



Preserving America's Heritage

Historic Preservation and the FAST Act

On December 4, 2015, President Obama signed into law the Fixing America's Surface Transportation Act or FAST Act (Act), a 5-year, \$305 billion surface transportation bill that boosts highway and transit spending. As summarized below, the Act includes a number of provisions with implications for historic preservation and the Section 106 review process.

Exemption of Railroad Rights-of-way from Section 106. Section 11504 of the Act directs the Department of Transportation (DOT) to submit to the ACHP a proposed exemption of railroad rights-of-way from Section 106 review. DOT must submit its proposal within one year of passage of the act, and the ACHP is required to issue a final exemption within 180 days of receiving DOT's proposal. The proposal and the final exemption are to be consistent with the exemption for the Interstate Highway System issued by the ACHP in 2005. Previous versions of this had proposed amending the language of Section 106 itself, to which the ACHP and our preservation partners raised objections. The conferees accepted our alternative to retain the exemption but to place it elsewhere within the bill.

Amendments to Section 4(f). The Act contains several amendments to the Section 4(f) review process for transportation projects. Under that process, DOT agencies may use ("use" is a different standard than "affect") historic sites only if there is no feasible and prudent alternative, and must undertake all possible planning to minimize harm to such sites.

- **Provision for NEPA and Section 106 Alignment and Substitution.** Section 1301 of the Act creates a new alternative path that DOT agencies may use in complying with Section 4(f). To set the stage for this new approach, the law places a general requirement on DOT to align, to the maximum extent practicable, the requirements of Section 4(f), Section 106, and the National Environmental Policy Act (NEPA). Within 90 days of the bill being signed into law, DOT is required to coordinate with the Department of the Interior (Interior) and the ACHP to establish procedures for achieving this alignment.

The law then goes on to set forth the baseline parameters of a process (summarized below) whereby DOT may choose to use the NEPA and Section 106 processes to fulfill the requirements of Section 4(f) review.

If DOT determines during the NEPA process that there is no feasible and prudent alternative to using an historic site, it may seek concurrence with that finding from the relevant State or tribal preservation officer(s), Interior, and the ACHP (if participating in the Section 106 review of the project). If DOT obtains the concurrence of the preservation officer(s), Interior, and the ACHP, then the NEPA determination is considered to satisfy the avoidance alternatives analysis requirements of Section 4(f).

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

If DOT is successful in completing the process outlined above, it may notify the relevant State or tribal preservation officer(s), Interior, and the ACHP that it plans to use the Section 106 consultation process to satisfy the Section 4(f) requirement to maximize planning to minimize harm to historic properties. Such substitution is fulfilled if the preservation officer(s), Interior, and the ACHP (if participating in the consultation) all execute a memorandum of agreement or programmatic agreement for the project under Section 106.

DOT has 90 days from the date of enactment (December 4, 2015) to develop procedures to implement the provision and is required to consult with the Department of the Interior and the ACHP on them. We have had an initial conference call on the subject and expect to be significantly involved in the process.

- **Exemption of Certain Bridges from Review.** Section 1303 exempts from Section 4(f) review those common post-1945 concrete or steel bridges or culverts that are not subject to individual review under Section 106 pursuant to a Program Comment issued by the ACHP in 2012.
- **Exemption of Many Rail and Transit Projects from Review.** Section 11502 effectively exempts the improvement, maintenance, rehabilitation, or operation of railroad or rail transit lines or elements from Section 4(f) review. The exemption does not apply to stations or to bridges and tunnels on abandoned rail lines or transit lines not in use. However, the exemption does apply to such bridges and tunnels when they are on lines that have been railbanked or where service has been discontinued.

Improving Federal Permitting. Title 41 is a non-transportation-related portion of the Act that addresses improving the permitting process for major capital projects. Section 41002 creates an interagency Federal Permitting Improvement Steering Council, and the ACHP is one of 13 named members of the council. This builds on and makes permanent the permitting streamlining initiative launched by the Obama Administration in 2012 under Executive Order 13604. The ACHP has been serving on the steering committee established under that executive order, which is the model for the newly created council. Title 41 also establishes new requirements for coordination and timing of environmental reviews for covered projects. While Section 106 is not specifically mentioned, ACHP staff are exploring to what extent Section 106 reviews will be affected by the new requirements.

Authorization for Funding for Federal and State Agencies, and Indian Tribes. Section 1312 permits entities receiving DOT funds to ask DOT for permission to give funds to federal agencies, state agencies, and Indian tribes to support activities that improve permitting and review activities, including planning, approval, and consultation processes. This broadens the previous funding authorization. Funds may be used for planning, environmental review, dedicated staffing, training, information gathering and mapping, and development of programmatic agreements. In the context of the Section 106 process, SHPOs and THPOs (and even the ACHP) potentially could receive funds to assist DOT in identification of and consideration of effects on historic properties.

Requirement for Development of Environmental Checklists. Section 1304(e) requires that during NEPA compliance the lead agency for a highway project develop a checklist to help project sponsors identify potential natural, cultural, and historic resources in the area of the project. One of the stated purposes of the checklist is to identify agencies and organizations that can provide information on such resources. Section 1313 also calls upon DOT to develop a checklist (within 90 days of enactment of the law) to help project sponsors identify potential natural, cultural, and historic resources in the areas of proposed projects.

Emergency Exemptions. In accordance with Section 1432, if a road, highway, railway, bridge, or transit facility is damaged by a declared emergency, reconstruction in the same location with the same capacity, dimensions, and design is eligible to be exempted from the requirements of Section 110 of the National Historic Preservation Act.

Creation of a New Nationally Significant Federal Lands and Tribal Projects Program. Section 1123 creates a new nationally significant Federal lands and tribal projects program for construction, reconstruction, or rehabilitation of nationally significant Federal lands and tribal transportation projects. This is based in large part on the previously introduced Save Our National Parks Transportation Act (H.R. 2595). One criterion to be considered during project selection is the extent to which the highway, road, bridge, trail, or transit system involved is listed on or eligible for the National Register. The original bill was filed after structural concerns led to lane closures and a load-limit reduction on the historic, NPS-owned Arlington Memorial Bridge in Washington, D.C. \$100,000,000 is authorized for each of fiscal years 2016 through 2020.

Streamlining NEPA Compliance. The Act continues numerous revisions to existing DOT NEPA compliance requirements aimed at improving the efficiency of the process. Whether these will raise issues with coordinating NEPA and Section 106 compliance remains to be seen. One provision, however, potentially could have significant implications. Section 1309 requires DOT to create a pilot program for authorizing up to five states to use their own environmental laws in lieu of NEPA. In the short term, coordination of NEPA and Section 106 in the pilot states will need to be considered and addressed. In the long term, depending on its success, the program might be seen as a precedent for state assumption of other DOT environmental responsibilities, such as Section 106. The pilot program will sunset in 12 years.

January 13, 2016