Security

1. Maintenance, repair, replacement, or installation of the following security and intrusion prevention devices adjacent to tracks or in railyards or rail transit yards: Security cameras, closed captioned television ("CCTV") systems, light poles and fixtures, bollards, emergency call boxes, access card readers, and warning signage.

2. Maintenance, repair, replacement, or installation of security and safety fencing, guardrails, and similar intrusion prevention and fall protection measures.

3. Maintenance, repair, 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, and warning signage.

4. Maintenance, repair, replacement, or installation of wayside detection devices.

5. Maintenance, repair, replacement, or installation of bridge clearance/strike beams.

G. Erosion Control, Rock Slopes, and Drainage

1. Placement of riprap and similar bank stabilization methods 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 or brick headwalls. This does not include culverts such as those built by the Civilian

Conservation Corps or those made out of unique materials (e.g., a hollowed log).

5. Expansion through horizontal elongation of pre-cast concrete, cast iron, and corrugated metal culverts that lack stone or brick headwalls for the purpose of improved drainage.

6. Embankment stabilization or the re-establishment of ditch profiles.

7. Corrections to drainage slopes, ditches, and pipes to alleviate improper drainage or changing alluvial patterns.

8. In-kind maintenance, repair, or replacement of retaining walls. Replacements must be substantially the same size and appearance as existing.

9. In-kind maintenance or repair of stone or brick culvert headwalls and wingwalls.

10. Maintenance, repair, or replacement of culvert headwalls and wingwalls constructed of concrete.

11. Maintenance, repair, or alterations to the interiors of culverts and related drainage pathways.

12. The following activities must be performed or supervised by an SOI-qualified professional:

a. Replacement of stone or brick culvert headwalls and wingwalls.

b. Vertical extension of stone or brick culvert headwalls using in-kind materials and design compatible with existing.

H. Environmental Abatement

1. Removal or abatement of environmental hazards such as asbestos, treated wood, and lead or heavy-metal coatings and paintings. Activities that replace coatings, paint, flooring materials, etc. must be of the same color and appearance as the materials that have been removed or abated.

2. Removal of contaminated ballast, sub-ballast, subgrade, and 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.¹

2. Increased frequency of train or rail transit operations that do not result in noise or vibration impacts. The lead federal agency may, at its discretion, require a noise and vibration study be prepared by a qualified subject matter expert before approving the undertaking.

3. Temporary storage of rail cars or rail transit cars on active rail lines.

4. Maintenance, repair, or replacement of noise barriers. If a replaced noise barrier is to be located and publicly visible within a National Register-listed or eligible historic district, it must be substantially the same size as or smaller than existing and be visually compatible with the surrounding built environment.

¹ 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>).

J. Landscaping, Access Roads, and Laydown Areas

1. In-kind replacement of landscaping.
2. Mowing, seeding/reseeding, planting, tree trimming, brush removal, or other similar groundcover maintenance activities.
3. Maintenance of access roads and lay-down areas.

K. Utilities

1. Maintenance, repair, or replacement of above-ground and underground utilities (e.g., electrical, sewer, compressed air lines, fuel lines, fiber optic cable).
2. Maintenance, repair, replacement, or installation of utility lines and conduit inside tunnels that does not involve affixing new equipment to the exterior face of tunnel portals.
3. 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 (i.e., non-decorative concrete, asphalt, pavement, or gravel).
2. Adding lanes to existing shared use paths or other trails constructed with common materials.
3. Adding at-grade crossings for pedestrians and bicycle facilities, shared use paths, or other trails.
4. Maintenance, repair, replacement, or installation of bicycle aid stations, bicycle racks, and bicycle storage sheds, and similar amenities. Installation of new bicycle storage structures must be visually compatible with the surrounding building environment when located adjacent to historic passenger stations or within National Register-listed or eligible historic districts.
5. Maintenance, repair, replacement, or installation of information kiosks or displays, wayfinding signage, and similar amenities for pedestrian, bicyclists, or other path or trail users.
6. Maintenance, repair, or replacement of curbs, gutters, or sidewalks constructed with common materials.

M. Construction/Installation of New Railroad or Rail Transit Infrastructure

For any of the activities listed below, the federal agency shall require the work be performed by or under the supervision of an SOI-qualified professional, based on the scope of work and location of a specific proposal. As with all activities in this Exempted Activities List, but especially important for construction/installation of new railroad or Rail Transit infrastructure, consideration must be given to the potential for effects to non-rail properties within or adjacent to the rail ROW.

1. Minor new construction and installation of railroad or rail transit 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 or rail transit car service and inspection facilities; trailers or temporary structures for housing rail personnel; fueling stations; underground utilities; overhead utilities, transmission lines, and communications poles, and signage. This does not include substantial new construction, such as construction of new passenger stations, railyards or rail transit yards, or tunnels, or demolition of existing structures.

2. Construction of new at-grade crossings.

3. Construction of new erosion control, drainage, or stormwater management infrastructure, such as culverts or retaining walls.

Authority: 36 CFR 800.14(e).

Dated: August 21, 2018.

John M. Fowler,
Executive Director.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-6081-N-10]

Order of Succession for HUD Region VIII

AGENCY: Office of Field Policy and Management, HUD.

ACTION: Notice of Order of Succession.

SUMMARY: In this notice, the Assistant Deputy Secretary for Field Policy and Management, Department of Housing and Urban Development, designates the Order of Succession for the Denver Regional Office and its Field Offices (Region VIII). This Order of Succession supersedes all previous Orders of Succession for HUD Region VIII.

DATES: August 17, 2018.

FOR FURTHER INFORMATION CONTACT: John B. Shumway, Assistant General Counsel, Administrative Law Division, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 9262, Washington, DC 20410-0500, telephone number 202-402-5190 (this is not a toll-free number). This number may be accessed through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION: The Assistant Deputy Secretary for Field Policy and Management, Department of Housing and Urban Development, is issuing this Order of Succession of officials authorized to perform the