

Milford Wayne Donaldson, FAIA  
Chairman

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*Preserving America's Heritage*

August 6, 2015

Honorable Bill Shuster  
Chairman  
House Transportation and Infrastructure Comm.  
2163 Rayburn House Office Building  
Washington, D.C. 20515

Honorable Peter DeFazio  
Ranking Member  
House Transportation and Infrastructure Comm.  
2163 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Shuster and Ranking Member DeFazio:

As development of comprehensive surface transportation legislation proceeds, the Advisory Council on Historic Preservation (ACHP) would like to bring several issues to your attention as you consider the GROW AMERICA Act (H.R. 3064) and the Senate's DRIVE Act (H.R. 22). Established by the National Historic Preservation Act, the ACHP is the independent federal agency charged with advising the President and Congress on matters relating to historic preservation. In that capacity, the ACHP wishes to express concerns regarding several sections of the above mentioned bills and their potential impact on the national historic preservation program.

***Section 35505 of the DRIVE Act.*** Section 35505 of the DRIVE Act would amend Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108). Under Section 106, federal agencies are required to take into account the effect of their undertakings on historic properties and provide the ACHP with an opportunity to comment on such effects. Section 35505 of the DRIVE Act would amend Section 106 to add a requirement that the ACHP issue an exemption of railroad rights-of-way from review. While the ACHP accepts the concept of a railroad rights-of-way exemption from Section 106 and does not object to a legislative directive to complete one within a specified time, the ACHP strongly opposes amending Section 106. Amending the language of Section 106 itself would encourage future requests for legislative exemptions, an outcome that Congress has previously sought to avoid, and cause unnecessary confusion in the administration of the government-wide Section 106 process. There is an alternative way to achieve the exemption that would not result in these negative outcomes.

As drafted, Section 35505 would split the existing language of Section 106 into three subsections: subsection (a) would retain the current language requiring agencies to take into account the effects of their undertakings on historic properties; subsection (b) would retain the existing requirement that agencies provide the ACHP with an opportunity to comment on undertakings; and subsection (c) would be the proposed railroad rights-of-way exemption. This alteration of the current statutory language is problematic for two reasons.

First, the addition of a specific exemption to the provision that states the generally applicable requirements for federal historic preservation reviews would give harmful prominence to the concept of legislative exemptions. Exemptions by their nature have always been rare exceptions to the rule. Including one in the body of Section 106 strongly suggests a new norm, one that could invite further efforts for specific exemptions through amendments to Section 106. This outcome would place an unnecessary burden on the legislative process and undermine Section 106 through multiple legislative

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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exemptions.

Second, Section 106 applies to all federal projects, not just transportation projects. Accordingly, Section 106 in its current statutory form has become an established concept within the federal project delivery process and is widely embedded in government procedures, guidance, training, and public information materials, as well as industry processes and publications. Subdividing it into three parts will cause unnecessary confusion among users and require revision of a massive amount of material even though there is no substantive change in the current language of Section 106.

If exempting railroad rights-of-way from Section 106 review is retained in the final version of a surface transportation bill, the ACHP urges that the language of Section 35505 not be used as currently drafted, but rather be revised so that it does not amend Section 106 itself. The ACHP recommends the following language that would have the same effect as the current draft of Section 35505 but would address the concerns raised:

**RAILROAD RIGHTS-OF-WAY.**—No later than one year after the date of enactment of this Act, the Secretary of Transportation shall submit to the Advisory Council on Historic Preservation a proposed exemption of railroad rights-of-way from review pursuant to Section 306108 of title 54, United States Code, that is consistent with the exemption for the interstate highway system issued by the Advisory Council on Historic Preservation on March 10, 2005 (70 Fed. Reg. 11,928). The Advisory Council on Historic Preservation shall issue such an exemption no later than 180 days after the date the Secretary of Transportation submits the proposed exemption.

**Section 1005 of the GROW AMERICA Act/Section 11116 of the DRIVE Act.** Section 1005 of the GROW AMERICA Act and Section 11116 of the DRIVE Act are substantially identical and would permit outcomes reached through the review process established by Section 106 of the National Historic Preservation Act to substitute for the more rigorous requirements of Section 4(f) of the Department of Transportation Act (49 U.S.C. §303). The ACHP previously forwarded correspondence (see attached) that outlined our serious concerns regarding this proposal. We would like to take this opportunity to refer you to that correspondence and reiterate our continuing concerns.

**Section 1006 of the GROW AMERICA Act/Section 35502 of the DRIVE Act.** Section 1006 of the GROW AMERICA Act and Section 35502 of the DRIVE Act are substantially identical and would exempt “improvements to, or the maintenance, rehabilitation, or operation of railroad or rail transit lines or elements thereof” from Section 4(f) review. The attached correspondence also addresses this section, which the ACHP believes is useful but should be tweaked for clarity and to ensure protection of exceptionally significant historic properties.

Please feel free to contact us if you have any questions on our position or if the ACHP can be of any assistance during further consideration of comprehensive transportation legislation. Our Executive Director, John Fowler, may be reached at (202) 517-0200 or at [jfowler@achp.gov](mailto:jfowler@achp.gov).

Sincerely,



Milford Wayne Donaldson, FAIA  
Chairman

Attachment

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May 1, 2015

Honorable Bill Shuster  
Chairman  
House Transportation and Infrastructure Comm.  
2163 Rayburn House Office Building  
Washington, D.C. 20515

Honorable Peter DeFazio  
Ranking Member  
House Transportation and Infrastructure Comm.  
2163 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Shuster and Ranking Member DeFazio:

As the Congress undertakes consideration of important surface transportation legislation, the Advisory Council on Historic Preservation (ACHP) wishes to offer its views on the critical intersection between the nation's transportation infrastructure and our cultural patrimony. We submit these comments in furtherance of our fundamental statutory charge as an independent federal agency to "advise the President and the Congress on matters relating to historic preservation." (54 U.S.C. §304102)

Our comments focus on the Administration's proposed bill, Generating Renewal, Opportunity, and Work with Accelerated Mobility, Efficiency, and Rebuilding of Infrastructure and Communities throughout America Act, known as the GROW AMERICA Act. While the proposal has not been formally introduced in the Congress, it is an important component of the dialogue on surface transportation legislation and frames several issues of significant import for the nation's heritage.

At the outset, we commend the Administration for developing a proposal that will provide increased and stable funding for surface transportation. Taking appropriate measures to avoid the insolvency of the Highway Trust Fund is important to all of America. Likewise, helping States and local governments to fund highway, transit, and rail projects in which Federal assistance often closes financial gaps is critical to our economy and population.

We were pleased that the GROW AMERICA Act includes an increase in the TIGER competitive grant program by 100 percent (approximately \$7.5 billion over six years) and \$6 billion in the highway and transit competitive grant program entitled, Fixing and Accelerating Surface Transportation (FAST). These programs will provide grants for historic preservation activities related to transportation projects located in urban, rural, and tribal communities. Ongoing interagency collaboration regarding port expansion, rail improvements, and maintenance and rehabilitation of highways, and planning and environmental reviews will assist in timely project delivery.

While the ACHP supports the programs advanced by the GROW AMERICA Act, we have serious concerns about certain provisions that would modify existing processes for addressing transportation project impacts on historic properties. Section 1005 would fundamentally alter the protections for historic properties that have been in place for nearly 50 years. It would permit the outcomes reached through the review process established by Section 106 of the National Historic Preservation Act (54 U.S.C. §306108) to substitute for the more rigorous requirements of Section 4(f) of the Department of Transportation Act

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(49 U.S.C. §303). Section 106 establishes a procedural review process, while Section 4(f) mandates a substantive standard that requires the Secretary of Transportation to determine that there is “no feasible and prudent alternative” to a transportation project adversely affecting historic properties and to further undertake “all possible planning to minimize harm” to such properties.

For nearly five decades, these processes have acted in harmony to accommodate important historic preservation values with the delivery of essential transportation projects. The rationale put forward for altering the current system is that the processes are duplicative and create inefficiencies. The ACHP’s experience, based on its fundamental statutory responsibility to oversee the Section 106 process, does not support that assessment and conclusion. To the contrary, our close working relationship over the years with the Federal Highway Administration (FHWA), which is the agency most experienced in dealing with Section 4(f) and Section 106 reviews, has confirmed the importance of these two mutually-reinforcing processes in reaching good historic preservation outcomes, and has demonstrated that they can work harmoniously and efficiently.

There is no question that opportunities exist to improve the interface between Section 106 and Section 4(f), especially as new and expanded funding programs are put into place that deal with the nation’s rail and transit infrastructure. We learned from our collaboration with FHWA that the administrative tools provided by the ACHP’s regulations implementing Section 106 offer opportunities to better coordinate the two processes and gain efficiencies. Likewise, in March 2013, the Report to Congress entitled, *Streamlining Compliance with Section 4(f) of the Department of Transportation Act and Section 106 of the National Historic Preservation Act, in accordance with the Passenger Rail Investment and Improvement Act of 2008 (PL. 100-432)*, included recommendations for administrative actions that would improve both environmental reviews. Subsequent discussions initiated in the fall of 2014 between the ACHP and DOT, along with the Federal Railroad Administration and Federal Transit Administration, have explored the needs specific to these modes and the utility of the existing administrative options to address these issues, as recommended in the congressionally-mandated report.

These collaborative efforts are progressing well. The transportation agencies have been able to identify several areas where process improvements would be helpful and the ACHP, working with its preservation partners, has offered specific solutions that can be achieved in a reasonable time frame. It is worth noting that we have concluded that Section 1005 will not resolve the operational issues that the DOT agencies have identified.

The ACHP would also like to draw the committee’s attention to Section 1006 of the GROW AMERICA Act, which would exempt “Improvements to, or the maintenance, rehabilitation, or operation of railroad or rail transit lines or elements thereof” from the provisions of Section 4(f). This provision would leave in place the requirements of Section 106 for any federal grant that would affect properties listed on or eligible for the National Register of Historic Places.

The ACHP believes this is a useful provision and would support it if two points were addressed. First, the term “improvements” is unclear and could include the demolition and replacement of existing historic resources. We believe this should be defined in the accompanying report to make clear that the term does not include demolition and replacement. Second, Section 1006 as currently drafted excludes railroad stations from its provisions. We believe that exclusion should be expanded to include rail facilities that have been designated National Historic Landmarks or National Civil Engineering Landmarks. This would be a small expansion in number, but would ensure that properties of exceptional historic significance in America’s railroad history, such as the Eads Bridge across the Mississippi River or the Moffat Tunnel through the Rocky Mountains, are given the highest protection of federal historic preservation law.

The ACHP appreciates this opportunity to comment on this important legislative issue and would welcome the opportunity to elaborate on any point we have raised. John Fowler, the ACHP's Executive Director, can be reached at 202-517-0200 or [jfowler@achp.gov](mailto:jfowler@achp.gov).

Sincerely yours,

  
Milford Wayne Donaldson, FAIA  
Chairman